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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZATION OF THE COURT (BAY'S REPORTS) UP TO AND INCLUDING VOLUME 25 OF THE SOUTH CAROLINA REPORTS

ANNOTATED EDITION

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REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME XIV

FROM APRIL, 1880, TO NOVEMBER, 1880, INCLUSIVE

BY ROBERT W. SHAND

STATE REPORTER

JERSEY CITY, N. J.
FREDERICK D. LINN & CO., LAW PUBLISHERS AND BOOKSELLERS
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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.†

HON. A. J. WILLARD. HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER. HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

FIRST CIRCUIT,	HON. B. C. PRESSLEY.
SECOND "	" A. P. ALDRICH.
THIRD "	" T. B. FRASER.
FOURTH "	" J. H. HUDSON.
FIFTH "	" J. B. KERSHAW.
SIXTH "	" T. J. MACKEY.
SEVENTH "	" W. H. WALLACE.
EIGHTH "	" THOMAS THOMSON.

ATTORNEY-GENERAL.††

HON. LEROY F. YOUMANS.

SOLICITORS.††

1*st Circuit*—W. ST. J. JERVEY.	5*th Circuit*—R. G. BONHAM.
2*d Circuit*—F. H. GANTT.	6*th Circuit*—T. C. GASTON.
3*d Circuit*—J. J. DARGAN.	7*th Circuit*—D. R. DUNCAN.
4*th Circuit*—G. W. DARGAN.	8*th Circuit*—J. S. COTHRAN.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

† See post p. 191, Simpson v. Willard.

†† Elected November 2d, 1880. The Attorney-General for a term of two years, and the Circuit Solicitors for a term of four years.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. A. J. WILLARD, CHIEF JUSTICE.
HON. W. D. SIMPSON, " "
HON. HENRY McIVER, ASSOCIATE JUSTICE.
HON. SAMUEL McGOWAN, "

14 S. C. *1

*(Case No. 893.)

CADE v. PERRIN.

(April Term, 1880.)

[1. *Taxation* ⇐542.]

A county treasurer, by public advertisement, called for the payment of a railroad subscription tax, and threatened to enforce its collection by levy and sale. Under this call, a tax payer paid, under protest, the amount demanded of him, and then brought action for its recovery under the provisions of "An act to facilitate the collection of taxes." 16 Stat. 785. At the trial, the county treasurer testified that he had been forbidden by the comptroller-general to enter these railroad subscription assessments upon the tax duplicate, and that he collected only as agent for the railroad company.—*Held*, that the presiding judge erred in granting a nonsuit.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1004; Dec. Dig. ⇐542.]

[2. *Pleading* ⇐387.]

[Cited in Hogg v. Pinckney, 16 S. C. 395, to the point that when, upon the trial of a case, it appears that the plaintiff is entitled to a remedy, he cannot be turned out of court merely because the cause of action set forth in his complaint does not conform to such state of the proofs.]

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1301–1304; Dec. Dig. ⇐387.]

Before Thomson, J., Abbeville, February, 1880.

*2

*Associate Justice McGOWAN, having been of counsel, did not sit at the hearing of this case.

The order of the presiding judge fully states the case. It was admitted at the trial that there was no public notice given, that in collecting the tax, the treasurer acted without authority from the comptroller-general; but the defendant testified that the comptroller-general had instructed him, that he, as county treasurer, could not collect the railroad taxes, and must not charge them upon his tax books. The following is a copy of the tax receipt given to plaintiff:

No. 432. Township No. 16.

January 15th, 1879.

Received from G. S. Cade (protest) eight 25-100 dollars for railroad tax, due on the following real estate, for the year 1878, viz.:

50 acres, 4 buildings, } Value $1650.00

Tax, 5 mills,..... 8.25

(Signed) J. W. Perrin,
Treasurer for R. R. Co.

The order of the presiding judge is as follows:

Under an act to alter and amend an act entitled "An act to charter the Greenwood and Augusta Railroad Company," passed December 13th, 1877, (16 Stat. 323,) the commissioners of election of Abbeville county were authorized, upon the petition of fifty landholders of certain townships, to submit the question of subscription or no subscription to the capital stock of said railroad, to the landholders of the townships; and were further ordered to appoint managers to hold elections in relation to the said question in accordance with the laws and regulations of general elections of this state.

Petitions were presented, elections were held, and subscriptions made under the provisions of said act.

In two of the townships, however—Smithville and Bordeaux—some of the landholders paid, under protest, the sums assessed

upon their property, alleging the provisions of the said act had been violated in many particulars.

*3

*By the sixth section of the said act it is provided, "the county commissioners of Abbeville and Edgefield, and their successors in office, shall have all the powers to assess and collect the amounts voted for by each township pro rata on the real estate of said townships as now are provided by law for the collection of taxes."

The defendant, J. Wardlaw Perrin, treasurer of the county, instructed by the authorities of the said railroad, on December 25th, 1878, gave notice that after January 15th, A. D. 1879, he would proceed to collect, by levy and sale of land, the railroad tax, as provided for in the collection of state and county taxes.

According to this notice the plaintiffs named, with sundry others, paid their shares of the amount voted, but under protest; and brought their actions in the Court of Common Pleas for the recovery of the sums severally paid by them.

These suits are brought under the provisions of the act of 1878. 16 Stat. 785. The act is entitled "An act to facilitate the collection of taxes."

The plaintiffs state (each for himself) they now bring suit "to recover the sums (money paid to defendant) under the provisions of the late act of the general assembly 'to facilitate the collection of taxes,'" and proceed to state their grounds for recovery.

The act declares "that in all cases in which any state, county or other taxes are now or shall hereafter be charged upon the books of any county treasurer of the state against any person, and such treasurer shall claim the payment of the taxes so charged, or shall take any step or proceeding to collect the same," such person shall pay the same under protest as being wrongfully and illegally collected, and within thirty days may bring suit for the recovery thereof.

The act of 1877, in the sixth section, does not declare the amounts voted for by each township to be taxes; but that the agencies for the collection of taxes may be employed to collect the amounts. The word "taxes" has a technical meaning. Taxes are burdens imposed by legislative authority for the support of government and for public purposes. "Amount" or "assessment" are words of different import; and the latter word means

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*a certain sum to be collected, not from the public at large, but from a certain class of persons, who, by their own act, have subjected themselves to its payment. As by the act only taxes wrongfully or illegally collected can be recovered, unless the words "amounts voted for by each township" mean taxes, then the act gives no remedy to the plaintiffs. They have not wrongfully or illegally paid taxes, and have thus failed to bring themselves within the description of persons relieved by the act.

Further, the sixth section of said act was repealed or "erased" by A. A. March 12th, 1878. 16 Stat. 482. The townships severally were declared to be bodies politic and corporate. The result of this legislation was, that at said time, the power to enforce payment pro rata of the amount voted for was taken away. Thus, when the notice was given by the treasurer on December 15th, 1878, that a levy and sale to enforce the collection of the parts of the amount unpaid would be made on January 15th next, the proceeding was without authority of law. It was urged for the defence that a payment without law to enforce the collection was voluntary and could not be recovered.

The act provides that when the treasurer shall claim the taxes charged upon his books, or when some step or proceeding is taken to collect the same, the person paying taxes wrongfully or illegally—and under protest—may bring suit to recover the sum paid. The proof is, the treasurer did not charge the sums received on his books of office, but had some book, not official, in which he made his entries, and that the only step or proceeding to collect the same was the notice given by the defendant, as above stated. The plaintiffs have not proved either of the particulars on which their suit should rest.

In the opinion of the court, the plaintiffs have failed to bring their cases within the meaning and provisions of the act of 1878; and the court orders and adjudges that the complaint be dismissed, unless the plaintiffs shall, within thirty days, amend their complaints with such allegations, as they may be advised will fix a liability upon the defendant; and with costs to the defendant in the two cases named in the caption upon amendment made.

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*Leave was granted to the plaintiffs in all the other cases of like character against the said defendant to amend without payment of costs.

The plaintiff appealed.

Messrs. Lee & Noble, for appellant.

Messrs. W. H. Parker and Burt & Graydon, contra.

July 21st, 1880. The opinion of the court was delivered by

WILLARD, C. J. This action is against the defendant, as county treasurer, to recover back money alleged to have been paid to the defendant by the plaintiff upon an alleged illegal demand made by the defendant as county treasurer. It appears that the money was paid under protest in order to obtain a remedy for its recovery back under the provisions of the act "to facilitate the collection of taxes," approved December 24th, 1878, (16 Stat. 785,) and the action was fram-

ed with special reference to the provisions of that act. It appeared by the testimony of the defendant that he had no authority, as county treasurer, to make the demand. That, notwithstanding such want of authority, he gave public notice, as treasurer, as follows:

"I am instructed by the Greenwood and Augusta railroad authorities to extend the time for the receiving of the railroad tax without penalty until Wednesday, January 15th, 1879.

"Persons are notified that after that time I will proceed to collect, by levy and sale of lands, as provided for in the collection of state and county taxes.

(Signed) "J. W. Perrin, Treasurer.

"October 25th, 1878."

It appears that, under this notice, the payment was made by plaintiff under protest.

Assuming for the present that the pleadings admitted of it, the jury would have been entitled, on the evidence in the case, to say whether the defendant had represented that the plaintiff was liable to pay the amount in question as a tax levied against him, and whether the plaintiff believed and acted upon

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such rep*resentation in making payment of the money now sought to be recovered back, and whether such statement was false, and might have found as matter of fact that such was the case.

The Circuit judge granted a non-suit upon the ground that the case could not be brought within the provisions of the act "to facilitate the collection of taxes." He places his decision upon the ground that the demand against the plaintiff was not a tax in the meaning of that act. That act provides a remedy where any "state, county or other taxes are now or shall hereafter be charged upon the books of any county treasurer against any person," &c. Had there been such a charge against the plaintiff, as the notice given by the defendant imputed, it would have sustained the remedy provided by this act. If there had been such a tax, this plaintiff could have paid it under protest, and have had his action to recover it back. In that case, on receiving such payment, it would have become the duty of the defendant to transmit the amount to the comptroller-general, who would be compelled to refund it in case judgment went in favor of the plaintiff. The action was evidently framed under the idea that a right to demand the tax, as such, existed, in form at least, and steps taken to secure the remedy by the act, including the shaping of the complaint to suit such a case.

It appeared on the trial, through the defendant's testimony, that no such tax, as such, existed at any time, and that he was in fact acting as the agent of the railroad company, enforcing the payment of money claimed to be due to such company. It was a clear case, under the code, for not restraining the verdict to the issues framed by the pleadings, but sending the case to the jury upon the evidence with or without previous amendment of the pleadings. The court would have been justified in holding that the misconduct of the defendant, as disclosed by the evidence, had induced the plaintiff to select an inappropriate form of action.

When upon the trial of a case it appears by evidence admitted without objection, or properly admissible under the pleadings, that the plaintiff is entitled to a remedy, upon the case exhibited, he cannot be turned out of

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court merely because the cause of *action set forth in his complaint does not conform to such state of the proofs.

The non-suit must be set aside and a new trial had.

McIVER, A. J., concurred in the result.

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14 S. C. 7

(Case No. 895.)

STATE, ex relatione BRIGHT, v. BRIGHT.

(April Term, 1880.)

[1. *Bastards* ⇐86.]

A party arrested under a charge of bastardy gave his recognizance, with a surety, to the State of South Carolina, in the penal sum of $900, conditioned to "pay over to the Court of Trial Justice for the county of Charleston aforesaid, the sum of seventy-five dollars per year, for the support of the following named illegitimate children, now in the custody of their mother, viz.: C., seven years old; E., five years old; and E. L., one year and nine months old, until each of said children become twelve years of age"—*Held*, upon the objection of the surety, that the recognizance was not a binding obligation, because it was not in compliance with the statute, nor in such form as would practically effect the object of the statute, nor payable to the proper officers.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 217; Dec. Dig. ⇐86.]

[2. *Bastards* ⇐86.]

A recognizance in such case is not a judgment of the court, binding because not appealed from. State v. Harmon, 3 Hill 275, explained.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. ⇐217; Dec. Dig. ⇐86.]

[3. *Principal and Surety* ⇐46.]

The surety is not estopped from disputing the validity of the recognizance because of payments made thereon by another party, after its execution.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. ⇐91; Dec. Dig. ⇐46.]

Before Aldrich, J., Charleston, December, 1879.

From the brief furnished in this case, no fuller statement is possible than that this action was brought by the mother of three bastard children upon a recognizance entered into May 24th, 1876, before M. R. Delany,

trial justice, whereby Saulsberry Bright and Thomas R. Smalls acknowledged themselves indebted to the State of South Carolina in the sum of $900, with condition underwritten, as stated in the opinion of this court; that $6.25 was endorsed as a credit thereon by Delany, trial justice, in June, 1876, and $6.25 as a further credit by Chisolm, trial justice, in August, 1876; that Smalls defended the action; that the verdict was for

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defendant; that plaintiff moved for a *new trial, which was refused, and that she then appealed to this court upon the following grounds:

1. Because the bond upon which the suit is brought is a judgment of a court having jurisdiction over the subject matter therein contained, and the said judgment, whilst unreversed, cannot be impeached in a collateral way, and the court erred in allowing said judgment to be impeached or questioned by the defendant.

2. Because the court erred in holding that the bond was void, it being "for the support of three illegitimate children," instead of being for the support of one illegitimate child.

3. Because the bond is in accordance with the statute under which it was taken, and which allows one or more children to be provided for in the same bond, and the court erred in not sustaining it.

4. Because the defendant is estopped from denying the validity of the bond, he having, since the execution of the same, made two payments thereon, thereby curing any defects in said bond, and the court erred in not so holding.

5. Because, if the bond is irregular in being for the support of too many children, it is good for the support of the first child therein named, and the court erred in not so holding.

6. Because the bond, if not good under the statute, is good at common law, being a voluntary obligation on the part of the defendant, Smalls, and the court erred in not so holding.

Mr. S. J. Lee, for appellant.

Messrs. G. W. Dingle and T. W. Bacot, contra.

July 21st, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action on a bond in the sum of $900, alleged to have been given to provide for the support of three illegitimate children. The condition of the obligation is as follows: "That if the said Saulsberry Bright shall pay over to the court of trial justice for the county of Charleston, aforesaid, the sum of $75 per year for the support of the following named illegitimate children, now in the custody of their mother,

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*viz.: Charlotte, seven years old; Elizabeth, five years old; and Emma Louisa, one year and nine months old, until each of said children become twelve years of age," &c.

It is very obvious that the bond sued upon is not such a bond as is contemplated by the statute, and, therefore, cannot be recovered upon as such. It is contended, however, that the bond, if not good under the statute is good at common law, being a voluntary obligation, so far as the defendant Smalls, who is a mere surety, is concerned. It may be that under the authority of the case of Commissioners of the Poor v. Gilbert, 2 Strob. 152, that if the bond was voluntarily entered into and it was in such form as would practically effect the object contemplated by the statute, that though not good under the statute, it might furnish a good cause of action as a valid common law obligation. But in this case, even were we to assume that the bond was voluntarily given, so far as the defendant Smalls was concerned, it is clear that the bond is not only not in conformity to the statute, but is not adapted to effect the object of the act. This object is to save the county harmless by securing the payment of a certain specified sum, $25, annually, from the time of the birth of the child until it attains the age of twelve years; but if the child dies in the meantime the obligation to pay ceases. In this case, however, the bond provides for the payment of $75 annually, "until each of said children become twelve years of age," and, therefore, if Charlotte or Elizabeth, one or both, were to die to-morrow, the defendant, by the terms of this bond, would still be obliged to pay the sum of $75 annually until Emma Louisa attained the age of twelve years, while under the statute, the amount which he would be required to pay would be only $50 or $25 per year, accordingly as one or both might die.

This bond also provides for the payment of this money "to the court of trial justice for the county of Charleston," and, bound as we are, to take judicial notice of the fact spread upon the legislative records of the state, that there are several trial justices in the county of Charleston, it would become a very perplexing question to determine which one of them could receive the money and give the defendant a valid discharge. In addition to this these officers are not, like the former

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boards of com*missioners of the poor, charged with the duty of administering the fund provided for the support of the destitute, and, therefore, while there may have been some propriety in sustaining bonds of this character, made payable to the commissioners of the poor, as has been done in the case above referred to, and others of that class, we are unable to see any reason why a bond providing for the payment to a trial justice, who is in no way charged with the duty of disbursing the poor fund, should be sustained.

Again, it is urged in behalf of the appellant that the bond or recognizance in question is a judgment of the court, and, not being appealed from at the time it was entered into, cannot now be questioned, and to sustain this proposition the case of State v. Harmon, 3 Hill 275, is cited. That case, however, does not decide any such proposition. The defendants there, in answer to a scire facias to estreat the recognizance, insisted that they could not be made liable for the annual payment prior to the time when the party charged had been convicted, while, on the other hand, it was contended that they were liable from the time of the birth of the child. The court, while declining at that time to decide the question as to when the annual payments should commence, according to the proper construction of the act, held that as Harmon had been convicted at a former court, and, in pursuance of the sentence following such conviction, had entered into the recognizance in question, which, by its terms, provided for the payments to commence from the birth of the child, the court would presume that the sentence required the defendant to enter into such a recognizance, and the sentence—not the recognizance—being the judgment of the court, from which there was no appeal, could not afterwards be inquired into. In this case there was no trial or sentence, and there could not, therefore, be any judgment.

Finally, it is urged that the defendant is estopped by the payments made upon the bond from now denying its validity. A sufficient answer to this is that it does not appear by whom the alleged payments were made. If made by the principal obligor, as would be the natural inference, they certainly cannot affect the defendant Smalls, who alone is

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contesting the plaintiff's right to *recover, the principal obligor having permitted the case to go against him by default.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

---

14 S. C. 11

(Case No. 896.)

EDWARDS v. EDWARDS.

(April Term, 1880.)

[1. *Pleading* ⟸276.]

An order for leave to file a supplemental complaint can be made by a judge at chambers, but notice of the motion should be given to the defendant.

[Ed. Note.—Cited in Ellen v. Ellen, 26 S. C. 101, 1 S. E. 413; Shelton v. Southern Ry., 80 S. C. 78, 61 S. E. 220.

For other cases, see Pleading, Cent. Dig. §§ 833, 835; Dec. Dig. ⟸276; Judges, Cent. Dig. § 112.]

[2. *Pleading* ⟸276.]

Where granted ex parte, it is not a nullity, but only an irregularity, to be corrected by motion or appeal, and is waived by an answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 833, 835; Dec. Dig. ⟸276.]

[3. *Pleading* ⟸421.]

Where a supplemental complaint is served before leave to file is obtained, the defendant, by answering, waives the irregularity, and cannot, at the trial, raise an objection to such service.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1413; Dec. Dig. ⟸421.]

[4. *Pleading* ⟸279.]

After action commenced in the Court of Common Pleas, a decree was rendered by the Court of Probate, affecting the rights of the parties as pending in the original action. *Held*, that in such case a supplemental complaint was proper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 836–841; Dec. Dig. ⟸279.]

[5. *Pleading* ⟸279.]

Where pending suit in the Court of Common Pleas, the Court of Probate renders a decree which affects the parties and subject matter of the cause in the superior court, but which cannot be enforced by the inferior court, the Court of Common Pleas may be called upon by supplemental complaint to supplement the powers of the inferior tribunal and enforce its decree.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 836–841; Dec. Dig. ⟸279.]

[6. *Homestead* ⟸96.]

A and B jointly purchased a tract of land and paid in part, B paying more than A; B then died and A became his administrator; afterwards a re-sale was ordered, titles to be withheld until full payment, and the land to stand pledged for such payment, one half of the purchase money to be paid to A, and the other half to the distributees of B; A became the purchaser. Upon settlement in the Probate Court, A was found indebted to B's estate on account of B's interest in this land, and for rents and profits before the resale. *Held*, that as against this indebtedness A was not entitled to a homestead exemption in this land.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 147; Dec. Dig. ⟸96.]

[This case is also cited in Moon v. Johnson, 14 S. C. 436, as an instance of the review by Supreme Court of the order of the court below allowing a supplemental complaint.]

Before Fraser, J., Abbeville, April, 1879.

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*Andrew Edwards died in February, 1870, and J. G. Edwards and Epaminondas Edwards qualified as his executors. Under a power in the will, the lands of testator were sold December 20th, 1870, and E. Edwards and M. L. Edwards, sons of testator, purchased jointly the Home tract for $2339.88, and paid $851.22 upon their purchase, leaving $1488.66 unpaid. Of the cash payment, M. L. Edwards paid $565.62, and E. Edwards $285.60. In December, 1871, Amos W. Edwards and others filed their complaint against J. G. Edwards and E. Edwards, executors, and others, for a settlement of the estate of Andrew Edwards, to which action

all the heirs of A. Edwards were parties. Pending suit, in March, 1872, M. L. Edwards died intestate, without wife or children, and E. Edwards administered upon his estate. His distributees were all parties to this action.

In June, 1872, Judge Orr filed his decree, in which he ordered the re-sale of the Home tract by J. G. Edwards, the proceeds to be applied to the debt due by the former purchasers, one-half of the balance to be paid to E. Edwards, and the other half to J. G. Edwards, for the distributees of M. L. Edwards. This tract was re-sold in December, 1872, and purchased by E. Edwards for $2050, of which he paid all except the sum of $208.78, which was balance due to distributees of M. L. Edwards. J. G. Edwards refused to deliver titles, as the decree of Judge Orr had directed that titles should be withheld until the purchase money was paid, and that the land should stand pledged for its payment.

In 1875, the plaintiffs in this action filed their petition in the Court of Probate, demanding of E. Edwards, administrator, a settlement of the estate of M. L. Edwards. The statement of his indebtedness was declared by the judge of Probate, on September 18th, 1877, as follows:

Amount from A. Edwards' estate...	$450 29
Interest on same.....	59 11
Amount and interest, crops of 1871, rent of land for 1872, &c., after deducting all expenses and charges,	676 45
	$1185 85

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*The Court of Probate entered its decree for this amount and issued execution, to which there was a return of nulla bona.

There was no appeal from this decree, nor from the decree of Judge Orr.

On March 25th, 1878, J. G. Edwards and others, distributees of M. L. Edwards, filed their supplemental complaint against E. Edwards, administrator of M. L. Edwards, reciting the above-stated facts, and alleging the insolvency of the sureties on the administration bond of E. Edwards, and praying an order for the sale of the Home tract, and the application of the proceeds of the sale to the amount found due by the decree of the Probate Court. This complaint was served upon the defendant March 28th. Defendant filed an answer, denying the insolvency of his sureties and claiming a homestead. The date of this answer or of its service, is not given. On April 8th, 1878, Judge Mackey signed an order at Greenville granting leave to plaintiff to file a supplemental complaint. Neither the defendant nor his attorneys had any notice of the application for the order, nor did they, or any of them, know of its existence until the cause was heard in April, 1879.

In addition to the grounds taken in the answer, the defendant, at the trial of the cause, made the following objections:

1. That the order of Judge Mackey was a nullity, having been granted at chambers without notice to the defendant or his attorneys.

2. That the service of the supplemental complaint on the defendant was irregular and unauthorized.

3. The facts stated do not constitute a case for a supplemental complaint.

4. That the proceedings in the Probate Court is a bar to the proceedings in this court.

5. That the facts stated do not constitute a cause of action against the defendant in favor of the plaintiffs.

The insolvency of the sureties to the defendants' administration bond, was proved.

Defendant is the head of a family, having a wife and children.

His Honor, Judge Fraser, in his decree, after stating the facts, continued:

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*It is objected that this is not a proper case for a supplemental complaint, and that Epaminondas Edwards is entitled to a right of homestead in said Home place, on which he lives with his family. Perhaps a new proceeding against Epaminondas Edwards, in the nature of a creditor's bill, might have been properly instituted, but the new position in which the parties before the court in the original proceeding have been placed by the transfer to another tribunal of matters in issue in this court, and which still require the exercise of its powers, makes it proper to bring these matters before the court by supplemental complaint, and it is held that to avoid further litigation it is better to bring the whole matter of the fund, for which execution has been issued by the judge of Probate into the proceeding, that the whole may be disposed of together. If, in this view, there is error, I still feel bound to sustain the form of pleading filed in pursuance of an order of my predecessor, who made the order for leave to file a supplemental complaint for the very matters set forth in this.

On the second point I am bound by the express ruling of the Supreme Court, that a homestead can not be set off in an equity, and that a legal title, which is the subject of levy and sale by the sheriff, is necessary to support it. In this case, Epaminondas Edwards has no legal title, and is not entitled to it until the shares of his surviving brothers and sisters in the proceeds of the sale of the Home place is paid over to them in pursuance of the order of Judge Orr.

The decree concluded with an order for a sale of the land, the proceeds of which, after payment of costs, was to be applied to the payment of $1185.85, with interest from Sep-

tember 18th, 1877; and the remainder was to go to the defendant.

Defendant gave notice of appeal, the grounds whereof are sufficiently stated in the opinion of the court.

Messrs. Burt & Graydon, for appellant.

Messrs. Cothran & Perrin, contra.

July 21st, 1880. The opinion of the court was delivered by

WILLARD, C. J. This appeal is from a decree under an original and supplemental

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complaint. The first ground of ob*jection to the decree is that the order allowing the plaintiffs to file a supplemental complaint is a nullity, on the ground that it was made ex parte by a judge at chambers. The motion for leave to file a supplemental complaint can be made before a judge at chambers. Code, § 417, Subd. 2. It was an irregularity to take an order ex parte for leave to file the supplemental complaint. Section 200 of the code says: "That the plaintiff and defendant may be allowed, on motion, to make a supplemental complaint, answer or reply," &c. The allowance is not a matter of course, but must depend in part on the consideration to be given to the existing pleadings and proceedings in the cause, so that the opposite party has a direct interest to be heard, and should have notice. It is a misapprehension to call an order a nullity because made at chambers, and without notice to the party, where such notice is required. In order to justify the treatment of a judicial order as a nullity it must appear that there was an entire want of judicial power to make such order. If the power exists, but has been improperly exercised, that constitutes an irregularity that may be corrected, according to circumstances, by motion or on appeal. The Circuit judge was competent to exercise the powers properly belonging to the Court of Common Pleas, at chambers, in making an order of the nature of that in question, and the character of their powers precludes the order of a court, in a case within its jurisdiction, from being disregarded as a nullity. The proper course for the defendant was to move the court to set aside the order as irregular, which he failed to do. Irregularities, not involving the merits, are deemed waived where the party having an opportunity to object thereto fails to do so in time, or where he does some act recognizing the objectionable proceeding as valid, such as interposing a pleading or proceeding that pre-supposes a valid proceeding of the nature of that alleged to be irregular. In the present case the defendant filed an answer to the supplemental complaint, an act that could not be called for except where an order allowing a supplemental complaint existed. This was a complete waiver, as it does not appear, and cannot be inferred, that the merits of the defence were in any way prejudiced by the allowance of such order to file a supplemental complaint.

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*But it appears, in addition to this, that on the hearing of the cause the defendant was heard upon the propriety of the allowance of leave to file a supplemental complaint. From this it appears that the defendant has not been in fact deprived of a hearing of the matters affected by the ex parte order, and the only question that can be considered at this time is whether the conclusion of the decree that it was a proper case for a supplemental complaint was correct in point of law, which will be presently considered.

The second objection has been disposed of by what has just been said. The third objection is that the Circuit judge erred in not holding that the service of the supplemental complaint on the defendant was irregular, having been made prior to the granting of the order allowing such supplemental complaint to be filed. It does not appear that any motion was made to set aside the service of the supplemental complaint prior to the service of the defendant's answer thereto. The answer was a clear waiver of any irregularity in the service of the supplemental complaint. Nor does it appear that any motion was made for that purpose prior to the hearing. Such an objection cannot be taken on the hearing, and it was properly disregarded by the Circuit judge.

The fourth objection involves the question whether this is a proper case for a supplemental complaint. In deciding this question it is not necessary to hold that the case was one in which relief could be had in no other mode. Even where relief might be had on a motion or petition as to matters occurring since the commencement of the action, still where the nature of such matters is such that certainty and convenience would be promoted by a supplemental complaint, the authority of the court to allow a supplemental pleading for that purpose cannot be doubted. In the present case the original complaint was filed by an executor joining the distributees against his co-executor for an account of assets coming into the hands of the latter. The defendant became the purchaser, with one of the distributees, of certain lands of the decedent, ordered to be sold under such complaint, but did not fully comply with the terms of such purchase. M. L. Edwards, the

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joint purchaser with the defend*ant, died after the purchase, and the defendant became the administrator of his estate. The pleadings were conformed to this new state of facts, and an order was taken for the re-sale of the premises so purchased to pay the debt incurred by the first purchase for the purchase money. The re-sale took place, and

the defendant became sole purchaser of the land, making payments on account of such purchase, but leaving a balance of the purchase money unpaid. While matters thus stood, the distributees of M. L. Edwards, who are the same persons made parties plaintiff, as the distributees of the original testator, commenced proceedings in the Probate Court for the settlement of the accounts of E. Edwards, the defendant, as administrator of M. L. Edwards. No objection appears to have been made by the defendant to this mode of proceeding either in the Circuit Court or the Probate Court, and the case in the Probate Court went to a decree against the defendant for a balance found due on such accounting. It appears that execution issued out of the Probate Court under this decree, and was returned nulla bona. The object of the supplemental complaint was to bring these matters before the court so that satisfaction of such judgment could be obtained by enforcing the decrees and orders in this cause, looking to the completion, by the defendant, of the purchase of the premises bought by him, part of the purchase money still remaining unpaid as was alleged, and title not having been made under such purchase. As all parties consented to the proceeding in the Probate Court, the decree of that court is entitled to as conclusive force as affecting the rights of the parties submitted to that court, at least, as would be ascribed to a contract, upon consideration, between the parties themselves, modifying their rights in the same manner as they were modified by the Probate decree. Such a contract could be made pendente lite, with such effect as to conclude the rights of the parties as to all matters disposed of by it in all further proceedings in the cause to which it related. The fact that a Probate decree admits of enforcement by execution is immaterial, as that circumstance cannot affect the nature of the estoppels proper to the decree. As there was no actual satisfaction of that decree, and the only means of enforcing it in

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the hands of the Probate *Court exhausted, there is no ground to say that the parties should be left to the tribunal which they have chosen. The jurisdiction of the Circuit Court over the new matter brought in by the supplemental complaint is not dependent on the Probate decree and the exhaustion of the means of enforcing it, but existed antecedent to the proceedings in the Probate Court. The supplemental complaint was, therefore, no analogy to a creditor's bill. The case resolves itself to this, that, subsequent to action commenced, the parties, by their mutual acts, have given a new mould to their rights as pending in the original suit, and this is one of the cases to which the practice of allowing supplemental complaints looks. It follows that the fourth objection must be disallowed.

The fifth objection is that plaintiffs are barred by the judgment in the Probate Court. It is not clear upon what principle the judgment is alleged to be a bar, and what is the effect claimed for it as such. So far as it adjudicates, finally, certain rights between the parties, it is undoubtedly a bar to any attempt to re-open the discussion of such rights, but the decree appealed from makes no such attempt. If it is meant that when one court has proceeded to judgment, and has failed to compel the satisfaction of such judgment, no other court can supplement its powers, that would conflict with the jurisdiction on which a judgment creditor's bill rests. The Circuit Court, under the facts disclosed, could clearly have taken jurisdiction under an original bill of the equitable enforcement of the judgment: and, such being the case, it could indirectly afford the same relief as incidental to a pending suit between the same parties within its proper jurisdiction. It would be specially exceptionable to hold such a doctrine as it regards the judgment of a court of limited or special jurisdiction, both as violating the principle that brings to the aid of such courts the powers of courts of general jurisdiction, and the constant practice of making the decree of the Probate Court as formerly of the Court of Ordinary, the basis of a decree in the Circuit Court between the same parties and touching the same subject of controversy. This objection must be overruled.

The sixth objection is well taken, pointing as it does to a mere clerical error in the figures stated in the decree, which must be corrected accordingly.

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*The seventh, eighth and ninth objections involve a claim of homestead made by the defendant in the lands purchased under the decree of the court, and will be considered together. It is not necessary to consider the question whether the nature of the rights acquired by the defendant by the purchase and part payment of the purchase money, in respect of the lands sold under the decree, is such as to sustain a homestead right. The original purchase of the Home place was made by defendant and M. L. Edwards jointly. Before the order of re-sale was made, M. L. Edwards died, and defendant became his administrator. The default in non-compliance with the terms of the first sale, that rendered necessary the second sale, was that of the defendant, in part in his personal right, and in part as the representative of M. L. Edwards. As the estate of M. L. Edwards had contributed to make the payments that had been made on the first sale, no reason appears why the defendant should have excluded that estate, represented by him, from participating in any advantage that might arise from the purchase. This matter is not brought before us for direct consideration, and no explanation of the transaction appears. If

then, the defendant seeks the aid of a court of equity to establish a homestead right as against parties with whom he sustains such a fiduciary relation, it would be necessary that he should make such a demand to appear reconcilable with the equities of such parties. This he has failed to do, nor are the grounds for claiming a homestead stated in the case.

The right of homestead is asserted against an order for the sale of the premises for the satisfaction of the purchase money demand, under the re-sale, as appears by a distinct statement in the decree to that effect. That portion of the purchase money, on the re-sale, remaining unpaid was, under the decree of Judge Orr, to go to the estate of M. L. Edwards. This balance of purchase money must be regarded as contained in the amount adjudged by the Probate decree, and as belonging to the distributees of M. L. Edwards, and payable by E. Edwards individually. In equity, no such loss of character, by merger in the decree, would be allowed to take place as to disturb the equities existing before such decree. As the final decree orders a re-sale

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*for the purpose of satisfying this decree, it must be regarded in substance, as well as in form, ordering it for the satisfaction of the purchase money on the re-sale, absolutely due from the defendant to the distributees of M. L. Edwards. Until a judicial sale is permitted to be finally consummated by the transfer of title the whole matter remains in the power of the court, and it will not permit a purchaser, failing to comply in full with the terms of purchase, to acquire rights prejudicial to the objects of the decree under which such sale was made. An assertion of homestead right on the part of the defendant would tend to defeat in part the relief intended by the decree of Judge Orr, and cannot be allowed. It is not a question now whether credit should have been given to the defendant for the amount of the purchase money, on the re-sale, due to the estate represented by him. No such application appears to have been demanded or made; on the contrary, by the voluntary act of the parties in interest, in submitting to the action of the Probate Court, the title to such balance of purchase money has passed into the plaintiff and out of the defendant as administrator. Equity certainly will not make such an application for the mere purpose of letting in a claim of homestead of, to say the least, doubtful equity.

The tenth objection is general, and is disposed of by what has already been held.

The decree must be modified by the correction of the clerical error pointed out by the sixth objection, and, as so modified, is affirmed, and the appeal dismissed.

McIVER and McGOWAN, A. J.'s concurred.

14 S. C. 20

(Case No. 897.)

EDGAR v. CASTELLO.

(April Term, 1880.)

[Reported and Annotated in 37 Am. Rep. 714.]

[*Death* ⟸7, 31.]

A father is not entitled to recover damages for the negligent killing of his infant child.

[Ed. Note.—Cited in Lewis v. Western Union Telegraph Co., 57 S. C. 330, 35 S. E. 556.

For other cases, see Death, Cent. Dig. §§ 10, 43; Dec. Dig. ⟸7, 31.]

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*Before Fraser, J., Charleston, June, 1879.

This was an appeal by plaintiff from an order of non-suit. The case is sufficiently stated in the opinion of the court.

Mr. A. J. Magrath, Jr., for appellant.

Messrs. De Saussure & Son, contra.

July 23d, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action brought by a father to recover damages for an injury, occasioned by the alleged negligence of the defendant, which caused the immediate death of the child of the plaintiff, an infant about three years of age. There is no allegation in the complaint that the plaintiff has sustained any damage by reason of the loss of the services of his child, or by reason of any expense or outlay to which he was thereby subjected, but damages are claimed simply for the killing of the child. A motion for a nonsuit was made and granted, upon the ground that under the statute of this state the action could only be maintained by the executor or administrator of the deceased. The statute referred to is the act of 1859, (12 Stat. 825), incorporated in the General Statutes, Chapter CIX., page 507. That statute, in its first section, provides that "*whenever* the death of any person shall be caused by the wrongful act, neglect or default of another, * * * in *every* such case the person or corporation who would have been liable if death had not ensued, *shall* be liable to an action," &c., and, in its second section it declares "that *every* such action *shall* be for the benefit of the wife, husband, parent and children of the person whose death shall have been so caused, and *shall* be brought by, or in the name of the executor or administrator of such person," &c., and then proceeds to provide for the distribution of the amount recovered among "the before-mentioned persons in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate." There are no saving words in the statute and the imperative terms employed, which we have italicis-

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ed in the fore*going quotation, exclude the

idea that the party causing an injury, which resulted in death, was to be subjected to tw› actions for such injury; indeed, the provisions of the fifth section of that chapter seem to have been framed with a view to prevent a double liability. It is true that in the cases of Smith v. City of St. Joseph, 55 Mo. 456, (17 Am. R. 660), and Mewhirter v. Hatten, 42 Iowa 288, (20 Am. R. 618), it has been held that a party may be subjected to two actions for an injury done to a wife—one brought by her for the damage done to her personally, and one by the husband for damages sustained by him by reason of expenses incurred by him in procuring necessary medical and other attendance, and for the loss of her services during the time she was disabled by reason of the injury. But death did not ensue from the injury sustained in either of these cases, and they are, therefore, not strictly applicable to the case in hand. According to our view, however, in order to subject one to a liability to two actions for the same act or default, the law should be express and not left to depend upon inference merely, and while, if we had full access to the statutes of those states, we might be able to see that they were properly decided, we are not prepared, as at present advised, to yield our assent to them. But in addition to this our statute expressly declares that, in the action provided for by it, "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought," which terms would, of course, embrace damages resulting from the loss of services of the deceased; and if a father should, in his character as master, be permitted to bring an action in his own name for the loss of the services of his child, in the character of servant, it is manifest that the defendant would be liable to be twice called upon to respond in damages for the same thing. So that even if the cases above cited should be accepted as authoritative of the general principle therein announced, it is clear that they could not affect the question now under consideration, for they are based upon the ground that the damages recoverable by the wife are intended as a compensation to her for the personal injuries which she may have sustained, while the damages

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recoverable by the husband *are intended as a compensation to him for the loss of her services and for the expenses incurred in providing her with proper attendance during the time she was suffering from the injury.

But, aside from our statute upon the subject, we think the motion for a non-suit was properly granted. As was said by Mr. Justice Hunt in Insurance Company v. Brame, 95 U. S. 757 [24 L. Ed. 580], quoting from Hilliard on Torts, the rule undoubtedly is "that at common law, the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages." There are some cases (Plummer v. Webb, 1 Ware 80 [Fed. Cas. No. 11,234]; Ford v. Munroe, 20 Wend. 210,) which might be claimed as establishing as an exception to this rule the right of the father, in his character of master, to bring an action for an injury causing the death of his child; but the ground of such action, if sustainable at all, is the loss of the services of the child as a servant. This is manifest from the case of Plummer v. Webb, which, though recognizing the right of the father, as master, to bring an action against another who has wrongfully caused the death of his child, places that right exclusively upon the ground of the loss of services, for there, the child having been hired to a third person, it was held that the father could not recover because the services of the child were due, not to the father, but to such third person, and hence that the action in that case could not be maintained by the father. So, also, Ford v. Munroe was an action brought by a father to recover damages sustained by reason of the killing of his child, about ten years of age. The special damage alleged was: 1. That the plaintiff's wife was made sick by reason of the occurrence, and that he was thereby deprived of her society and was subjected to expense in procuring necessary attendance upon her. 2d. The loss of the services of the child from the time the injury was sustained until he would have attained his majority. The jury were charged that the plaintiff might recover whatever sum the jury might think the services of the child would have been worth from the time the injury was sustained until he attained the age of twenty-one years, and, also, for damages incident to the wife's sickness. These points of the charge received but little attention at the hands of the court, though

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they were sustained, the principal *question considered being in relation to another matter. It is difficult to understand how, in any view of the case, that portion of the charge which permitted the jury to give, as damages, whatever they might think the services of the child would have been worth from the time of the injury until he attained the age of twenty-one years could be vindicated, for the child might have died from natural causes long before he reached the age of twenty-one years.

It is said, however, by Mr. Justice Hunt, in the case of Insurance Co. v. Brame, supra, in speaking of these cases: "They are considered by the New York Court of Appeals, in Green v. Hudson River Railroad Co., 2 Keyes 294, and compared with the many cases to the contrary, and are held not to diminish the force of the rule above stated."

The case of Cutting v. Seabury, 1 Sprague's Dec. 522 [Fed. Cas. No. 3,521], which has been cited to sustain the doctrine that a

father may recover damages for an injury to his child resulting in death, does not decide any such proposition, but, on the contrary, Mr. Justice Sprague, though expressing his own opinion in favor of such a doctrine, admits that "the weight of authority in the common law courts seems to be against the action, but natural equity and the general principles of law are in favor of it," and then undertakes to show that, by the civil law, such an action could be maintained. Indeed, we do not find that it is anywhere decided that the father could maintain such an action except where it is alleged and proved that the father has sustained damage by reason of the loss of services of the child, or by reason of expenses incurred from the killing of his child for funeral or other expenses. Hence, where, as in this case, there is no allegation in the complaint upon which such damages could be claimed, we do not see how, in any view of the question, this action could be maintained. And where, as in this case, death resulted immediately from the injury, and the child was of such tender years as to negative the idea that he could render any such service to the father, there certainly could be no ground for a claim of damages from a loss of services; and, as to the funeral expenses, in addition to the fact that there is no allegation upon which to base a claim for such damages, we find that it

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has been *distinctly decided in the recent case of Osborn v. Gillett, L. R., 8 Exch. 88, that a father could not maintain an action for injuries which caused the immediate death of his child, either upon the ground of loss of services or for burial expenses.

The cases of Pennsylvania Railroad Co. v. Bantom, 54 Penna. St. 495; Owen v. Brockschmidt, 54 Mo. 285, which were cited by appellant to sustain the proposition that the plaintiff was entitled to a verdict for the amount proved to have been necessarily expended for funeral and other expenses incurred by reason of the killing of the child, prove to be cases arising under special statutes of those states, and are, therefore, inapplicable here. The other case cited on this point, Roeder v. Ormsby, 22 How. Pr., was a case as to the measure of damages, and turned mainly on a question as to the construction of the pleadings, as to whether the expenses claimed to be the foundation for the damages, were properly alleged to have been incurred.

We are of opinion, therefore, that in any view which may be taken of this case, the judgment of the Circuit Court was right, and accordingly it is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

14 S. C. 25

(Case No. 898.)

PENDER v. LANCASTER.

(April Term, 1880.)

[*Exemptions* ⇐7; *Homestead* ⇐95.]

Where an execution debtor marries after levy upon his personal property but before its sale, he does not thereby become entitled to its exemption under the homestead provisions of the constitution of this state.

[Ed. Note.—Cited in Oliver v. White, 18 S. C. 240; Chafee & Co. v. Rainey, 21 S. C. 20; Rollings v. Evans, 23 S. C. 328.

For other cases, see Exemptions, Cent. Dig. § 7; Dec. Dig. ⇐7; Homestead, Cent. Dig. § 144; Dec. Dig. ⇐95.]

[This case is also cited in Chafee & Co. v. Rainey, 21 S. C. 11, and distinguished therefrom.]

Before Fraser, J., Barnwell, September, 1879.

This was an action by T. C. Pender to recover from J. W. Lancaster, sheriff of Barnwell county, damages for the sale of a horse, which, as a work animal, was exempt from levy and sale, and to recover the balance due

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upon the execution paid by *plaintiff under protest, after levy upon his land. At the time of judgment rendered, and at the time of the levy upon the horse, plaintiff had no family, but married before its sale, and demanded of defendant its exemption, which was refused. The levy upon the land was after the sale of the horse. The presiding judge, by whom the case was tried, a jury having been waived, dismissed the complaint. Plaintiff appealed. In the arguments before this court no question was made about the balance paid upon the execution under protest, after levy upon the land.

Mr. Robert Aldrich, for appellant.

Mr. I. M. Hutson, contra.

July 30th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The defendant, as sheriff of Barnwell county, levied upon a horse belonging to the plaintiff, under an execution issued upon a judgment recovered against the defendant. Subsequent to the levy the plaintiff married and claimed to have become the head of a family, and thereby entitled to a right of a homestead, and demanded of the defendant, as sheriff, the horse so levied upon, as exempt from execution. The defendant refusing to recognize such right of exemption, the present action was commenced, which resulted, at the Circuit, in a judgment of nonsuit.

The only question presented by the appeal is, whether the fact that the plaintiff became the head of a family and entitled to a homestead right, as such, and to the exemptions of personal property incident thereto, after the levy, entitled him to allege such exemp-

tion as against personal property actually levied upon prior to the acquisition of such right of exemption.

The argument of the appellant places the right of homestead, and to those exemptions of personal property connected therewith, on a peculiar footing, distinguishing them in important particulars from ordinary rights. The validity and effect of rights are usually tested by the state of things existing at the time they became operative. Conflicting claims in the nature of rights of property, general or special, take priority,

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as among *themselves, according to the time when they commenced to act upon the particular subject of property. But the appellant regards the right of homestead and the concomitant right to exemptions of certain kinds of personal property, as sui generis, and as operating independently of the fact of having priority in point of time over other rights conflicting with them. The respondent claims that by virtue of the levy the execution took a special property in the horse levied upon, which, having become vested, could not be divested through a right of homestead exemption arising subsequently to the levy, while the appellant claims that the only test of the validity of the right of exemption is whether it existed at the time the property was demanded of the sheriff and at the time of sale.

The right of homestead exemption, and that to the exemption of personal property of the prescribed kinds, must be regarded as of the same nature and attended by the same general incidents, as they are both created by the same instrument for the accomplishment of the same purpose, and only differ in the respect that one relates to real and the other to personal property, which is unimportant in its bearing on the question of their nature. It will serve the purpose of convenience to discuss the question as one of homestead exemption, reserving for subsequent consideration the question whether the difference in the mode of asserting the right in the two cases gives rise to any distinction between them material to the present question.

The provisions of the constitution granting the right of homestead exemption, must be regarded as taking effect in one or the other of two modes, namely, either as creating in certain persons rights of a remedial character, capable of being enforced by action or defence, as the case may require, or by limiting the jurisdiction and powers of the courts so as to deny a certain efficacy to their process. According to the view last mentioned, the constitution operates by way of disabling the process of the court from having any effect to deprive a person entitled to such exemption of the property to which such exemption relates. These provisions of the constitution (Article II., Section 32,) declare that certain rights of property held by certain persons, "shall be exempt from attachment, levy or sale, on any mesne

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*or final process issued from any court." Was it the intention of the constitution to deprive the process of the court of efficacy in certain cases by acting directly on such process? If so, then the levy of an execution upon property entitled to exemption, is, ipso facto, void. Certainly it cannot be contended that the process of a court can take an effect denied to it by the constitution, especially where, as is contended by the appellants, the object of the constitution was to act upon the process so as to prevent such an effect. Such being the case it would be unnecessary for the defendant in an execution, claiming property levied upon thereunder as exempt under the constitution, to take any steps to prevent a sale, but he might content himself by standing by silently until that property has passed into the hands of a purchaser from the sheriff, and then, by an action against such purchaser, contest the constitutional efficacy of the levy. In such a case the requirements of the statute, under which the debtor must assert his right of exemption in a particular manner, while the property is in the hands of the sheriff, would be not only useless, but in derogation of the constitution, as imposing conditions upon the right of exemption in excess of what is imposed by the constitution creating such right, declaring the cases in which it may be exercised and the mode of its exercise. It would also follow, if this view could be maintained, that a sale for the foreclosure of a mortgage or other lien created by the debtor, other than for the purchase money of the land, would be invalid, as the process by which such sale must be effected is within the description, set forth in the constitution, of the process from which such property is declared exempt. Another consequence that would result would be that when a judgment had once taken a lien upon land, that lien might be defeated by a subsequently arising right of homestead exemption, as the final process for enforcing it would be without capacity to operate against such a homestead right. That such consequences do not flow from the constitution is evident, not only from the consideration of the principles of construction, but from the opposite conclusions reached by this court, in general harmony with the views that have prevailed wherever the system of homestead exemptions has been adopted.

On the other hand, the conclusion that the

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constitution intended *as its proper effect, the investing of the debtor with a right of exemption that must be asserted as other similiar rights are required to be asserted, and which might be lost by neglect to assert it, or by estoppel arising from his acts, and

which, when asserted, would carry with it the usual incidents of such rights, is clear on the face of the constitution, and is in harmony with all the decisions under it. In that case the proper subjects upon which it must be regarded as intending effect are the rights of the judgment debtor and the duty of the officer or person using such process commensurate with such right. This view leaves the debtor to prosecute his right of exemption by such proceedings and means as may be prescribed by law for that purpose, not inconsistent with the constitution, for it includes the idea of creating the right and leaving to the legislature the duty of devising the remedy, while the opposite construction would involve the idea that the constitution itself has afforded the proper remedy by destroying the validity of what is done against its provisions, thus placing legislation on that subject beyond the reach of the legislature.

It must, therefore, be concluded that the proper effect of the constitution is to invest the debtor with a right to demand exemption in certain cases, in behalf of certain descriptions of property held by him as the head of a family. This right does not differ in its nature from other rights that may be made available by action or defense. It is true it looks to the protection of existing enjoyment rather than to future acquisitions, but numberless rights of action and defence are given for a similiar purpose that are subject to the same rule.

As has been already said, when there are conflicting rights to any subject of property, they are always adjusted according to their relative priorities, having regard to the time when they commenced to be operative, so as to create a vested interest in such property. It cannot be disputed that the execution in the present case took, by the levy, a lien, a special property, in the horse levied upon, for the purpose of the execution, and that such lien existed effectively in the hands of the sheriff, as the agent of the law and of the parties, from the time of the levy.

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The right *of homestead subsequently arising, was, necessarily, subordinate to this right, because later in point of time.

It has already been said, in substance, that if a subsequently accruing right of exemption could defeat the lien of an execution levied upon personal property, it could also defeat the lien of a judgment upon land. There is no difference in the nature of these two liens, as they are allowed for the protection of the same rights and follow the same general principles. The difference between them is in the steps by which they are respectively acquired and the mode of realizing from them, arising from the difference between real and personal property. Both are equally amenable to the rule that rights must be determined according to their respective priorities. Thus, no ground of distinguishing the two appears, as it regards the effect upon them of rights subsequently arising.

From the foregoing conclusions it is manifest that the plaintiff obtained, by the acquisition of the general right of homestead, no rights as against the lien taken by the execution previously levied, and was accordingly properly nonsuited.

The appeal must be dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. 30

(Case No. 899.)

DUBOIS v. THOMAS.

(April Term, 1880.)

[1. *Records* ⇐17.]

The Court of Common Pleas in virtue of its general authority, possesses the power of substituting new records, including judgments, in the place of originals lost or destroyed.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 25; Dec. Dig. ⇐17; Courts, Cent. Dig. § 370.]

[2. *Judgment* ⇐283.]

The act of assembly entitled "An act to provide a mode by which to perpetuate testimony in relation to deeds, wills, choses in action, other papers and records destroyed or lost during the recent war," approved December 21st, 1865, neither took away nor suspended the ordinary power of the Court of Common Pleas in such cases.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 557; Dec. Dig. ⇐283.]

[3. *Records* ⇐2.]

The act of 1871 which renews and extends this act of 1865, until February 11th, 1876, was not intended to deny to the courts, after the limited date, the remedy provided by the act of 1865.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 27; Dec. Dig. ⇐2.]

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*Before Aldrich, J., Colleton, March, 1880.

This was an application dated in February, 1880, for leave to substitute a new record for a judgment of the Court of Common Pleas for Colleton district, entered up in April, 1859, and burned in the City of Columbia on February 17th, 1865. The order was granted, and defendant appealed.

Messrs. Henderson & Behre, for appellants.

Messrs. Tracy & Tracy, contra.

July 30th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This was an application to the Court of Common Pleas to substitute a new record of a judgment for the original record alleged to have been destroyed. D. Padgett, one of the defendants, and the appellant here opposed the application on the

ground "that the time limited by the act of assembly entitled an act to provide a mode by which to perpetuate testimony in relation to wills, choses in action, other papers and records destroyed or lost during the recent war, dated December 21st, 1865, and acts amendatory thereto, within which parties were allowed to come in and obtain relief thereunder has long since expired." This objection was overruled and an order made substituting a new record for such original record. The only questions submitted by the present appeal are, whether the time allowed by statute for making such application has expired, and whether the proper effect of the acts in question is to preclude the making of such application after the expiration of the time allowed for that purpose.

It is material to inquire whether the Court of Common Pleas, prior to the statute, possessed power to allow the substitution of new records in the place of original records lost or destroyed, as having a bearing on the proper effect of the statute. This will constitute the first point of inquiry. No direct authorities have been found in this state, but abundant authority exists for concluding that the superior courts of law in England possess such authority.

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*King v. Bolton, 1 Stra. 140. In this case the record of the King's Bench was stolen while being transmitted to the House of Lords, and a new record was ordered to be filed by the King's Bench, which was affirmed in the House of Lords.

Evans v. Thomas, 2 Stra. 833. Here a judgment roll was lost after being "docquetted," but before being filed. Leave was granted to file a new roll, the defendant being dead and the executor consenting. The allowance of this substitution cannot be regarded as resting entirely on the consent of the parties, as the court took into consideration its effect upon purchasers, as appears by the statement of the report that "there being a docquet it could be no deceit upon purchasers."

Douglass v. Yellop, 2 Burr. 722. Through the neglect of the clerk, in 1729, a judgment had not been entered and the roll was lost. A rule was made thirty years after, in 1759, for the clerk to sign a new roll, "wherein is entered the judgment, signed in this cause in Michaelmass Term, 1729, and filed amongst the rolls of that term, a special entry being first made expressing the day of docquetting the same."

Dagrell v. Bridge, 2 Stra. 1264. In that case a new postea was ordered to be made out in the place of one lost.

It appears by these authorities that the courts of England, of general jurisdiction, possess authority to substitute a new judgment record for one lost or stolen, and that the lapse of thirty years does not preclude an application for that purpose from being granted. No statute authority is referred to as the ground of such competency, and it must be referred to the principles of the common law.

If such a power results from the principles of the common law it would apply to our Circuit Courts of Common Pleas and General Sessions as embodying all the principles of jurisdiction recognized by the common law as appertaining to courts of general original jurisdiction, when not otherwise denied by positive law, either constitutional or statutory. It is certainly essential to the powers of these courts that they should possess such competency, and if this proposition is maintained they must be deemed to possess it in

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virtue of the principle that a grant of *general public authority contains, by implication, all that is necessary to the full exercise of such authority.

If a judgment roll should be abstracted and destroyed by the party against whom the judgment was recovered, no one would doubt the authority of the court to replace it, as to suppose inability so to do would be to deny to the courts that which is clearly essential to the efficacy of their judgments. There is no difference in principle, as it regards the power of the court to replace a record, between the two cases of a malicious destruction by the act of a party before the court and of a loss or destruction occurring by accident or negligence without malicious intent. The power put in exercise is the same in both cases, however much difference there may be in the reasons calling for its exercise in the two cases. Where the destruction or loss occurs while the plaintiff is actively pressing his rights under such judgment the necessity for such a power is apparent. If, then, the power exists for any length of time, or for any purpose, it must be regarded as a general power, there being nothing in its nature to suggest that it is either of a temporary or special or restricted character. While a judgment remains in a condition to be enforced, the powers and duties of the court continue unchanged, and there is as much reason for the continuance of such a power as there is for its existence in the case of recent judgments actively pressed. Section 437 of the code, authorizing the court to supply lost pleadings and papers, must therefore be regarded as conferring no new power, but as recognizing one that already existed, and, therefore, it is unnecessary to consider whether judgments are within the description of those records capable of being restored under that section, for, regarding it in that light, there is nothing expressed or necessarily implied by it that can be regarded as a limitation of pre-existing powers. We are of opinion that the Court of Common Pleas, independently of the statutes in question and in virtue of its general authority, possessed the general power of substituting new rec-

ords in the place of its original records lost or destroyed, and that that power extended to judgment records.

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*The legislature could, beyond doubt, substitute for the general mode of proceeding by motion to the court for relief of this character, a more formal proceeding, or a different and inconsistent proceeding, and if it appeared that the object of such legislation was substitution and not the creation of an auxiliary or additional remedy, or the confirmation of an existing one, such substitution might have the effect either to take away the previous remedy or suspend its operation while the statutory remedy was in force. We do not find any such intent to create a substitute for the common law remedy by motion, in such cases, in the statute in question.

The remedy there contemplated is by motion, with no new incidents or limitations as to the mode of proceeding or the authority of the court thereunder. The most that can be assumed is that it was thought doubtful whether requisite authority existed in the courts for that purpose and deemed desirable that the competency of the courts in such a case should be placed beyond doubt. It is reasonable to assume that such was the motive that induced the passage of the act. As there is nothing in the mode of procedure, or in the results capable of being attained under the statute, that either enlarged or narrowed the powers previously possessed by the Court of Common Pleas, we see no reason for holding that the adoption of the statute either took away or suspended the ordinary power of the court in such cases.

Unless the statutes in question have some effect additional to that already discussed, it will be unnecessary to inquire whether the provisions of the statute were in force at the time the order appealed from was made or had expired by their own limitation, for, in either case, the power of the court to grant that relief is undoubted.

It is contended by the appellant that the act of 1871, (15 Stat. 537,) "renews and extends the act of 1865 until February 11th, 1876, which time has long since expired," and, therefore, has the effect of a declaration that the act of 1865 shall not be operative after that day. It is claimed that this is equivalent to a declaration that the remedy provided by the act shall not be allowed after that day. It is not claimed that such is the

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*express declaration of the act, the argument being that it is a fair and reasonable inference arising from the consideration of the objects that the statute had in view. As that which is claimed is the destruction of a power vital to the administration of justice, such a result cannot be admitted except where the intent to that effect is clearly expressed or may be gathered on the principles of necessary construction. It is clear that no such ground exists in the present case, as there is no express declaration, and all the purposes of the statute can be attained without ascribing such effect to them. But, even if the statute was open for implications, standing on grounds of less certainty than such as are competent to sustain a necessary inference, it would be impossible for this court to say from any evidence furnished by the statute in question, that the legislature had before its mind any question of the propriety of withdrawing from the courts powers of so important a character or subjecting them to restrictions of any kind. Without such fact there is nothing on which to base a conclusion that the statute intended to interfere in any way with the common law powers of the courts in cases like the present.

The appeal must be dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. 35

(Case No. 900.)

STERNBERGER v. McSWEEN.

(April Term, 1880.)

[1. *Justices of the Peace* ⇐171.]

On appeal to the Circuit Court from a trial justice's judgment, where the amount involved exceeds $10, there must be a trial de novo, unless appellant states in his notice of appeal that such appeal is taken upon questions of law only.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 656; Dec. Dig. ⇐171.]

[2. *Justices of the Peace* ⇐175.]

The trial being de novo the parties are not restricted to a repetition of the evidence offered in the court below.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 697; Dec. Dig. ⇐175.]

[3. *Agriculture* ⇐13.]

A lienee, under the agricultural lien law, is not entitled to recover from an innocent purchaser the value of property covered by the lien, sold by such purchaser before action brought.

[Ed. Note.—Cited in Jackson v. Merchants' Hotel Ass'n, 37 S. C. 569, 16 S. E. 713.

For other cases, see Agriculture, Cent. Dig. § 37; Dec. Dig. ⇐13.]

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[4. *Chattel Mortgages* ⇐153.]

*An unrecorded chattel mortgage is of no avail against a subsequent purchaser for valuable consideration without notice.

[Ed. Note.—Cited in Burriss v. Owen, 76 S. C. 482, 57 S. E. 542.

For other cases, see Chattel Mortgages, Cent. Dig. § 255; Dec. Dig. ⇐153.]

[5. *Agriculture* ⇐12.]

Under the act of 1878, (16 Stat. 411,) which requires agricultural liens to be filed in the office of the register of mesne conveyance, and an index thereof to be kept by that officer, a lien filed and immediately thereafter withdrawn by the lienee and retained in his posses-

sion, is not constructive notice to third parties, notwithstanding the proper entry appears in the index.

[Ed. Note.—Cited in Archer v. Long, 46 S. C. 294, 295, 24 S. E. 83; Townsend v. Sparks, 50 S. C. 383, 27 S. E. 801.

For other cases, see Agriculture, Cent. Dig. § 41; Dec. Dig. ⟸12.]

[6. *Evidence* ⟸87.]

The presumption of law that an officer has done his duty may be rebutted by proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 109; Dec. Dig. ⟸87.]

[7. *Agriculture* ⟸14.]

The lienee cannot avoid the consequences of the register's default in permitting the lien to be taken from its file, when the removal was the act of the lienee himself.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 38, 39; Dec. Dig. ⟸14.]

[8. *Records* ⟸16.]

This court cannot sanction the withdrawal of a paper from the files of a public office, even though by permission of the officer in charge.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 21; Dec. Dig. ⟸16.]

[9. *Action* ⟸35.]

[Cited in Kennedy v. Reames, 15 S. C. 552; Jennings v. Abbeville County, 24 S. C. 549; Whilden & Co. v. Pearce, 27 S. C. 48, 2 S. E. 709; Cope v. Hampton County, 42 S. C. 21, 19 S. E. 1018; Michalson v. All, 43 S. C. 460, 21 S. E. 323, 49 Am. St. Rep. 857; Newton v. Odom, 67 S. C. 10, 45 S. E. 105; Bingham v. Harby & Co., 91 S. C. 123, 74 S. E. 369, to the point that one who undertakes to enforce his rights under a lien, which is the creature of a statute, must confine himself to the remedy furnished by the statute.]

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 273–294; Dec. Dig. ⟸35.]

[This case is also cited in Creech v. Long, 72 S. C. 31, 51 S. E. 614, without specific application, and in Link v. Barksdale, 70 S. C. 487, 50 S. E. 189, and distinguished therefrom.]

Before Hudson, J., Darlington, March, 1880.

This was an action instituted before a trial justice by H. Sternberger to recover from John McSween $45.30, the value of a bale of cotton purchased by McSween from one L. Morris, and re-sold before action brought. The cotton had been raised by Morris during the year 1879, and plaintiff claimed that it was subject to an agricultural lien in his favor, by virtue of the following agreement:

"Whereas, it is agreed by and between H. Sternberger, merchant, and L. D. Morris, all of said county and state, that the said H. Sternberger is to make advances of provisions and supplies to the said ———, not to exceed in amount seventy-five dollars; the advances being for the purpose of enabling the said L. D. Morris more effectually to carry on the cultivation of his farm and produce a crop therefrom, in said county, on which he is engaged at work for the present year.

"Now know all men by these presents, that I, the said L. D. Morris, for and in consideration of the said advances to be made by the said H. Sternberger, whether at one time or at various times through the current year, have bargained, sold and pledged, and by these presents do bargain, sell and pledge unto the said H. Sternberger, all and every portion of the cotton, corn, peas, small grain, fodder, or other crops which I may produce

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on said *farm the present year, or so much thereof as may be necessary to fully pay and satisfy the amounts advanced to me under this agreement, save and except enough of same to satisfy the rent for the land, if there be any rent due on the same; and the said crop or crops to be prepared for market and delivered to said H. Sternberger between the months of August and October, the present year.

"In witness whereof, we, the contracting parties, have hereunto set our hands and seals this 13th day of January, 1879.

"H. Sternberger. [L. S.]
"L. D. Morris. [L. S.]

"Executed in the presence of
"C. Alexander."

This paper was filed in the office of the clerk of the court, as ex officio register of mesne conveyances, and the following entry was made in the Index to Liens:

"L. D. Morris—H. Sternberger advances—$75.00—Jan'y 17, 1879."

Plaintiff had no knowledge, previous to the sale to defendant, that Morris was disposing of his crop, and defendant had no actual notice of plaintiff's lien until after he had bought and sold, in the usual course of business. The cotton was not planted at the date of the agreement.

The trial justice gave judgment for plaintiff for the sum demanded. The defendant gave notice of appeal, upon grounds which raised questions of law only, but he did not say so in totidem verbis in his notice.

In the Circuit Court the presiding judge held that there must be a trial de novo, and permitted proof to be offered that the agreement, after being filed and indexed, was immediately withdrawn by Sternberger and retained in his possession until after this action was commenced—a fact not shown in the trial below.

The Circuit judge held that the agreement was substantially an agricultural lien; that plaintiff could not recover the value of the cotton from defendant, who had sold before action brought; and that the index was not constructive notice to defendant of the lien. He gave judgment for defendant, with costs. Plaintiff appealed. The grounds of his ap-

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peal and the positions *assumed in the argument are sufficiently stated in the opinion of the court, except the last position, which is thus stated by appellant:

"We say that the clerk of the court is supposed to have done his duty; after re-

ceiving and filing the paper, if he chose to give the same back to Sternberger, when it was his duty to retain the same, are we to suffer?"

Mr. J. J. Ward, for appellant.

Messrs. Boyd & Nettles, contra.

July 30th, 1880. The opinion of the court was delivered by

McIVER, A. J. The object of this action is to recover the value of a bale of cotton, sold to the defendant by one Morris, upon which the plaintiff claimed to have a lien, by virtue of an agreement in writing, between himself and said Morris, which, it is insisted, amounts to what is commonly called an agricultural lien, under the provisions of the act of March 4th, 1878. 16 Stat. 410. This agreement, bearing date January 13th, 1879, a copy of which is set out in the case, was received in the clerk's office on January 17th, 1879, and so marked, and was indexed by the name of the parties, the amount of the advances and the date of its entry in that office: but as soon as it was indexed it was taken out of the office by the plaintiff and remained in his possession until the trial in the court below. The action was originally instituted before a trial justice, and, he having rendered judgment for the plaintiff, the defendant gave notice of appeal to the Circuit Court upon various grounds, which are fully set out in the case. That court proceeded to hear the case de novo, and, upon such hearing, rendered judgment for the defendant, and from that judgment this appeal has been taken.

Various exceptions were taken to the rulings and the final decision of the Circuit judge, and the questions thus raised will be considered in their order. The first question is as to the right of the defendant, who was the appellant in the Circuit Court, to have a trial there de novo. It is contended here that as the grounds of appeal from the judg-

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ment of the trial justice raised *questions of law only, the case could not be tried de novo in the Circuit Court. This position is based, as we understand it, upon the language of the proviso to Section 369 of the code of procedure. That section provides that on appeal from a judgment of a trial justice, where the amount in controversy exceeds the sum of $10, as it does here, "a new trial shall be had in the Circuit Court in the following appellate cases: 1. When the judgment was rendered upon an issue of law joined between the parties. 2. When it was rendered upon an issue of fact joined between parties, whether the defendant was present at the trial or not." Then follows the proviso, containing a mere permission to appellant to waive his right to a new trial, by stating in his notice of appeal that such appeal is taken upon questions of law only. The only person who can avail himself of this permission is the appellant, and unless he does so in the manner prescribed by the statute, the code declares that "a new trial shall be had" even in cases "where the judgment was rendered upon an issue of law joined between the parties." We are unable to perceive the force of the argument drawn from the fact that Section 370 of the code requires the appellant to serve a notice of appeal "stating the grounds" upon which the appeal is founded. The provisions of this section apply to every case in which there is an appeal, and it is manifest that there are some cases in which, upon appeal, the trial must be de novo, we do not see why this requirement should operate, in this case, to abridge or deny the right of the appellant, in the Circuit Court, to a new trial there.

The next position taken is, that even if the trial should be de novo the parties should have been restricted to the issues raised before the trial justice, and that the Circuit Court erred in permitting the defendant to offer additional testimony to that adduced before the trial justice. We do not see the force of this objection. When a new trial is had, it seems to us that it should be conducted just as if there had been no previous trial, and either party is at liberty to offer any competent testimony pertinent to the issues involved in the case. Here there were no formal pleadings before the trial justice. The plaintiff alleged that he was entitled to recover the value of the bale of cotton in question, and this being denied by the de-

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fendant, any testimony *tending to defeat the plaintiff's claim was certainly pertinent to the issue which the court was called upon to try, and, if otherwise competent, was clearly admissible, even though it may not have been offered at the original hearing before the trial justice.

The next question to be considered is, whether the paper in question, assuming it to be an agricultural lien, would authorize the bringing of this action; in other words, whether the lien provided for by the statute invests the lienee with such a right of possession in the property covered by the lien, as would entitle him to recover the value of such property from an innocent purchaser who had previously disposed of it. An agricultural lien, as it is commonly called, is the creature of the statute, and to ascertain its nature and the rights which it confers, resort must be had to the terms of the statute. Looking into the statute we do not find that it purports to give such a paper the incidents of a chattel mortgage. It does not confer upon the lienee the right to the possession of the property covered by it even after default and while the property still remains in the possession of the lienor, and, certainly, not while it is in the possession of an innocent purchaser. The remedy which the statute provides is of a totally different character. So far from authorizing the lienee to seize

the property covered by the lien, even after default, it expressly provides that such seizure shall be made by an officer of the law, under a warrant issued by another officer. In this respect the lien provided for by the statute differs very materially from a chattel mortgage. One who undertakes to enforce his rights under a lien which is the creature of a statute, must confine himself to the remedy provided by the statute. The right is derived solely from the statute, and the remedy resorted to must be that furnished by the statute. The attempt to invest an agricultural lien with the qualities of a chattel mortgage, is an attempt to interpolate into the statute provisions which the legislature has not seen fit to adopt, for, certainly, if that body had designed to give an agricultural lien the qualities of a chattel mortgage, it would have been very easy to have said so. On the contrary, however, the agreement provided for by the statute, which creates the lien, lacks one of the qualities of a chattel mortgage, which has been held (Green v.

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Jacobs, 5 S. C. 283,) *to be essential to invest the mortgagee with the right to the possession of the property, in that it does not contemplate any provision whatever for the transfer of the title; and, as we have seen, the remedy provided by the statute manifestly contemplates no change in the title, but, on the other hand, presupposes the continuance of the title in the lienor, subject, however, to the lien, until it is transferred by the execution of the process of the law, just as in the case of property covered by the lien of a judgment or execution, the title to the property remains in the judgment debtor until it is transferred by a sale under process of law; and one who purchases from the judgment debtor takes subject to the lien, which follows the property into whosoever hands it may go, but the purchaser, after he has disposed of it, cannot be made liable for the value of the property or for the proceeds of its sale. Paysinger v. Shumpard, 1 Bail. 237. The foregoing remarks are based upon the character of the agreement contemplated by the statute; and the fact that the agreement in the case now under consideration does contain words purporting to transfer the title, cannot affect the argument as to the proper construction of the statute and the rights which it was designed to confer. These words might, possibly, have the effect of converting the paper in question into a chattel mortgage, as is argued by the respondent, though upon this point also we are inclined to agree with the Circuit judge, and if they should have such effect, then, manifestly, the plaintiff could not maintain his action. For, aside from the question whether the paper could be sustained as a chattel mortgage upon a crop not yet planted, as against the rights of a third person, (a question which we do not propose to consider, as all the facts necessary for its proper determination are not before us,) it is not pretended that it ever was recorded in the manner in which mortgages are required to be recorded, and, therefore, could avail nothing against the defendant who is a subsequent purchaser for valuable consideration without notice.

Another question has been raised by the grounds of appeal which, under the view we have taken, it is not absolutely necessary to decide, but as the point raised is one of importance it may be well for us to express our

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views. That question is *whether the paper, considered as an agricultural lien, was properly recorded so as to affect subsequent purchasers with constructive notice. To state the question more precisely—was the entry of this paper in the office of the clerk of the Court of Common Pleas, who, in the county where the parties resided is ex officio register of mesne conveyances, and indexing it as was done in this case, a sufficient compliance with the sixth section of the act of March 4th, 1878, (16 Stat. 411,) or was it necessary that the paper should remain on file in that office? The act requires that every lien "shall be filed in the office of the register of mesne conveyances for the county in which the lienor resides. * * * and he shall keep an index of all such liens so filed, * * * and this shall be a sufficient record of the same." It is argued that the word "this" refers only to the indexing required and not to the filing. This appears to us to be a forced and unnatural construction. The legislature manifestly designed to dispense with the usual mode of recording by copying the paper at length, and to substitute another simpler and cheaper, to wit, by filing the original paper and indexing it, and then declared that "this"—that is the new mode, not merely one of the incidents of the new mode, the indexing, but both, the filing and the indexing, should be a sufficient record.

Again, it is argued that filing a paper in the clerk's office does not necessarily convey the idea that it is to remain there, but that it may be marked filed and taken out of the office; and this view, it is urged, is supported by the prevalent practice in this state, to take papers from the clerk's office after they have been marked filed therein. There is no evidence in this case of any such custom, and if we were to assume its existence, we do not feel at liberty to give it judicial sanction. When papers are placed on file in a public office, they become public records, open to the inspection of the public, under proper regulations; but if private individuals are at liberty to remove them whenever they see fit, they necessarily lose their character as public records. They are in the custody of the officer in whose office they are filed, and he is responsible for them. If he chooses to allow individuals to remove the originals

rather than to require them to procure copies, that is a matter of mere favor and not of

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right, *and while we may not feel called upon to volunteer a condemnation of such a practice, we certainly cannot be expected to give it judicial sanction. As is said in 1 Bouv. Law Dict. 524: "A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file." In addition to this the proper office of an index is to afford a ready means of finding something else which contains the information desired, and if that something else is not in the office where the index is kept, it would not serve the purpose for which it is intended. The statute does not prescribe how the index should be kept, and the presumption is that it was intended to be kept in the usual way, and if so kept it would not afford such information as the statute evidently designed should be furnished to the public. The fact that the index in this particular case was fuller than usual cannot affect the question as to the proper construction of the statute, which requires a mere index, not an abstract.

Finally, it is argued that the presumption is that the clerk did his duty, and at all events the appellant should not suffer for the clerk's default. There is no doubt that in the absence of evidence to the contrary the presumption is that a public officer has done his duty, but here the proof shows the contrary, and there is no room for the presumption invoked. As to the other branch of the proposition, that is likewise disposed of by the evidence, which shows that it was by the appellant's own act and consent that the paper was removed from the office after it was indexed, and retained in his own custody. But even if it was the default of the clerk, it is difficult to see how that could affect McSween. If a party delivers a mortgage or other paper to the clerk to be recorded, and he neglects to do so, we can very readily understand how he might be made responsible for any damages occasioned by such a neglect of duty, but how an innocent third person could be made to suffer for such a neglect of duty on the part of a public officer it would be more difficult to comprehend.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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14 S. C. *44

*(Case No. 901.)

PFEIFER & CO. v. DARGAN.

(April Term, 1880.)

[1. *Assignments for Benefit of Creditors* ⇨ 326.

Under an assignment for the benefit of such creditors of assignor as shall establish their claims within a time limited, and agree to receive their dividends from the assigned estate in full discharge of their demands, and which excludes from its benefits all creditors neglecting or refusing to comply with these conditions, the whole of the assigned estate is applicable to creditors who do so comply, to the extent of their debts proven.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 950–957; Dec. Dig. ⇨326.]

[2. *Assignments for Benefit of Creditors,* ⇨ 326.]

A concluding clause in such assignment to the effect that dividends otherwise applicable to creditors neglecting or refusing to accept the provisions of the assignment, shall remain in the hands of the assignee, subject to such order as the court may make regarding the same, was not intended to apply to such creditors as failed, through their own fault or neglect, to comply strictly with the requirements of the previous conditions.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 952; Dec. Dig. ⇨326.]

[3. *Assignments for Benefit of Creditors* ⇨ 326.]

Although such conditions are permitted rather than favored, the courts cannot, in the construction of a subsidiary clause of such assignment, resort to implications which are not necessary, and which would conflict with the express terms of the main body of such instrument.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 950–957; Dec. Dig. ⇨326.]

Before Kershaw, J., Sumter, June, 1879.

This was an action brought by Charles M. Pfeifer & Co., in their behalf alone, against Herman Schwerin on an acceptance in favor of Charles M. Pfeifer & Co. and against John W. Dargan, assignee, under a deed executed by Schwerin for the benefit of his creditors.

The complaint prayed judgment against Schwerin for the amount due on said acceptance, and that the defendant Dargan might be decreed to satisfy the same out of the funds then in his hands derived under said deed. There was no further prayer.

The deed of assignment from Schwerin to Dargan was put in evidence. It transferred the entire estate of Schwerin to Dargan, "to and for the following uses and purposes, and none other," to wit:

"In trust that he, the said John W. Dargan, (in conjunction with the agent, if any, to be appointed by my creditors,) shall sell the said stock of goods, wares and merchandise

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and store *fixtures for cash, in such manner as he may deem most advantageous; and to collect said debts and demands due me as aforesaid as speedily as possible, and, after deducting the commissions allowed him by law and the necessary expenses of selling said stock and collecting said demands, to pay out of the moneys arising therefrom, in equal and ratable proportions, to all the creditors of the said Herman Schwerin, upon notes or accounts or obligations of any character, as shall render in the same to the said

John W. Dargan, and establish the same within ninety days from the date of these presents; and who shall, at the time of rendering and establishing said demands, signify and accept in writing that the dividends so to be received shall be a free and full discharge of their said claims and demands against the said Herman Schwerin; and, upon the payment of said dividends, shall grant such full and final release and discharge, hereby debarring and excluding all and every creditor of the said Herman Schwerin from any advantage or benefit whatever, under any provision of this assignment, who shall neglect for the period aforesaid, or refuse to render in and establish his, her or their demand, and signify and assent in the manner aforesaid to accept of their dividends as a full and final discharge of their claim or demand against the said Herman Schwerin.

"In case any of my creditors shall refuse or neglect to accept of the provisions of this assignment, the dividend, which would be applicable to their demands, shall remain in the hands of said assignee, subject to such order as the court may make in the premises regarding the same.

"In witness whereof I have hereunto set my hand and seal this 6th day of January, A. D. 1879.

(Signed) H. Schwerin." [L. S.]

The defendants, Schwerin and Dargan, in their answer, denied that plaintiff had any right to or interest in the fund.

John W. Dargan, assignee, was sworn on behalf of defendants. He testified that the total amount of debts due by Schwerin was about $5000; that his creditors, to the extent of about $4500, before any dividend had been declared or paid, had assented to and accepted the terms and provisions of the deed of assignment; that some four or five of the

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creditors, the aggregate of whose *debts was about $500, including the plaintiff in this separate action, had neglected and refused to render in and establish their demands, or to accept or assent to the terms and provisions of the deed, and had brought their separate actions against him, which are still pending; that the proceeds of the assigned estate amounted on the whole to about $2000; that he had paid the assenting creditors up to that time about thirty-six per cent. of their demands, and the balance remaining in his hands would pay them about five per cent. more, and that they were demanding such balance; that the plaintiff in this action, as well as those who had brought their separate actions against him, had neglected or refused to accept or assent to the terms of the deed; that this balance in his hands is the dividends to which the non-assenting creditors would have been entitled had they come in under the deed, and which they are now suing him for.

The case was heard by the presiding judge, who, after finding the facts as above stated, concluded his judgment in words following:

A debtor is allowed to make an assignment of his estate upon the condition that his creditors, before receiving any portion of the same, shall be required to execute a release of all demands against the debtor. In such a case, where all releasing creditors have been paid the full amount of their respective dividends, and a surplus remains in the hands of the assignee, there results a trust to the assignor as to such surplus, unless there be some other disposition made of it by the deed. In this case the deed declares that if any creditor shall neglect or refuse to accept of the provisions of the assignment, the dividend which would be applicable to his demand shall remain in the hands of the assignee, subject to such order as the court may make regarding the same. The fund so remaining is, in equity, distributable among the unpaid creditors. Niolon v. Douglas, 2 Hill's Eq. 455 [30 Am. Dec. 368].

It is, therefore, adjudged that the defendant, H. Schwerin, do pay the plaintiff the sum of $86.80, with interest thereon from November 13th, 1878, together with the costs and disbursements of the plaintiff herein, to

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be adjusted by the clerk of the court *and inserted in this judgment, and that the plaintiff have execution therefor against the said H. Schwerin.

That the defendant, John W. Dargan, as assignee, do pay from the fund remaining in his hands as such, the pro rata share of the same to which the plaintiff is entitled under the principles of this decree, as hereinbefore declared, first deducting from the entire fund his costs and disbursements, as one of the defendants herein, to be adjusted by the said clerk; the sum so paid to be credited on the judgment of the plaintiff herein.

That any other creditor of the fund entitled under the principles of this decree to a share therein, may apply, at the foot of this judgment, for such order as may be necessary to secure his rights in the premises.

Dargan, the assignee, appealed, upon the following grounds:

1. Because his Honor erred in not dismissing the complaint as to John W. Dargan, assignee.

2. Because his Honor erred in decreeing that the plaintiff had any interest in or right to the fund in the hands of the assignee, or any part thereof.

3. Because his Honor erred in not decreeing that plaintiff should release his demand according to the terms of the deed, upon receiving a pro rata share of the fund derived thereunder.

4. Because his Honor erred in converting plaintiffs' complaint into a creditor's bill, and decreeing that any other creditor might apply

under that decree for any necessary order to secure his rights in the fund.

Messrs. Moise & Lee, for appellant.
Mr. J. H. Earle, contra.

August 6th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The only matter presented by the appeal in this case, is the construction of an insolvent debtor's assignment for the benefit of releasing creditors. The question is whether, by the terms of the assignment, the whole proceeds of the assigned estate were to be distributed among such

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creditors as *proved their debts in a certain time, and agreed to release, in accordance with the condition attached to the assignment, to the extent necessary to satisfy the debts due to them by the assignor. If such is the proper construction of the instrument of assignment, the plaintiff is not entitled to recover in this action, as the whole fund is insufficient to satisfy the releasing creditors, and the Circuit judgment is erroneous.

But the plaintiffs, who are the respondents, contend that by the terms of the assignment the releasing creditors can only receive their ratable share of the assigned estate, estimating, for the purpose of ascertaining that proportion, the whole amount of the indebtedness of the estate, and that such proportion of the assigned estate as would have gone to the non-releasing creditors, had they consented to release, according to the terms of the assignment, is a fund undisposed of, and, accordingly, subject to the claims of creditors generally. The Circuit Court sustained the claim of the plaintiffs and gave judgment accordingly.

The assignment, after transferring the estate to an assignee, proceeds to declare the trusts upon which the same is made, and directs that so much of the proceeds thereof as shall be available for that purpose shall be paid "in equal and ratable proportions to all the creditors of the said Herman Schwerin, upon notes or accounts or obligations of any character, as shall render in the same to the said John W. Dargan, and establish the same within ninety days from the date of these presents; and who shall, at the time of rendering and establishing said demands, signify and accept, in writing, that the dividends so to be received shall be a free and full discharge of their said claims and demands against the said Herman Schwerin; and, upon the payment of said dividends, shall grant such full and final release and discharge."

The assignment then proceeds to exclude from its benefits all creditors who shall neglect or refuse, within the prescribed time, to establish their demands and signify the consent previously provided for.

Considering this part of the assignment independently of the concluding clause of the instrument, under which the point of difficulty has arisen, it is clear that the intention was to divide the whole estate among

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a certain class of creditors, namely, such *as should prove their demands and signify the requisite consent within the time prescribed. The direction to divide, ratably, among "all of the creditors" * * * "as shall render," &c., can receive no other construction than that the rate of distribution was to be established with reference alone to the class provided for, consisting of such as could prove their debts and signify the proper consent in due time. It is presumably the intention of the assignor, in assignments of this class, that his whole estate shall go to such creditors as he choses to prefer, to the extent necessary to satisfy their demands against him. The motive of the creditors in releasing is, ordinarily, to gain an advantage over non-releasing creditors, or, what is equivalent, to prevent releasing creditors from gaining such advantage over him. That advantage usually consists in the fact that releasing creditors generally take the whole estate, if necessary, to satisfy their demands. There is nothing in that part of the assignment, already considered, that indicates a different intention from that just mentioned as usually characteristic of assignments of this class.

Unless the remaining clause of the assignment has the effect to fix on the instrument a different intention, that already stated must stand as its clear purpose.

The assignment concludes as follows: "In case any of my creditors shall refuse or neglect to accept of the provisions of this assignment, the dividend which would be applicable to their demands, shall remain in the hands of said assignee, subject to such order as the court may make in the premises regarding the same." The direct sense of this clause is that the assignee shall not apply that portion of the estate which would have been the share of non-releasing creditors in the event that they had complied with the condition of the assignment without the aid of the court. The proper recipients of this part of the estate were not pointed out in this clause, therefore there is nothing in its direct effect to conflict with the designation of such persons made in the former part of the instrument.

Is there a necessity for extending this direct sense of this clause in the manner contended for? If there is such a necessity it must be created by the instrument itself. In

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the first *place there is no hiatus in the expression of the intention of the assignment, to be supplied constructively, as the previous portion of the instrument had fully declared the trusts in that respect. In the next place, the clause under immediate examination can take full force and effect, without any en-

largement by implication. There is a clear purpose that can be ascribed to it, sufficient to account for its introduction. It might well be that creditors entitled to prove their debts and signify their consent to release might be prevented from so doing without fault or neglect on their part and under circumstances which would raise an equity for them to be let into the benefits of the arrangement notwithstanding the want of strict compliance with the express requirements. As the provisions that deprive the non-releasing creditors of an interest in the proceeds of the assigned estate are in the nature of a forfeiture, and, as such, equity might, in a proper case, relieve against them, it was eminently prudent to enable the assignor to demand the aid of the court in ascertaining the existence of such forfeiture and not compel him at the peril of risk and expense to prejudge such questions. It is evident, then, as neither the instrument at large nor the particular clause under consideration make any demand for the enlargement, by implication, of the sense of that clause, having full and complete operation without it, there is neither reason nor justification for so doing.

Nor is there any reason for a resort to implication arising from the fact that conditional preferences, having a compulsory effect upon creditors, are rather permitted than favored. If the instrument left a doubt of its intention, the effect of favor or disfavor might make a difference in the character of the inferences drawn to supply such doubt; but disfavor is no ground for injecting into an instrument that which is not demanded by its language or fair import. To go to the extent of raising out of a clause, subsidiary to the main purpose of the instrument, an implication not demanded by such clause, which shall have the effect to unsettle the express terms employed in that part of the instrument, the office of which is to create the trusts, is not warranted by the principles of construction, and, if defended on the ground of disfavor for such assignments,

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would place the *principle of favor and disfavor in the light of an arbitrary power of dispensation.

The construction that has just been placed upon the assignment is in harmony with the presumable intent of the assignor. He would not, as we must assume from the nature of the condition of the assignment, have annexed the condition except as affording a motive for releasing. If, then the releasing creditor could get no more by releasing than he would get by equal division among all creditors without any condition annexed, he has no motive for releasing. A construction that would destroy the motive for releasing would destroy the purpose of the condition, and cannot be ascribed to the mind of the assignor, nor does it result from the principles of law, for, as held in this state, they permit the use of such conditions in the assignment of insolvent debtors.

It must be concluded that it was the intention of the assignment that the proceeds of the estate, available for that purpose, should be divided ratably among such creditors as are entitled to be regarded as having complied with the condition of the assignment, and, consequently, the Circuit decree must be set aside and the cause remanded for further proceedings in conformity with the principles hereinbefore laid down.

McIVER and McGOWAN, A. J's, concurred.

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14 S. C. 51

(Case No. 902.)

CHERAW & CHESTER RAILROAD COMPANY v. WHITE.

(April Term, 1880.)

[1. *Corporations* ⇐514.]

Where the complaint alleges a corporate existence in the plaintiff, and no facts or circumstances appear upon the face of the complaint showing in plaintiff a want of corporate authority, or of capacity to sue, a demurrer to the complaint under Class 2, of Section 167 of the code, cannot be sustained.

[Ed. Note.—Cited in Cheraw & C. R. Co. v. Garland, 14 S. C. 63.

For other cases, see Corporations, Cent. Dig. §§ 2052–2081; Dec. Dig. ⇐514.]

[2. *Corporations* ⇐514.]

A reference to its charter in the complaint of a corporation plaintiff does not so incorporate the charter into the complaint as to ren-

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der the state*ment of its right to sue defective, by reason of the failure to allege the performance of conditions precedent to its corporate existence.

[Ed. Note.—Cited in Cheraw & C. R. Co. v. Garland, 14 S. C. 63.

For other cases, see Corporations, Cent. Dig. § 2053; Dec. Dig. ⇐514.]

[3. *Corporations* ⇐514.]

The performance of conditions precedent to a corporate existence is a matter of proof, and a failure to allege such performance is not ground for demurrer under the second class of Section 167 of the code.

[Ed. Note.—Cited in Cheraw & C. R. Co. v. Garland, 14 S. C. 63; Harle v. Morgan & Co., 29 S. C. 259, 7 S. E. 487.

For other cases, see Corporations, Cent. Dig. §§ 2052–2081; Dec. Dig. ⇐514.]

[4. *Corporations* ⇐35.]

The charter of a railroad company conferred corporate powers in terms importing an immediate grant, with a proviso "that said persons shall commence operations upon said road within two years after the passage of this act, and complete the same within five years." *Held*, that the requirements of the proviso were not conditions precedent to a corporate existence.

[Ed. Note.—Cited in Cheraw & C. R. Co. v. Garland, 14 S. C. 63.

For other cases, see Corporations, Cent. Dig. § 103; Dec. Dig. ⇐35.]

[5. *Corporations* ⇐90.]

The charter of a railroad company permitted subscriptions in labor, materials or land, as well as in money; in action brought by the corporation to recover a stock subscription, the complaint alleged that the "defendant subscribed to the joint stock of the said company four hundred dollars, for and in consideration of eight shares of the capital stock," and also alleged a demand of payment. *Held*, on demurrer, that the complaint sufficiently stated that the subscription was payable in money and was due before action brought.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 406; Dec. Dig. ⇐90.]

[6. *Corporations* ⇐77.]

The word "subscribe," in contracts of this nature, has a distinctively definite sense, and includes the idea of a promise to pay the amount subscribed in the manner agreed upon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 210–212, 219–243, 455; Dec. Dig. ⇐77.]

[7. *Costs* ⇐51.]

Where a demurrer to a complaint is overruled, the Circuit judge may require the payment of all costs up to that time, as a condition of leave to answer.

[Ed. Note.—Cited in Lowry v. Jackson, 27 S. C. 324, 3 S. E. 473.

For other cases, see Costs, Cent. Dig. § 220; Dec. Dig. ⇐51.]

Before Wallace, J., Chesterfield, January, 1879.

This was an action commenced in January, 1878, by the Cheraw and Chester Railroad Company against Ellison B. White. The complaint is as follows:

The above named plaintiff, complaining of the defendant, respectfully shows to this court:

1. That on or about the ——— day of ———, 1873, the said defendant subscribed to the joint stock of the above named company $400, for and in consideration of eight shares of the capital stock of said company at $50 per share, the said subscription being made to aid in the construction and carrying into operation a railroad between the towns of Cheraw and Chester, in said state, pursuant to the provisions of an act of the legislature, entitled "An act to charter the Cheraw and Chester Railroad Company," approved February 27th, A. D. 1873.

2. That the plaintiff is and ever has been

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ready since then, *upon the payment of said sum of money, to deliver to defendant a certificate of said stock; and defendant, although required and called on to pay the money so subscribed to plaintiff, according to the true intent and meaning of said subscription, has utterly refused and failed to pay the same or any part thereof.

Wherefore plaintiffs demand judgment for the sum of $400, and interest thereon from January 1st, A. D. 1877.

To this complaint the defendant demurred, upon the grounds stated in the judgment of the Circuit Court.

In the brief it is stated that at the hearing "his Honor suggested to defendant's counsel that argument upon the incorporation of the company was unnecessary, as the act of the legislature granting the charter would determine that matter."

The judgment of the Circuit Court is as follows:

This is an action brought by the plaintiff to recover the amount subscribed by the defendant to the capital stock of the Cheraw and Chester Railroad Company. The defendant has filed a demurrer to the complaint, alleging, as the first ground thereof, that plaintiff has not a legal capacity to sue, and specifies thereunder, First. That the act of incorporation is not alleged in the complaint. Second. That the corporators are not named therein, and no authority to enter into the contract is alleged. Third. And that the company is not chartered. Now as to this ground and the specifications, as recited, the court, after due reflection, has reached the conclusion that the plaintiff is a corporate body, and so constituted by the act of the general assembly, passed on February 27th, 1873, entitled "An act to charter the Cheraw and Chester Railroad Company," and that it has, by reason of its organization under said act, been clothed with authority to sue. The act granting the charter being general and not a special act of the legislature, I am of opinion that it was not necessary for the plaintiff in the complaint to allege its corporate existence. It would be unnecessary to prove that the plaintiff was a corporation unless the defendant, in his answer, had alleged that the plaintiff was not a corporation; and, as a general rule, it is unnecessary to allege that which need not be proved. See Voorhies' Code (9th Rev. ed.) 213, and the various authorities there referred to.

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*If the plaintiffs were a foreign corporation, it might be necessary to allege its corporate existence; but, in the present instance, it is domestic, and the court is satisfied that there is no necessity for such allegation in the complaint. And here it may be observed that the defendant, by making the alleged subscription, had, in a measure, acknowledged the corporate existence of the plaintiff. The court can see no necessity for naming the corporators mentioned in the charter, nor for alleging any more authority for entering into the contract than is alleged in the complaint. The act of the legislature above referred to shows the grant of the charter to the company; and the question raised by the defendant that the plaintiff is not a chartered company, would appear to be more a question of fact than of law, unless it be assumed that the act of the legislature is a nullity. It appears, therefore, that the demurrer cannot be sustained on the first ground and the specifications thereunder.

The second ground of demurrer is, that the

complaint does not state a cause of action; and the specifications thereunder are as follows, to wit: First. In that that it does not state that the subscription was to be paid in money. Second. In that that it does not allege the time when or the terms upon which the contract was made. Third. In that that it does not allege that the amount sued on was due before the commencement of the action. Fourth. In that it does not state a promise on the part of defendant to pay. On examination of the allegations of the complaint, the court finds that the complaint is not as full and complete as it might have been on the points referred to, but that, for the purposes of substantial justice between the parties, it is sufficient. The code does not favor a technical construction of pleadings, but only looks to the substance. And if the cause of action be substantially alleged, whether it be in full and complete form or not, it will meet the requirements of the code. If the allegations of the complaint on any of the points referred to were a little vague and indefinite, the defendant, by motion, could have required the plaintiff to make such allegations more definite. The court is of opinion that for the purpose of substantial justice between the parties the complaint is sufficient. The demurrer must, therefore, be overruled. The defendant,

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*however, on the payment of all costs which have accrued, may be allowed to answer over.

The defendant appealed from this judgment upon the grounds taken in his demurrer, and upon the additional grounds, (1.) That his Honor erred in declining to hear argument on the question of law raised by the demurrer, whether the plaintiff is a chartered company, and in determining that question as a question of fact, without evidence or argument; and (2) that his Honor erred in requiring defendant to pay more costs than the costs of the demurrer.

Messrs. Prince & Caston, for appellants.

Messrs. R. E. Allison and M. J. Hough, contra.

August 14th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This action was brought to recover the amount of a subscription to the capital stock of the plaintiff company, alleged to have been made by the defendant, and not duly complied with on his part. The defendant demurred to the complaint on various grounds. This demurrer was overruled by the Circuit Court, and leave to answer granted on terms. From this decision the defendant now appeals.

The grounds of appeal follow the line of the reasoning of the Circuit opinion; but as the question now is, whether any ground exists for sustaining the conclusion reached by the Circuit Court, the sufficiency of the grounds stated in the demurrer will be considered in the order therein stated.

The first ground of demurrer is, that the plaintiff has no capacity to sue. Several propositions are stated under this ground of demurrer that, in substance, involve the general proposition that the plaintiffs have received, by law, only authority to become a corporation upon the performance of certain conditions precedent, and that the complaint contains no allegations showing that such conditions have been performed. Two questions are here presented: First. Was the plaintiff bound to do more than to assert its alleged rights in the character of a corpo-

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ration, leav*ing the question of its right to sue in that character to be disputed by the defendant's answer as an issuable fact? If so, then the demurrer was clearly bad in this respect. Second. Whether by the act entitled "An act to charter the Cheraw and Chester Railroad Company," (15 Stat. 442), the corporators therein named received immediate competency as a corporation under the name and style in which the plaintiff sues?

The grounds upon which a demurrer to a complaint may be supported being, by the code, reduced to six, enumerated in Section 167, it becomes necessary to inquire whether any such ground of demurrer exists in the present case? The second ground stated in Section 167 is the only one that can possibly include the objections under consideration, and that is where it appears on the face of the complaint that the plaintiff has not legal capacity to sue. It may be conceded that the want of authority to act as a corporation by a plaintiff suing in that character, is a case where the plaintiff has not legal capacity to sue in the sense of Section 167. It may also be conceded that when it appears, as matter of legal conclusion, that the plaintiff does not possess such capacity, a demurrer may be maintained. This want of legal capacity may appear either as a general incapacity attached to the character in which the plaintiff sues, or in facts and circumstances showing that the plaintiff is not entitled to the character in which he sues, or to any character in which he might have capacity to maintain the suit. It is presumable that every corporation having legal existence and rights, has, as such, capacity to maintain an action, therefore this is not a case in which it appears that the character in which the plaintiff sues is one to which the capacity to maintain an action is not ascribed by the law. The only question, then, that can be considered, as raised by the ground of demurrer under examination, is, whether facts and circumstances appear showing that the plaintiff is not entitled to appear in the character in which it has made itself a party. The general question, whether these facts and circumstances may, in any case, be made to appear by matters of which the court is bound to take judicial

notice, such as the public statutes, or whether they must be, in all cases, pleaded so as to create an issue of fact, need not be consid-

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ered. It is clear that the exist*ence of a particular corporation is a question of fact, and cannot be ascertained as a mere conclusion of law, except upon an admitted state of facts. At common law this was necessarily so, for corporations were created by letters patent of the Crown, or existed by virtue of long usage, so that the question of the existence of a corporation could only be legally ascertained upon proof of a royal grant, or of the long use of such corporate franchise, and could, for that reason, never be a pure question of law. Unless it appears that corporations can exist with us only under direct statute sanction, there is no basis for an argument that the nature of the issue has undergone any change in this respect. Although corporations in this country are usually created by statutes, public or private, yet it by no means follows that no such corporation can exist unless direct authority can be found conferred for that purpose by the statute. There may be corporations that can only show as their authority grants from the Crown of Great Britain, or some other governments once exercising sway over parts of the territory now occupied by the United States, issued while such government held sovereignty here. A grant from the Crown creating a franchise would be entitled to the same force and effect as a grant of lands, grantable by the Crown. But resort to such source of authority is not likely to occur in such a case, for, if corporate franchises so granted have been continuously exercised until the present day, the other principle of the common law, namely, that of long, undisputed use, would furnish a source of proof presumably more accessible. There is no ground for saying that the principles of the common law as to the effect of the use of corporate franchises for long periods of time in establishing title to use such franchises have undergone any change in this country. Such being the case it is not possible that the courts should have judicial knowledge of all the facts and circumstances enabling them to say whether any party claiming such franchise is entitled thereto. At all events the character of the issue in such cases, as settled by the principles of the common law, has undergone no change by direct statute authority, and, therefore, remains unchanged.

The other case that may arise under the

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second class, men*tioned in Section 167, is where the facts and circumstances appear in the complaint, from which it is claimed, as an inference of law, that the plaintiff has no capacity to sue. It should be observed that the code does not make it a ground of demurrer; that the complaint does not set forth the facts and circumstances showing the plaintiff to be entitled to sue in the character in which he has come into court. On the contrary, the complaint itself must contain evidences that the plaintiff has no such capacity. This is what is plainly meant as to its appearing on the face of the complaint that the plaintiff has no legal capacity to sue. In a word it is no ground of demurrer; that it does not appear by the complaint that the plaintiff has legal capacity to sue, but only where such facts and circumstances appear as legally exclude the inference that the plaintiff has such capacity.

The foregoing disposes of the principal question under the first ground of demurrer, as above stated, for the plaintiff not being bound to state the facts and circumstances entitling it to sue in the character set forth in the complaint, was not bound to set forth any conditions precedent upon which it might alone be authorized to exercise corporate franchises, such as are asserted by it, nor to aver that such conditions precedent were duly performed. But the argument of the appellant may be construed as including the proposition that the plaintiffs having made reference to an act of the legislature as its authority to make the contract sued upon, the complaint must be read as if all the provisions of the act were set out and pleaded at length in it, and, therefore, under the view which the appellant takes of that act, it would appear that there were certain conditions to be performed before the plaintiff could claim legally to exercise the powers of a corporation. As the plaintiff was not bound to set forth the facts and circumstances that entitle it to exercise the powers of a corporation, it is not clear upon what ground the provisions of the act can be incorporated in its complaint against its will. It is true that the complaint refers to the act to charter the plaintiff company, but that is alleged for the purpose of showing the nature and legal effect of the contract sued upon, for every subscription to the capital stock of a corporation, when a binding contract, is such in virtue of the charter or

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organic *compact under which the corporation acts, and, therefore, such charter, whether set out in words or by reference to the statute constituting it, is a proper part of the cause of action alleged. Such being the only purpose for which reference is made to the act chartering the plaintiff, it cannot, with any propriety, be said that the plaintiff has attempted to set forth its right to sue as a corporation, and has made a defective statement of such right.

But, assuming for the present purpose that the act is to be regarded, as set forth, as part of the averments of the complainant, and, also, that the appellant's construction of the act is correct, namely, that it imposes upon the plaintiff the performance of certain acts as conditions precedent to receiving and exercising the powers of a corporation, and, further, that the plaintiff failed to set forth

the performance of such conditions specifically, or in the general manner permitted by Section 186 of the code, still, at most, that would show only defect of proof to establish the right of the plaintiff to sue as a corporation, but affords no positive proof tending to show, affirmatively, that such conditions precedent have not been complied with, which is the only proof available to sustain a demurrer on the ground of want of legal capacity to sue. The demurrer admits the right to sue, unless the facts of the case, as spread out in the face of the complaint, show that such right cannot exist at law; a mere case of want of proof cannot produce such an effect.

But the statute does not admit of the construction which the appellant seeks to put upon it. The act to charter the plaintiff company, passed February 27th, 1873, (15 Stat. 442,) confers corporate powers on the corporators named, in terms importing an immediate grant, with the following proviso annexed: "Provided that said persons shall commence operations upon said road within two years after the passage of this act, and complete the same within five years." The period of completion is stated by Section 6 at seven years, but this conflict of time is not material to the present question. The question is whether the proviso can have the effect to convert a grant of the corporate franchise, made in terms that import an immediate grant, into one taking effect only upon the happening of a certain contingency. If the purpose intended by the proviso can-

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not be fully *accomplished without a limitation of the broad sense of the language conferring the franchise, then such effect can be accomplished consistently with the rules of construction, for, in that case, the proviso would be necessarily interpreted as a condition in substance and effect. As a condition subsequent this is undoubtedly the effect of the proviso, but does it contain, in itself, anything that imports a necessity that it should operate as a condition precedent? Two things are to be considered in this respect: First. What is essential to the full efficacy of the matter of the proviso itself? Second. What would be the effect of allowing it to stand as a condition precedent on the completeness of the powers granted for the purpose intended by the grant, and to which the terms of the proviso stand as a condition? It certainly was intended that the corporators should have all the powers and capacity properly incident to a railroad corporation for the purpose of enabling it to commence and complete the road in the times prescribed by the law, for it must be assumed that the construction of the road was deemed a public benefit, and that the acquisition of that benefit to the public was the true consideration of the grant, and, in this light, the proviso must be regarded as directly intended as a means of hastening its construction. This view also excludes the idea that the proviso was intended to limit the capacity or powers of the company to construct the road within the times prescribed for that purpose. It must certainly be assumed that the possession of corporate powers during the time that the company was organizing and acquiring the capital and credit requisite to construct the road was a material aid toward the accomplishment of that result. It is fair, then, to assume that the grant, in terms importing immediate corporate capacity, was intended to operate as such for the purpose of conferring on the corporation the most perfect means for accomplishing that which it was the purpose of the proviso to secure. So far then from its being essential to the efficacy of the proviso that the sense of the terms granting, directly, the corporate franchise should be narrowed, the purpose of the proviso is best subserved by holding these powers intact according to the terms in which they were granted. If, at the end

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of two years, the corporation had not *commenced to construct the road, every object intended to be secured to the state and to the public, by the limitation, would be fully attained, even if the company had at once, upon the granting of the charter, become a corporation. The extinguishment of the franchise of building and operating a railroad would have followed, and the right to exercise the functions of a corporation would have fallen with it as an accessory. On the other hand if the grant is held to be subject to a condition precedent, by reason of the limitation as to commencing work in two years, the argument that would produce that result would go a step further and make the completion of the road a condition precedent. In that case the anomaly would be presented of a company undertaking the construction and completion of a work of such magnitude without the powers of a corporation, and only hoping to obtain such powers when the work had been accomplished. Such an intention cannot be ascribed to the statute. It is clear that the demurrer was properly overruled as it regards the ground just considered.

The second ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action, and, under this ground, it is objected that it does not appear by the complaint that the contract sued upon was to pay money, while its charter permitted plaintiff to take subscriptions in labor, materials, or land as well as money. The complaint clearly and distinctly charges that the subscription was for the payment of money. It states that "the said defendants subscribed to the joint stock of the said company $400, for and in consideration of eight shares of the capital stock." Unless the

plaintiff availed itself of the privilege of making a special contract calling for payment in labor, materials or land, it is unnecessary to notice the provision intended for such cases. The law will presume the contract to have been made with reference to the payment of money unless the contrary appears, for that is the most general form of such contract. There can be no doubt as to the nature of the contract laid in the complaint as it regards the proper mode of satisfying it.

It is objected that the complaint does not state the time when or the terms upon which

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the contract was entered into. There *is nothing in the charter that prevented the parties from effectively contracting in terms requiring immediate payment or payment on demand. The contract as laid must be construed at all events as calling for payment on demand, if not for immediate payment. The terms of the contract appear sufficiently to give it binding force by referring to the averments of the complaint and the provisions of the charter. There was a lawful subject-matter, namely, a certain number of shares of the capital stock of the company, made vendible by the charter; there were also competent parties, and a price agreed upon; these are all the requisites to a valid contract.

The third objection under the second ground of demurrer is answered by what has just been said; as the plaintiff alleges a demand before action brought, the money must be regarded as due before the commencement of the action. It was not necessary to add to the complaint a distinctive promise to pay. The word "subscribe," as applied to contracts of this nature, has a definite technical sense, including in it the idea of a promise to pay the amount subscribed in the manner agreed upon, and the act in question must be regarded as using it in that known sense.

The statement in the grounds of appeal that the appellant was not permitted to submit an argument on certain questions, is not supported by the record.

The objection to the allowance of full costs as the condition on which the defendant should be permitted to answer over, is not well taken. The permission, in such cases, cannot be claimed as matter of right, but rests in the discretion of the court, and may be allowed when the demurrer has been interposed in good faith. Code, § 195. Accordingly it was competent for the court to grant such relief on terms. We see no error in law in the mode in which the court has exercised its discretion in the present case.

The judgment must be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s concurred.

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*(Case No. 903.)

CHERAW & CHESTER RAILROAD COMPANY v. GARLAND.

(April Term, 1880.)

[1. *Corporations* ⇐35, 514.]

Nos. 1, 2, 3 and 4 of the syllabus in Cheraw and Chester Railroad Company v. White, ante p. 51, re-affirmed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 103, 2053; Dec. Dig. ⇐35, 514.]

[2. *Corporations* ⇐77.]

There is nothing in the charter of the Cheraw and Chester Railroad Company (15 Stat. 442) which requires its whole capital stock to be subscribed before calls are made for the payment of subscriptions; and therefore stock subscriptions may be made payable upon such terms as are agreed upon between the corporation and the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 229; Dec. Dig. ⇐77.]

[3. *Corporations* ⇐89.]

When a contract does not call for any demand of payment by specified persons or in a particular mode, a general demand is all that need be alleged in the complaint.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 376; Dec. Dig. ⇐89.]

[4. *Appeal and Error* ⇐1170.]

An omission to state in the complaint that plaintiff was ready to perform his part of the contract sued upon, does not affect the substantial rights of the defendant; and the judgment of the Circuit Court disregarding such omission may not be reversed on appeal. Code, § 199.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540–4545; Dec. Dig. ⇐1170.]

[5. *Appeal and Error* ⇐91.]

Complaint alleged the subscription by defendant to the stock of plaintiffs' company of fifty acres of land, and a refusal to convey, and demanded payment in money for the land so subscribed, without alleging a promise to pay money or a previous demand for money—*Held*, on demurrer, to state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 631; Dec. Dig. ⇐91.]

Before Wallace, J., Chesterfield, January, 1879.

This case was heard in conjunction with the next preceding case. The differences between the complaint and demurrer there and here are sufficiently indicated in the opinion of the court.

The judgment of the Circuit Court was as follows:

This is an action brought by the plaintiff to recover the value of a landed subscription to the capital stock of the Cheraw and Chester Railroad Company. The defendant has filed a demurrer on two grounds, with several specifications thereunder. One ground is that the plaintiff has not legal capacity to sue. And the other is that the complaint does not state a cause of action. The specifications are, some of them, the same as set forth in the demurrer in the case of these plaintiffs v. Ellison B. White, and some of them a

little different, but they are all substantially
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the *same. So the court refers to the decree made in that case as setting forth more in detail the conclusions reached by the court. The court, after a careful consideration of the grounds of demurrer and the various specifications thereunder, concludes that the complaint for the purposes of substantial justice between the parties is sufficient and the demurrer is therefore overruled. The defendant, on the payment of all costs that have accrued up to this time, may be allowed to answer over.

Defendant appealed.

Messrs. Prince & Caston, for appellants.

Messrs. R. E. Allison and M. J. Hough, contra.

August 14th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This is an action for recovering the amount of $250, alleged to have been subscribed by the defendant to the capital stock of the plaintiff corporation, payable by the conveyance to the plaintiff of a designated lot of land, estimated by the agreement of the parties as of that value. The defendant demurred on several grounds, which demurrer was overruled, and the defendant appeals from such ruling.

The first ground of demurrer objects to the legal capacity of the plaintiff to sue. This objection is disposed of by the judgment of this court on the same question, rendered in the case of the same plaintiff v. E. B. White. The complaint in this case sets forth the fact of incorporation directly, and not merely inferentially, and, accordingly, as the question of due incorporation is one of fact, as was held in the case to which reference has just been made, it must be regarded as admitted by the demurrer.

This case appears to have been heard at the Circuit in conjunction with that of the same plaintiffs against White. The opinion and judgment rendered in that case is set forth in the record as the judgment in the present case, and the grounds of appeal have critical reference to the line of reasoning pursued by the Circuit Court in that case. As there is a very decided difference in the questions presented in the two cases, as it re-
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gards the *second ground of demurrer, it will not be serviceable to follow the grounds advanced by way of appeal, but to consider whether the grounds of demurrer give proper support to the conclusion of the Circuit Court.

The objections that go to make up the second ground of demurrer, which is that the complaint does not state facts sufficient to constitute a cause of action, will be considered in the order stated in the demurrer. The first is, that the complaint does not state that the subscription to the capital stock of $1,000,000 was ever received, and that the directors were ever authorized to make calls for assessments or payment of subscriptions. There is nothing in the act chartering the plaintiff that requires that the whole capital stock should be subscribed before calls are made for the payment of subscriptions, or before subscriptions made without specific limitations as to the time of payment should become due. There is, therefore, nothing to prevent the parties from making the contract alleged in the complaint and admitted by the demurrer. The contract, as alleged, is to pay "when required," the amount subscribed, in the manner agreed upon, namely, by the conveyance to the plaintiff of the land bargained for. A breach of this contract is alleged and admitted by the demurrer. The second objection is, that it is not alleged "that any call was made by the directors for any payment." The contract, as laid in the complaint, does not require that any call should be made by the directors for payment, nor prescribe any particular mode of demand, so the allegation of a general demand was all that could be required of the complaint, and this is fully made.

The third objection is, that it is not alleged "that the plaintiff was ready, on his part, to perform the contract on a conveyance by defendant." The omission to state that the plaintiff was ready to perform, is immaterial. If there was any ground for an issue as to the ability of the plaintiff to perform its part of the contract, such issue could be properly tendered by the defendant in his answer. As the burden of proof under such an issue lay, at all events, with the defendant, it is evident that such omission did "not affect the substantial rights of the adverse party," and, therefore, under Section 199 of
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the code, *the Circuit Court was bound to disregard it, and this court is in terms excluded from reversing the judgment of the Circuit Court by reason of any such omission.

The fourth objection is, "to the want of an allegation of a demand for the payment in money for said stock." The contract, as laid, does not admit of a demand for the payment of money for the stock, as, by the agreement, payment was to be made in a different manner. The breach follows the contract as laid, and that is all that is required.

The fifth objection assumes that a recovery cannot be had for the money value of the land agreed to be conveyed; but, that to warrant such recovery a promise to pay money must be set forth. The question of the measure of damages on the breach of the contract to convey is not before us on the demurrer, and need not be considered. It is enough if it appears that some damage has resulted to the plaintiff, and that appears as a necessary legal inference from the nature of the contract and breach alleged.

There is no error in the judgment overruling the demurrer, and the appeal must be dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. 66

(Case No. 904.)

LYNCH v. HANCOCK.

(April Term, 1880.)

[1. *Subrogation* ⇐31.]

Where seven bonds are secured by mortgage, the surety, upon paying one of them to its assignee, becomes subrogated to all the rights of the assignee, and as such is, in equity, the assignee of a proportionate part of the mortgage, with the mortgagee as his trustee.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 91; Dec. Dig. ⇐31.]

[2. *Mortgages* ⇐249.]

After mortgage executed the premises were sold to H., and H. agreed to convey to R., and subsequently one of the mortgagees (there being two) entered in the office of records, without the knowledge of such assignee or the surety, a discharge of the lien of the mortgage, and afterwards R. agreed to convey to A. and J. *Held*, that such entry did not affect the right of the assignee or of the surety to enforce the mortgage upon the property in the possession of H. or of R., or even of A. and J.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 671; Dec. Dig. ⇐249.]

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[3. *Mortgages* ⇐309.]

*One of the mortgagees could not, in such case, release the lien of the mortgage; and as the record of the mortgage showed that there were two mortgagees, and seven separate bonds secured thereby, there was enough to put subsequent purchasers upon the inquiry, and thus charge them with notice of the assignment.

[Ed. Note.—Cited in Williams & Co. v. Paysinger, 15 S. C. 174; Werber v. Cain, 71 S. C. 350, 51 S. E. 123.

For other cases, see Mortgages, Cent. Dig. §§ 864, 870, 899, 900, 902–905, 907–912; Dec. Dig. ⇐309.]

[4. *Payment* ⇐12.]

If A purchased land in 1863 and gave his mortgage deed, contracting with reference to confederate money, an offer to pay in confederate currency in January, 1864, the amount due, is not an offer to pay the amount secured by the contract, nor a legal tender of the debt; and the lien of the mortgage would not be thereby destroyed.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 50; Dec. Dig. ⇐12.]

[5. *Adverse Possession* ⇐31.]

An entry in the book of records in the proper office that the lien of a mortgage has been released, cannot operate to make the possession of subsequent purchasers from the mortgagor adverse to the claim of one entitled in equity to the security of such mortgage; and more particularly not until notice of the entry is had by such claimant.

[Ed. Note.—Cited in Williams & Co. v. Paysinger, 15 S. C. 173.

For other cases, see Adverse Possession, Cent. Dig. § 130; Dec. Dig. ⇐31.]

[6. *Mortgages* ⇐424.]

Mere possession for the statutory period by a purchaser from the mortgagor, with notice of the mortgage, will not constitute a bar to the action for foreclosure. Norton v. Lewis, 3 S. C. 25, recognized and followed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1263; Dec. Dig. ⇐424.]

[7. *Mortgages* ⇐257.]

Spreading upon the records a notice that the lien of a mortgage has been discharged, is not constructive notice, for it is not within the terms of Chapter LXXXII, Section 20, of the general statutes, and not such a paper as is required by law to be recorded.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 684; Dec. Dig. ⇐257.]

[8. *Mortgages* ⇐143.]

Adverse possession cannot be asserted against a mortgage where the necessary statutory period includes the years when the stay law was of force.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 281–284; Dec. Dig. ⇐143.]

[9. *Vendor and Purchaser* ⇐226.]

The plea of purchaser for valuable consideration without notice, cannot avail unless the party has both paid the purchase money and acquired the legal title before notice of the outstanding encumbrance or equity.

[Ed. Note.—Cited in Hill v. Burgess, 37 S. C. 605, 15 S. E. 963; Peay v. Seigler, 48 S. C. 514, 26 S. E. 885, 59 Am. St. Rep. 731; Robert v. Ellis, 59 S. C. 147, 37 S. E. 250.

For other cases, see Vendor and Purchaser, Cent. Dig. § 476; Dec. Dig. ⇐226.]

[10. *Principal and Surety* ⇐177.]

Where a surety gives his note in payment of the debt, he is not entitled to recover the amount of the note from his principal, unless he shows that the note has been paid, or that he has the means to pay it.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 510, 511; Dec. Dig. ⇐177.]

[11. *Executors and Administrators* ⇐432.]

A payment of the debt by a surety after his principal's death, is a good set-off in an action brought by the executor of the principal upon an obligation of the surety to the principal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1674–1676; Dec. Dig. ⇐432.]

[12. *Mortgages* ⇐290.]

Where the mortgaged premises are held by several purchasers, in different rights, acquired at different times, the several parcels must be sold in the inverse order of the sales by mortgagor. Norton v. Lewis, 3 S. C. 25.

[Ed. Note.—Cited in Gregory v. Ducker, 31 S. C. 146, 9 S. E. 780; Kennedy v. Boykin, 35 S. C. 85, 14 S. E. 809, 28 Am. St. Rep. 838; Steinmeyer v. Steinmeyer, 55 S. C. 30, 33 S. E. 15.

For other cases, see Mortgages, Cent. Dig. §§ 791–805; Dec. Dig. ⇐290.]

[13. *Mortgages* ⇐301.]

[Cited in Salinas & Son v. Ellis, 26 S. C. 347, 2 S. E. 121; Reynolds v. Price, 88 S. C. 537, 71 S. E. 51, to the point that a tender of the mortgage debt at the time it is due discharges the lien of the mortgage, though it does not extinguish the debt.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 876–881, 885, 887, 888; Dec. Dig. ⇐301.]

[This case is also cited in Interstate B. & L. Association v. McCartha, 43 S. C. 75, 20 S. E. 807, and Whitmire v. Boyd, 53 S. C. 341, 31 S. E. 306, without specific application.]

Before Pressley, J., Richland, November, 1878.

This was a bill in equity, filed by John Bauskett, in February, 1867, to foreclose a mortgage given him by Lana J. Hancock, in 1856, to which bill James M. Rhett, E. J. Arthur and L. D. Childs, subsequent purchasers from the mortgagor, were made parties defendant. These defendants answered. Some testimony was taken, but before a hear-

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ing, Bauskett died in 1867, *and E. J. Arthur died in March, 1868. John Lynch and Sophia Bauskett, as qualified executors of John Bauskett, filed their bill of revivor against William Martin and Martha Arthur, executors of E. J. Arthur, and against Hancock and Childs. Subsequently, Lynch, plaintiff, (Sophia Bauskett having died) under leave of court, filed his amended complaint against the heirs of Arthur, and the heirs of R. M. Johnston, (who died in 1868, and who, it was ascertained, was, instead of Childs, the joint purchaser with Arthur,) and also against Thomas B. Wadlington, who claimed to hold a mortgage prior in time to the Hancock mortgage. Wadlington filed his answer in July, 1875, asserting his prior mortgage. Again, in October, 1875, under order of the court, James F. Sims, then in possession of a part of the mortgaged premises, which he claimed under a tax title, the date of which is not stated, was made a party defendant.

The agreement between Hancock and Rhett was as follows:

"Articles of agreement between Dr. L. J. Hancock and James M. Rhett. Dr. Hancock agrees to sell James M. Rhett his plantation, three and a half miles from Columbia, containing 1500 acres, more or less, for the sum of twenty-seven thousand and five hundred dollars, payable in equal installments, the first in two years from date, the balance in three installments, payable in three, four and five years from date, and Mr. Rhett to have the privilege of paying the bond, or any part of it, at any time he may wish to. The interest to be paid annually. Should the land prove less than 1500 acres, it is to be paid for at the same rate. The plantation to be delivered in the next two or three days, Dr. Hancock to make good titles in the next ten days, and to pay expenses of papers. James M. Rhett agrees to purchase the above mentioned plantation on terms as started above, and to secure Dr. Hancock's payments by bonds and mortgage of the plantation and endorsement by Maj. Roland Rhett.

"Columbia, 21st March, 1863.

"(Signed) L. J. Hancock.

"Jas. M. Rhett.

"Witness—Charles H. Rhett."

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*All the issues of law and fact were referred to James H. Rion, Esq., as special referee, who made the following report:

After hearing argument of counsel and a consideration of all the evidence, I find as matters of fact—

A.

1. That on January 2d, 1854, Samuel Fair and J. Foster Marshall conveyed to John Bauskett, eighteen hundred and ninety-nine acres of land, for which Bauskett executed to them seven bonds, signed by himself as principal, and Thomas B. Wadlington as surety, and gave a mortgage of the land to secure the payment of the bonds, which was duly recorded.

2. That the entire interest in the said bonds and mortgage became vested in Samuel Fair.

3. That Bauskett died A. D. 1867, having paid all of the said bonds except the one first due, to wit, January 1st, 1855, and another due January 1st, 1859.

4. That prior to January 1st, 1855, Fair assigned the bond due January 1st, 1855, to one Gerhard Muller, guaranteeing the payment of the same, without mention of the mortgage.

5. Suit was instituted on the bond due January 1st, 1859, against Bauskett and Wadlington, and judgment by confession obtained against Bauskett only, on March 2d, 1867.

6. That on April 14th, 1863, the following was endorsed on the mortgage: "The lien and legal effect of the within mortgage is hereby released and discharged forever. Samuel Fair, for Fair and Marshall. This April 14th, 1863, in presence of James A. Black;" which endorsement was recorded in the same office in which the mortgage was recorded.

7. That in April, 1871, Muller sued Wadlington on the assigned bond and obtained judgment thereon.

8. That on appeal, the Supreme Court of this state, at April Term, 1874, (5 S. C. 347), affirmed the judgment, holding that upon the facts hereinbefore stated, Wadlington was not released from his liability as surety.

9. That on October 9th, 1874, Muller assigned to Wadlington all his right, title and interest in the mortgage, for Wadlington to hold and use, for enforcing the payment of the bond, and for his indemnity as surety.

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*10. That on April 13th, 1875, Wadlington paid Muller $3671.01, in full satisfaction of the aforesaid judgment, of which $127.10 was costs.

11. That on January 10th, 1856, Bauskett conveyed the aforesaid land to Lana J. Hancock.

12. That on March 21st, 1863, Hancock contracted to sell fifteen hundred acres, more or less, of the said tract of land to James M. Rhett, under which contract of sale Rhett entered into possession; and on January 19th, 1864, he, Rhett, sold the fifteen hundred acres, more or less, as fifteen hundred and fifty-four acres, to Rufus M. Johnston and

Edward J. Arthur, who then went into possession of the land and held the same until their deaths.

13. That Arthur died February 27th, 1868, and Johnston died April 20th, 1869, and since their deaths their heirs (defendants in this case) have held possession of the said fifteen hundred and fifty-four acres as tenants in common.

14. That the remaining three hundred and forty-five acres, more or less, is now held under a tax title by James C. F. Sims, son-in-law of Hancock, said land having been sold for taxes assessed thereon as the property of Hancock.

Upon the foregoing facts Wadlington, who is brought in as party defendant by Bauskett's executor, the plaintiff, in a bill to foreclose a mortgage upon the land mentioned, given by Hancock to Bauskett, seeks to foreclose the mortgage given by Bauskett to Fair and Marshall.

The assignment of the mortgage by Muller to Wadlington was a nugatory act. By the payment of the bond upon which he was surety, Wadlington became at once vested with a right of action upon the bond against Bauskett, and entitled to all the benefits of the mortgage given by Bauskett.

To the prayer of foreclosure three defences are set up—

First. That the lien of the mortgage was released by Fair. This I overrule as having been decided by the Supreme Court in Muller v. Wadlington.

Second. Adverse possession for ten years. I overrule this on independent grounds.

1. Wadlington's rights, as above ruled, do

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not come through *Muller, but are the consequences of his paying the bond upon which he was surety. Hence his right of action only accrued on April 13th, 1875.

2. Wadlington was made a party to the bill on July 18th, 1875. Hancock's adverse possession cannot be connected with, or (prior to the code) benefit subsequent grantees. Neither Sims nor Rhett held for ten years. Arthur and Johnston and their heirs (whose adverse possession can be connected) held from January 19th, 1864, to July 18th, 1875, ten years and seven months. But in the foreclosure of a mortgage the administrator or executor is a necessary party, for in their possession are the evidences, if any, of payment, and it is their duty to relieve the land of any encumbrance out of the personal assets, if any. Hence any court would ignore the rights of the heirs of decedent (often minors) by granting a decree of foreclosure without the administrator or executor being brought into court as a party. But no suit can be brought for nine months after decedent's death against an administrator or executor. Hence, for nine months the possession was not adverse, but protected by the statute. This leaves only nine years and ten months adverse possession.

3. Again, from December 21st, 1861, to December 21st, 1866, the operation of the statute of limitations was suspended as applicable to all actions for the collection of money; hence, for two years and eleven months no action could have been brought to collect the amount due on the bond by a foreclosure at law or in equity. This leaves less than ten years.

4. Arthur and Johnston and their heirs, if purchasers from mortgagor out of possession but with notice of the mortgage, cannot avail themselves of the defence of the statute, unless they did some act of express open defiance to the claimants under the mortgage. Norton v. Lewis, 3 S. C. 31.

I hold (subter) that they had such notice, and that no such act was proven.

Third. The third defence is, that all the parties interested in the land since the release by Fair (April 14th, 1863,) are "subsequent purchasers without notice of the mortgage to Fair and Marshall."

It is contended by the counsel for Wad-

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lington that Fair had *no authority to execute a release for Marshall, and that the release was not in form legally sufficient. I hold that as no one has, on the part of Marshall, up to this day, disputed Fair's authority, he had such authority. The arguments of counsel and the authorities cited are all applicable to the release of a debt. This was not a release of the debt, but merely a declaration of, or an agreement for, the surrender of a security. This, I hold, can be done without consideration or any formality, as to third parties, who became subsequent purchasers of the property affected by the security. A mere verbal declaration in unambiguous terms by a mortgagee, that his mortgage debt is paid, satisfied, or released, or that he releases, waives or surrenders his security, will estop him from afterwards setting up his mortgage against those who, on the faith of his declaration, became purchasers of the property.

But what was the extent of this release and of what did it give notice? It is to be presumed that all parties had notice of the recorded mortgage. For the purposes of this case I give all parties the benefit of holding that they had actual notice of the entry by Fair on the mortgage. The whole question is then resolved into an inquiry as to the extent of this notice. All parties had notice that the mortgage was a security for seven different bonds. Hence the entry of release was a notice to the effect that Fair on April 14th, 1863, released the security to the full extent of his interest in that security, which was commensurate with his interest in the seven bonds, to secure which the mortgage was given. At this date one of these bonds was held by Fair unpaid. The

mortgage was released as to this. But one was held by Muller, and in the latter he held no interest, and consequently he had no authority to release the security as to that bond. Hence those who became subsequent purchasers on the faith of the notice of release, assumed the risk, first, of Fair not having authority to release for Marshall; and second, of his having parted with his interest in some of the bonds; and events have proven that their second risk was unfortunately assumed. In my opinion the foregoing is fully sustained by the decision in Muller v. Wadlington, and in fact almost parodies the reasons in that case. It is true

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the court in that case disclaimed *precluding purchasers of the land from setting up defences, but the decision itself precluded them from setting up that Fair had authority to release the security of the mortgage quoad the bond assigned to Muller.

I therefore hold as matters of law—

1. Fair's release was valid to the extent of the interest he had in the then unpaid bonds.

2. The lien of the mortgage was not released quoad the bond assigned to Muller.

3. That Wadlington's rights arose from and upon his payment of the bond upon which he was surety.

4. That neither Hancock nor any subsequent purchaser of the land are purchasers without notice of the mortgage by Bauskett to Marshall and Fair being in force quoad the bond assigned to Muller.

5. That the defence of ten years adverse possession cannot be successfully set up by any of the parties to this suit.

And in this behalf I recommend that it be adjudged and decreed by the court that the plaintiff, as executor of Bauskett, is indebted to the defendant Wadlington in the sum of $3435.91, with interest thereon from April 13th, 1875; and that unless the sum be paid on a day stated, that the whole tract of land conveyed to Bauskett and by him to Hancock, be sold on terms and in manner usual in foreclosure sales, the tract now in possession of Sims first, and the proceeds of sales being insufficient to satisfy the debt and costs, then the tract now in possession of the heirs of Johnston and Arthur, in such parcels as the counsel for the parties may agree, until sufficient be realized.

B.

As to that branch of the suit which relates to the prayer of the plaintiff as executor of Bauskett, to foreclose the mortgage given his testator by the defendant Hancock.

I find as matters of fact—

1. That on January 10th, 1856, John Bauskett conveyed eighteen hundred and ninety-nine acres of land to Lana J. Hancock, in payment of which Hancock gave ten bonds for $3000 each, payable in one, two, three,

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four, five, six, seven, *eight, nine and ten years respectively, all secured by a mortgage of the land, which mortgage was duly recorded.

2. That on March 21st, 1863, Hancock contracted to sell fifteen hundred acres, more or less, of this land to James M. Rhett, under which contract of sale Rhett went into possession, and on January 19th, 1864, he, Rhett, sold the fifteen hundred acres, more or less, as fifteen hundred and fifty-four acres to Rufus M. Johnston and Edward J. Arthur, who then went into possession of the land and held the same until their deaths.

3. That Arthur died February 27th, 1868, and Johnston died April 20th, 1869, and since their deaths, their heirs (defendants in this case) have held possession of the said fifteen hundred and fifty-four acres as tenants in common.

4. That the remaining three hundred and forty-five acres, more or less, is now held under a tax title by James C. F. Sims, son-in-law of Hancock, said land having been sold for taxes assessed thereon as the property of Hancock.

5. That after the contract between Hancock and Rhett, and before the sale by Rhett to Arthur and Johnston, Bauskett expressed his willingness to Arthur, in his capacity at that time of attorney for Rhett, at any moment to release his mortgage and mark it satisfied. During the same interval Bauskett declared, in the presence of Hancock, that he did not know that he, Bauskett, had any claim against the land.

6. That Bauskett and Hancock had divers and numerous mutual money and business transactions with each other besides the land purchase, from the date of said conveyance up to the death of Bauskett, during the whole of which period Bauskett was the regular confidential legal adviser of Hancock.

7. That Bauskett and Hancock, in their said mutual money and business transactions during the civil war, recognized confederate notes and values of articles furnished at prices estimated in confederate notes as if the same had been in legal currency.

8. That in stating the account between Bauskett and Hancock—

a. I charge Hancock with the mortgage bonds, $30,000, with interest payable annually from January 10th, 1856.

b. I charge Hancock with the following notes. * * *

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*c. I charge Bauskett with $1000 collected on note of Robert N. Lewis, with interest from January 1st, 1863.

d. I charge Bauskett with the amount of the Kirkland bond, $10,000, with interest payable annually from April 15th, 1864.

e. I charge Bauskett with the following items. * * *

I finding the aforesaid items of indebted-

ness to exist and to be unpaid as matters of fact; but more specifically—

9. I find that Hancock gave Bauskett the note on Lewis of $1000 to collect, which note is unaccounted for by Bauskett or his executor.

10. I also find that the bond of Bauskett with Hancock as surety to Mrs. Kirkland, was not paid by Bauskett in his lifetime; that after Bauskett's death, to wit, on September 26th, 1873, Hancock became the owner thereof for value, to wit, by giving his note for $10,000 and the interest to J. C. F. Sims, whom I find to have been the holder and owner thereof from some date subsequent to August, 1872, the time of Mrs. Kirkland's death.

In this accounting, the statute of limitations is set up against the items of discount offered by Hancock, and the notes and due-bills offered by plaintiff.

I overrule the plea on both sides for the reason of the continued contemporaneous mutual dealings between the parties as proven.

Objection is made to insufficient notice of these opposite claims having been given, and as to some not having been properly pleaded; I overrule this on the ground that at this reference any of the parties were at liberty to offer proof against any item, and that from February 9th, 1876, to July 21st, 1877, afforded ample time to recover from any surprise and enable all parties to hunt up and produce proof.

The Lewis note I allow not as proven to be collected; but being unaccounted for by Bauskett or his executor, I presume its collection.

The Kirkland bond I allow on the ground that since September, 1873, Hancock has held this bond, and his ownership has been undisputed to this date, near four years. His pay-

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ment of *the same by his note is good payment, being accepted as such by the owner and holder of the bond.

The payment of the bond by Hancock, after the death of Bauskett, would not authorize him to set the same up as a set-off were it not that he paid it as surety for the testator. This constituted the fruition of a credit given by Hancock to Bauskett at the time of the execution of the bond, by his becoming surety thereon for Bauskett. A contract was then entered into by Bauskett that if Hancock would become his surety on the bond, he, Bauskett, his heirs, executors and administrators, would, in event Hancock ever had to pay the bond, repay the amount so paid.

I therefore find as matters of law—

1. That the plea of the statute of limitations cannot be successfully set up by either party to any item of the accounting.

2. That proof or disproof of any of the items was admissible as of the date of July 21st, 1877.

3. That Bauskett's estate is liable for the value of the Lewis note on failure to account for its non-production.

4. That Hancock is to be presumed to have become holder and owner of the Kirkland bond rightfully on account of the length of time the ownership has been undisputed by those interested so to do, and he being surety.

5. That Hancock's payment by his note is a valid payment, having been accepted as such.

6. That his payment as surety, though after testator's death, entitled Hancock to set up the amount so paid as a set-off.

7. That Hancock is not indebted to the estate of Bauskett in any amount, on the mortgage bond or otherwise.

8. That the estate of Bauskett is indebted to Hancock in the sum of $4967.52, with interest thereon from September 26th, 1873.

To the prayer for foreclosure, the same defendants set up the same defence of ten years adverse possession, which I overrule for some of the reasons hereinbefore given as regards the Fair and Marshall mortgage (2, 3 and 4.)

The same defendants also set up the defence of subsequent purchasers without notice of the mortgage. This I sustain upon

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*the fifth finding of fact herein, and for reasons given as to how informally a party may release the security of a mortgage as to third parties when discussing the question of the release by Fair.

I therefore further find as matters of law—

9. That the defence of ten years adverse possession cannot be successfully maintained by any of the parties to this suit.

10. That Johnston and Arthur were subsequent purchasers without notice of the mortgage to Bauskett, being a subsisting lien or encumbrance upon the land purchased.

In neither view of the question, then, as having an unsatisfied mortgage debt, or having subsequent purchasers with notice in possession of the land mortgaged, is the executor of Bauskett entitled to the prayer of his bill or complaint.

I therefore recommend that the court adjudge and decree that the prayer of plaintiff for a foreclosure be not granted.

As to the question of costs, I recommend that as nearly an equitable adjustment as possible, (besides being the only one not merely nominal,) in this very complicated cause, the court orders all the costs be paid out of the proceeds of such land as may be sold under decree made in this cause.

All which is respectfully submitted.

The case was heard by the Circuit Court upon exceptions to this report, and the following decree was filed:

This case involves the foreclosure of two mortgages, on which the referee has reported separately. He sustains the claim of T. B. Wadlington who holds a bond amounting to

$3435.91, with interest from April 13th, 1875. It is one of seven, dated January 2d, 1854, by John Bauskett, with Wadlington as surety, to Samuel Fair and J. Foster Marshall, secured by mortgage duly recorded. Marshall transferred his share to Fair, but did not in writing assign the mortgage: it remained of record to both of them. In 1854, Fair sold one of said bonds to Gerhard Muller, to whom Bauskett paid the interest several years.

After his death, (insolvent,) Muller compelled Wadlington, the surety, to pay that bond, and he now claims repayment out of the mortgaged property. Meanwhile, on

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April 14th, 1863, *Fair had surrendered the mortgage to Bauskett, having first endorsed thereon for Fair and Marshall that its "lien and legal effect was thereby released and discharged forever." This release was recorded, and now Hancock, who purchased the mortgaged land from Bauskett, in January, 1856, and the heirs of Arthur and Johnston, who claimed to have purchased in January, 1864, resist the mortgage, alleging the validity of the said release. I agree with the referee that it cannot avail them. Hancock cannot claim its benefit, because his purchase was long before the release, and he has not attempted to prove that he then relied on any promise to obtain such release, or that he ever required one as precedent to his paying the purchase money.

As to Arthur and Johnston, I hold that the irregularity of the said release was sufficient to cause them to inquire whether Fair held all the bonds secured by the said mortgage. It secured the purchase money of land which had been sold by Fair and Marshall as tenants in common. That was express notice of the nature of Marshall's interest in the bonds, and the record did not show any assignment of that interest. He, too, as holding part of the legal title in the mortgage, was trustee with Fair for Muller. In that condition of the record no purchaser should have relied upon a release made by Fair for Fair and Marshall without requiring him to show his authority. Failing to require this, the party so negligent must bear the loss, if any, which it occasioned. The heirs of Arthur and Johnston further claim the mortgaged property by possession, but allege no notice of its adverse character except the record of the said release.

I hold that Muller will not be presumed to have had notice of that record. He had purchased his bond long before that time, and the obligor had been notified of the said purchase and was then paying the interest to Muller. He therefore could have had no motive or occasion to examine the record in respect of the said mortgage, nor is there any requirement of the registry law imposing such duty. The said release so recorded was not, therefore, any notice to Muller that the mortgagor or his assigns held possession of the land adversely to the mortgage; as

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against a *mortgagee notice of adverse possession should be unmistakable and clearly proved.

But if the said defendants had even proved the adverse character of their possession, its period is too short to sustain their claim. Their alleged purchase was in January, 1864; then the stay law prevented suits on such bonds. That stay continued until December 21st, 1866, and from that time until January, 1875, when Wadlington was made a party to this suit, was too short a period to perfect their adverse possession. In the matter of Hancock's mortgage to Bauskett, who is dead, the referee has erred in admitting the testimony of Hancock and the declarations of Arthur. They prove transactions with the deceased or declarations by him, and such proof by interested parties is incompetent. If their testimony be stricken out, as it must be, there remains no proof whatever that Bauskett ever agreed to receive payment from Hancock in supplies at their price in confederate money. Nor is there proof as to what amount of supplies Hancock delivered. Hall's testimony on that head is very vague, and he also proves that Bauskett was "not to pay the market price." Nor is there any proof to warrant the charge against Bauskett of $1000 on the Lewis note. That and all other discounts, if properly proved hereafter, should be credited on Hancock's mortgage at their value in legal currency. Only Roland and Charles Rhett prove that Bauskett at one time consented to discharge said mortgage for confederate money. The time of that consent must have been soon after March 21st, 1863, when James Rhett contracted to buy fifteen hundred acres of the mortgaged land, and the moderate price which he was then to pay for the same in confederate money, clearly proves that it was still available for investment. The consent of Bauskett to receive it at that time is therefore no proof of his agreement to accept such payment afterwards, when that currency had become less than one-fourth of its value in 1863. But the testimony of Charles and Roland Rhett is also, with the letter of Bauskett dated January 27th, 1864, relied on to prove an admission by Bauskett, that nearly all the Hancock debt had then been paid. The Rhetts prove that both Hancock and Bauskett then refused to receive confederate money, each excusing himself by

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saying it *was to go to the other. Bauskett's letter does not indicate what balance was due to him on his mortgage: it simply required the Rhetts to execute their bonds and mortgage according to contract, and offers to satisfy his mortgage without indicating what portion of the Rhett bonds he was to keep in payment of the balance due to him.

On April 15th, 1863, Hancock became sure-

ty for Bauskett on a bond for $10,000 to Rebecca Kirkland, which was unpaid when Bauskett died insolvent. After that Hancock purchased it, and now claims it as a discount in this case.

I hold that at law it could not be so allowed. Nettles v. Huggins, 8 Rich. 273. But in equity the surety of a mortgagee who is asking a foreclosure of a mortgage will be relieved of his liability as surety before the court will compel him to pay his mortgage. In that case it does not allow as a discount the full amount of the bond, if the surety has already taken it up, for a less sum. He must not use his position as surety to speculate on his principal. Neal v. Sullivan, 10 Rich. Eq. 283; McKnight v. Bradley, Id. 557.

If, therefore, Sims, who is son-in-law of Hancock, bought the bond for him, the price then paid, with interest, is now the measure of Hancock's equity. And, if that purchase was not for him, the amount which he can now claim credit for in this case is only so much as his own estate was good for when he bought the bond from Sims. The mere giving his note for a larger sum than he could pay will be regarded in this case as only a contrivance between him and Sims to get more than their share of Bauskett's insolvent estate, to the loss of his other creditors; and that equity will not permit.

On March 21st, 1863, James Rhett contracted to buy from Hancock fifteen hundred acres of the mortgaged land for $27,500. He was to give bond with surety and mortgage for the purchase money, with privilege to pay it "at any time he wished." Hancock was to make good title in ten days, but Arthur, as attorney for Rhett, objected to Hancock's title, and the conveyance was never executed. If Rhett's bonds had been delivered, the contract authorized him to pay them in confederate money: but there is no proof that he

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ever offered any bonds or *was ever willing to accept such title as Hancock could make, at any time before January, 1864. Meanwhile confederate money continually depreciated, and on January 19th, 1864, Rhett sold the land to Arthur and Johnston for $50,000, they waiving the defect of title which he, under Arthur's advice, refused to waive. There is no competent proof that either Bauskett or Hancock knew anything of this sale before it was completed, or that either of them encouraged or assented to it. Arthur's declarations, which were objected to, is the only testimony offered on that point. After the said sale, Rhett tendered payment to Hancock in confederate money, and he refused to receive it. There is no proof that the money so tendered was afterwards deposited anywhere to his order, or that Rhett ever parted with his control over it. Whether he used it for other purposes or whether it finally perished in his hands, does not appear.

I hold that the said tender was not payment, and that the failure of Rhett to place the money beyond his control, made the loss, if any, fall on him.

I further hold that his persistent objection to Hancock's title until the depreciation of the currency made the contract a valuable speculation, deprived Rhett of all just claim to a specific performance thereof. When the contract was made, both the parties were on equal terms, and after contingencies might turn out to the advantage of either one or the other of them; if the war should cease, the currency would rise in value, and in that case Hancock would be the gainer; but if the war continue, then Rhett would gain by the decline of the currency. Each therefore was entitled to have the contract executed immediately. Then Hancock would have surety for its fulfillment if the currency should rise, and Rhett the privilege to pay if it should decline. But he so long objected to the title as to deprive Hancock of his right if the chances had been in his favor, and not until the advantage was clearly on his own side did Rhett waive his said objection. In such case I cannot think that this court should decree a specific performance in his favor, and I therefore adjudge that his claim to the land, and that of Arthur and Johnston, who are his assigns, is invalid.

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*It is ordered and decreed that the plaintiff pay to T. B. Wadlington within sixty days, the sum of $3435.90, with interest from April 13th, 1875. If the same be not so paid, Nathaniel Barnwell, master in equity, is authorized and directed, after usual advertisement, to sell at public sale the tract of land now in the possession of the heirs of E. J. Arthur and R. M. Johnston. The terms of the said sale are one-third cash, balance in two equal annual installments, bearing interest from the day of sale, payable annually, secured by bonds of the purchaser and mortgage of the premises.

Further ordered that the said master apply the proceeds of said sale, first, to pay the costs of this case; next, to pay the amount herein decreed to T. B. Wadlington, and the remainder to the further order of this court on the account to be taken between the plaintiff and Lana J. Hancock.

Further ordered that said master take the testimony and report the said account, excluding the evidence of the defendant Hancock and allowing him all proper credits at their value in legal currency, according to the principles hereinbefore stated.

The plaintiffs, defendant Hancock and the heirs of Arthur and Johnston, appealed to this court upon the grounds considered in the opinion of the court.

Mr. F. W. McMaster, for plaintiff.

Messrs. Wm. Wallace and Bachman & Youmans, for Hancock.

Messrs. Melton & Clark, for heirs of Arthur and Johnston.

August 25th, 1880. The opinion of the court was delivered by

McIVER, A. J. A brief statement of the leading facts of this case will be necessary to a proper understanding of the questions to be considered.

The land which is the subject matter of this suit, was sold by Fair and Marshall to Bauskett on January 2d, 1854, and to secure the payment of the purchase money the latter gave to the former seven bonds secured by a mortgage of the premises, which was

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*duly recorded. The entire interest in these bonds and this mortgage became vested in Fair, but how, or when this was effected does not appear. Prior to January 1st, 1855, Fair assigned one of these bonds, which became payable on that day, to Muller, but did not assign the mortgage. It is true, that in the argument of one of the counsel for Hancock, it is contended that this bond was never legally assigned to Muller, but the fact of the assignment is found by the referee and affirmed by the Circuit decree, and there being no exception to such finding, it is conclusive here. On January 10th, 1856, Bauskett sold and conveyed the land to Hancock, and, to secure the payment of the purchase money, took his bonds, secured by a mortgage of the premises, which was likewise duly recorded. On March 21st, 1863, Hancock contracted, in writing, to sell and convey fifteen hundred acres of the land to Rhett, for the particular terms of which agreement reference must be had to the copy set out in the "case." Under this contract Rhett went into possession, but no titles were ever made to him, and he never paid the purchase money, though it is insisted that the purchase money was tendered and refused: nor did he ever give, or offer to give, the bonds and mortgage to secure the payment of the purchase money provided for in the agreement. On April 14th, 1863, Fair made an endorsement on the mortgage held by him in the following words: "The lien and legal effect of the within mortgage is hereby released and discharged forever." (Signed) "Samuel Fair, for Fair & Marshall." This endorsement was recorded in the same office in which the mortgage was recorded, but whether at the same place in the record book, or whether reference was made from one to the other does not appear. On January 19th, 1864, Rhett contracted, in writing, to sell and convey to Arthur and Johnston the said fifteen hundred acres in consideration of the sum of $50,000, then paid in cash. After this contract was made, but exactly at what date does not appear, Rhett offered to pay Hancock, in confederate money, the amount which he had contracted to pay him for the land, which Hancock refused to receive. Arthur and Johnston went into possession of the land immediately after their contract with Rhett, and they and their heirs have since

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continuously remained *in possession—Arthur having died February 27th, 1868, and Johnston April 20th, 1869. The remainder of the land was subsequently sold for taxes assessed against Hancock, and is now held by his son-in-law, Sims, under a tax title. Bauskett having paid all the bonds given by him to Fair and Marshall, except two, one of which was held by Muller, and the other by Fair, filed the original bill in this case on February 18th, 1867, against Hancock, Rhett, Arthur and Childs, who was then supposed to be the owner of Johnston's interest, for a foreclosure of the mortgage given by Hancock to him. Bauskett died sometime during the year 1867, and, subsequently, a bill of revivor was filed by the plaintiff, as his executor, to which the executors of Arthur, who had also died, were made parties. In April, 1871, Muller brought suit against Wadlington, who was the surety of Bauskett on the bond assigned to him by Fair, and, having recovered judgment against him, assigned to Wadlington, on October 9th, 1874, all his right, title and interest in the mortgage given by Bauskett to Fair and Marshall, and subsequently, to wit, on April 13th, 1875, Wadlington paid to Muller the amount of the judgment recovered against him as surety for Bauskett. On June 30th, 1875, the plaintiff, by leave of the court, filed an amended complaint making as additional parties the heirs of Arthur, the heirs of Johnston, (who, as it had been in the meantime ascertained, had not transferred his interest to Childs,) and Wadlington, who claimed the right to enforce the mortgage given by Bauskett to Fair and Marshall to the extent of the amount paid by him as surety of Bauskett upon one of the bonds secured by said mortgage.

Wadlington, by paying the bond on which he was surety, became subrogated to all the rights of Muller, who, as assignee of one of the bonds, was, in equity, also the assignee of a proportionate part of the mortgage, with Fair as his trustee. Muller v. Wadlington, 5 S. C. 343. See, also, 1 Jones on Mortgages, § 822, where it is said that this is the generally received doctrine. This proceeding may, therefore, be regarded as an action by a junior mortgagee to foreclose his mortgage, brought against the mortgagor and those claiming under him, to which the senior mortgagee has been made a party with a view to

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the adjudica*tion of his rights also, and the enforcement of any lien which he may be able to establish.

There can be no doubt but that Hancock, at the time he purchased from Bauskett, took his title subject to the encumbrance of the Fair mortgage, which was duly recorded, and, therefore, notice to the world; and there is as little doubt that those who claim under him have no higher rights than he has, unless they can sustain their claim by adverse possession, or as purchasers for valuable consideration without notice of the equity set up by Wadlington as senior mortgagee, which will be hereinafter considered. If Hancock

took his title thus encumbered, at the time he obtained it, has anything subsequently occurred to remove that encumbrance? The endorsement made by Fair on the mortgage could not have that effect so far as the assignee, Muller or Wadlington, is concerned, for that was made long after the conveyance to Hancock, and could not, therefore, have formed any part of the inducement to or consideration for the purchase by him from Bauskett. As is said in 2 Jones on Mortgages, § 957: "An entry of satisfaction by a mortgagee, after he has parted with his interest in the security, will not discharge the mortgage in favor of one who acquired an interest in the land before the discharge was made. He is no worse off than he supposed himself to be when he acquired his interest, and there is no reason, in equity, why the person really entitled to the mortgage should not have the benefit of it so far as he is concerned." So far then as Hancock is concerned, the endorsement made by Fair on the mortgage was a nullity, except, perhaps, as to any interest which Fair then retained in the mortgage, as to which we are not now called upon to express any opinion. The same is true as to Rhett, who made his contract for the purchase of the land before the endorsement was placed upon the mortgage. But, in addition to this, Fair, as trustee, could not release a lien intended for the benefit of his cestui que trust, and, if he did so, it would be a breach of trust, in which all persons who had actual notice of the trust, or of such facts as would put them on the inquiry, would be regarded as participants, and could therefore claim no benefit from it. Here the mortgage, which was spread upon

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the records, not only gave notice to the *public that there was a lien upon the land, but that such lien was for the benefit of two persons, and was intended to secure the payment, not merely of one but of seven separate bonds. The fact that seven bonds were given instead of one, payable in seven installments, pointed very naturally to the conclusion that the object was to make use of these bonds separately by a transfer of them. Common prudence would therefore suggest to a purchaser the propriety of an inquiry as to whether all of the bonds had been paid, or the lien to secure their payment properly released, and such inquiry would have led to the discovery of the fact that one of these bonds had been transferred to a third person, and that, therefore, Fair had no right to release the lien of the mortgage so far as that bond was concerned. It is clear, therefore, that Hancock held the legal title, subject to the encumbrance of the Fair mortgage, and whatever rights he may have in the land can be subjected to the payment of the amount which Wadlington has been compelled to pay as the surety of the original mortgagor, Bauskett. What his rights are will next be considered.

Under his contract with Rhett, the latter stood in the position of mortgagor to Hancock as mortgagee, and Rhett could not therefore convey the land, free of such encumbrance, to Arthur and Johnston, unless the mortgage debt, as it might be called, was satisfied by payment, or the lien of the mortgage discharged or released. There is no pretence that such debt was ever, in fact, paid, but it is contended that the lien was discharged by a tender. There is no doubt but that a tender of the mortgage debt at the time it is due discharges the lien of the mortgage, though it does not extinguish the debt; and it will, therefore, be necessary to inquire whether Rhett ever made such a tender to Hancock. Assuming that he offered to Hancock the full amount of the purchase money in confederate treasury notes, this cannot be regarded, legally, as a tender, for such notes never were made a legal tender. The written contract did not provide for the payment of that kind of currency, and while it is quite true that parol evidence may be resorted to for the purpose of showing that the contract was made with reference to confederate treasury notes, as a basis of val-

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ue, with a view to determine the *actual value to be paid, we know of no authority which authorizes it to be received for the purpose of showing that the offer of such currency would amount to a legal tender of the debt and produce the legal consequences of such a tender. A contract which is proved to have been made with reference to such a currency may be discharged by the payment in actual money of the amount which the number of confederate dollars mentioned in it may be proved to have been worth at the time the contract was made, or a creditor may, if he chooses, accept payment in confederate treasury notes, and if he does so it will discharge the debt, upon the principle that anything accepted as payment will operate as such; but it is a very different thing to say that a creditor can be compelled to accept anything in payment of his debt except actual money, or that if he refuses he will be saddled with the consequences attendant upon a refusal to accept a legal tender of his debt. But, in addition to this, the offer of $27,000 in January, 1864, could not, in any view of the matter, be regarded as a tender of the amount secured by the contract made in March, 1863, as the currency was constantly depreciating in value. Rhett, therefore, occupies the position of one who has contracted to purchase but who has not received a title, nor has he paid or tendered the purchase money.

The position of Arthur and Johnston will next be considered. They bought from Rhett, whom they knew at the time had no title, and no right to demand a title until he had

complied with the terms of his agreement with Hancock, which he has never done. If they paid the purchase money to him and went into possession under a mistaken reliance upon the effect of what is claimed to have been a tender by Rhett to Hancock they must bear the consequences of their own mistake. They bought land which, as the records showed, was encumbered by two mortgages, from a person whom they knew had no title at the time, and they took the risk of showing that the land had been relieved from both of these mortgages, and that their vendor would acquire a title, or be able to show himself entitled to demand one. Have they done so? First, as to the Fair mortgage. It is very certain that the debt secured by this mortgage has never yet been fully paid, and it is not so pretended; but

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it is con*tended that the land has been discharged from the lien of the mortgage by the endorsement placed upon it by Fair. Assuming that Fair, as one of the joint mortgagees, could, by this endorsement, without any consideration, so far as appears, release the lien of the mortgage, he certainly could not thereby affect the rights of his assignee, Muller, or Wadlington, who now stands in the shoes of Muller. And though their right to the mortgage may be nothing more than an equity, yet it is an equity long prior in point of time to any equity which Arthur and Johnston can lay claim to, and is, therefore, the superior right. For it will be remembered that Arthur and Johnston (passing by for the present their claim of title by adverse possession) have not got the legal title and can only claim an equity. The question as to whether the land has been relieved from the second mortgage—that of Hancock to Bauskett—depends upon other considerations which must be the subject matter of further inquiry. It is quite clear, as we have seen, that Rhett, the immediate vendor of Arthur and Johnston, has not only never acquired the legal title, but has never placed himself in a position to demand such title, as he has never paid or tendered the purchase money, nor has he ever offered, nor does he now offer to comply with the terms of his agreement. It follows, therefore, that the land in the possession of Arthur's and Johnston's heirs must be subject to these various encumbrances, unless they can make good their claim to hold by adverse possession, or as purchasers for valuable consideration without notice.

As to the claim by adverse possession, we agree with the Circuit judge that it cannot be sustained; first, because there is no proof of the adverse character of the possession, and, next, because the possession was not for a sufficient length of time. Since the case of Norton v. Lewis, 3 S. C. 25, affirming the previous case of Wright v. Eaves, 5 Rich. Eq. 81, it must be regarded as the settled law of this state that the mere fact of the possession of land covered by a mortgage, for the statutory period, by a purchaser from the mortgagor, with notice of such mortgage, will not constitute a bar to the action for foreclosure. Here the only thing relied upon to show the adverse character of the possession of Arthur and Johnston, as against the

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Fair *mortgage, is the endorsement placed upon it by him. How that act, in which Arthur and Johnston had no participation, and which was done some time before they claim to have acquired any interest and before their possession commenced, can be said to give any character to their possession, it is difficult to understand. But, even giving it all the efficacy claimed for it, how can it affect Muller or Wadlington, who knew nothing about it—the former until 1871, and the latter until the fall of 1867 or spring of 1868, and dating from either of these periods the possession would be less than the ten years required by the statute before Wadlington was made a party to this action.

The fact that this endorsement was spread upon the records could not operate as constructive notice, because it was not such a paper as, by law, was required to be recorded, and, therefore, the recording of it would not operate as notice. Harper v. Barsh, 10 Rich. Eq. 149. The statute which is relied upon to show that this was a paper proper to be recorded, (Act of 1817, 6 Stat. 61; Gen. Stat., Ch. LXXXII., p. 427.) provides: "That each and every person who shall have received full payment or satisfaction, or to whom a legal tender shall have been made, of his or their debt, damages, costs and charges, secured by mortgage of real estate, shall, at the request of the mortgagor * * * enter satisfaction in the proper office on such mortgage, which shall forever thereafter discharge and satisfy the same." It will be observed that this provision applies only where full payment or satisfaction of the debt, secured by the mortgage, has been made, or where there has been a legal tender of such debt, and to extend it to anything else would be an unwarrantable addition to the terms of the statute. The doctrine of constructive notice, by recording, is not to be extended to all papers which are in fact recorded, but only to those which are authorized or required to be recorded. 1 Story's Eq. Jur., § 404. As there is no statute which authorizes or requires such a paper as the endorsement in question to be recorded, the fact that it was put upon the record will not make it constructive notice. We see no evidence, therefore, that gives to the possession of Arthur and Johnston a character adverse to the Fair mort-

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gage, and *certainly none that give it such a character as against the mortgage from Hancock to Bauskett.

But in addition to this, we do not think

the possession was of a sufficient length of time to bar the action for foreclosure even of the Fair mortgage. The right to bring this action was suspended by the stay law until December 21st, 1866, and from that time to July, 1875, when Wadlington was made a party, the ten years had not elapsed. Certainly, as against the Hancock mortgage, the statutory period had not elapsed before the commencement of the action to foreclose that mortgage.

Nor do we think that Arthur and Johnston can successfully maintain their claim as purchasers for valuable consideration without notice. For, to say nothing of the effect of their failure to plead this defence in the manner required by law, it is manifest that they have not got the legal title, and, at most, only an equity to demand title, and that though they may have paid the purchase money to their immediate vendor, whom they knew did not have the legal title, yet the purchase money has never been paid or tendered to Hancock, the person whom they knew did hold the legal title. As is said by Dunkin, Ch., in Bush v. Bush, 3 Strob. Eq. 134 [51 Am. Dec. 675]: "The protection of a purchaser for valuable consideration stands on this, that he has bona fide acquired the legal title and paid the purchase money before notice of the plaintiff's equity. If he has acquired the legal title but has not paid the purchase money before notice, his plea fails. So, if he has paid the purchase money, but has acquired no legal title, and then receives notice of the plaintiff's equity, he cannot defeat that prior equity by procuring the legal title." And, as is said by Marshall, C. J., in Vattier v. Hinde, 7 Pet. 271 [8 L. Ed. 675]: "The rules respecting a purchaser, without notice, are framed for the protection of him who purchases a legal estate and pays the purchase money, without knowledge, of an outstanding title. They do not protect a person who acquires no semblance of title. They apply fully only to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of any prior equity." For, as is said by the same distinguished judge in Boone v. Chiles, 10 Pet. 210 [9 L. Ed. 388]: "It is a general principle in courts

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of equity that where both parties *claim by an equitable title, the one who is prior in time is deemed the better in right." Again, at page 211, speaking of the protection afforded bona fide purchasers, without notice against a prior equity, says such an equity "can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money and receiving the conveyance without notice and a clear conscience." In view of these authorities it is very clear that Arthur and Johnston cannot maintain their claim as purchasers for valuable consideration without notice of the prior equity of Muller or Wadlington.

As to the mortgage from Hancock to Bauskett, we propose to say but little, as we agree with the Circuit judge that the questions whether anything, and if so, how much, is still due thereon, should be recommitted to the master, as the conclusions of the referee, based upon the incompetent testimony derived from the declarations of Arthur, and Hancock's testimony as to transactions with the deceased Bauskett cannot be sustained. We think, however, that the whole matter in reference to this mortgage, including the question whether Bauskett, by his conduct or declarations, induced Arthur and Johnston to purchase by holding out to them the idea that the debt due him by Hancock was paid, or that the lien of the mortgage would be released, should be left open with liberty to all parties to introduce any competent testimony as to all these matters, allowing all proper credits to Hancock at their value in legal currency, unless the testimony to be adduced shows that there was an agreement between Hancock and Bauskett that the various articles furnished were to be credited on the mortgage debt at their value in confederate money at the time they were delivered. The discount claimed on account of the amount alleged to have been collected by Bauskett on the Lewis note must be further inquired into, as we do not think the testimony adduced sufficient to establish the claim. As to the discount claimed on account of the Kirkland note, that also must be the subject of further inquiry. There is no doubt but that the claim of a surety for indemnity against the principal is founded, not upon contract, but upon a principle of natural equity and justice. This equity springs up at the time the relation is entered into, and

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consummated when the surety *pays the debt. Hence, as the Circuit judge has held, a mortgagee will not be permitted, in equity, to foreclose his mortgage against his surety without allowing such surety the benefit of a credit for any amount which he may have actually paid for such mortgagee; but the surety can only claim the benefit of such credit to the amount actually paid by him. If he has compromised the debt he can only claim the amount of such compromise—in other words all he can claim is indemnity—nothing more. See the American notes to the case of Dering v. Earl of Winchelsea, 1 W. & T. Lead. Cas. in Eq. 105, where these principles are laid down and fully supported by the cases there collected. The inquiry, therefore, in this case should be what is the amount which Hancock has actually, not nominally, paid on the Kirkland bond, and for such amount he is entitled to have credit. The mere fact of giving a note or due-bill for the whole amount of the bond is not sufficient without proof that he has paid or has the means to pay it. A mere pretensive payment would certainly constitute no founda-

tion for the equity upon which the claim must rest. The case of Peters v. Barnhill, 1 Hill 234, which has been relied upon to support a contrary view, was an action at law, and cannot be regarded as controlling this case. As to the ground taken by the counsel for the plaintiff that a payment made by a surety after the death of the principal cannot, in an action by the executor of the principal, be set off against an obligation given by the surety to the principal, we do not think it can be sustained; for, besides being directly opposed to the decision in Hinds ads. David, Harp. 423, the proposition contended for manifestly rests upon the idea that the claim of the surety is founded upon contract, which as we have seen, is not the case, but that on the contrary, it rests upon an equity which springs up when the relation of principal and surety is entered into, and is consummated when the surety pays the debt; and that it is upon a principle of equity rather than as a set-off that the principal will not be permitted to enforce the payment of a debt or the foreclosure of a mortgage in disregard of such equity.

The order of sale ignores the fact that the mortgaged premises are now held by different

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persons, under different claims acquired *at different times. When such is the case the rule is that the several parcels shall be sold in the inverse order of the sales made by the mortgagor. Norton v. Lewis, 3 S. C. 25. The order of sale must, therefore, be modified so that the tract held by Sims should be first sold, and if the proceeds of such sale should be insufficient to satisfy the various liens which have or may be established, together with the costs, then the remainder of the land in the possession of the heirs of Arthur and Johnston should be sold.

The judgment of the Circuit Court, except as modified herein, is affirmed, and the case is remanded to that court for such further proceedings as may be necessary.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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14 S. C. 93

(Case No. 905.)

WILLINGHAM v. CHICK.

(April Term, 1880.)

[1. *Trial* ⇐203.]

While the statement in the answer that defendant cannot "admit or deny," is not sufficient to put in issue the execution of the bond sued on, still, there being no evidence that the bond had not been executed, there was no material error in the charge to the jury, that "plaintiff has produced proof of the execution of the bond, which, in law, is ordinarily considered sufficient, but still the execution of the bond is a question of fact for the jury."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477–479; Dec. Dig. ⇐203.]

[2. *Executors and Administrators* ⇐221.]

In an action brought by an unpaid creditor against his debtor's executors, who, after duly advertising for creditors, had fully distributed the estate, the burden of proof is upon the creditor to show that the executors had notice of his claim before they made the distribution.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1863; Dec. Dig. ⇐221.]

[3. *Executors and Administrators* ⇐449.]

Under the plea of plene administravit in behalf of executors, the returns of administrators and guardians of the estates of the legatees, charging themselves with amounts received from the executors, who at the time of trial are deceased, are admissible in evidence in support of the plea.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1852; Dec. Dig. ⇐449.]

[4. *Executors and Administrators* ⇐307.]

An unpaid creditor cannot charge executors with the possession of assets, because that the legatees accepted a depreciated currency in payment of their distributive shares.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1251–1256; Dec. Dig. ⇐307.]

[5. *Bonds* ⇐130; *Insane Persons* ⇐45.]

Bond of a committee was given in 1843, the lunatic died in 1848, leaving as his distributees persons sui juris, and in 1849 the committee filed a statement of his indebtedness in the of-

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fice of the commissioner in equity. *In 1876 plaintiff administered upon the estate of the lunatic, and in 1877 brought his action against the executors of a surety on the committee's bond, alleging the bond, and that "no part of said balance found to be due as aforesaid by said committee has been paid." The executors, by their answer, did not controvert this statement, nor did they plead payment, but set up the statute of limitations as a bar, and denied plaintiff's right of action, and did not deny the allegation that there had been no previous administration on the estate of the lunatic. *Held*, that under these facts the Circuit judge did not err in charging the jury that the liability on the bond, if it ever existed, would be presumed to be paid and discharged, and that for that purpose, if necessary, it would be presumed that letters of administration had been granted on the estate of the lunatic.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 225; Dec. Dig. ⇐130; Insane Persons, Cent. Dig. § 72; Dec. Dig. ⇐45.]

6. Riddlehoover v. Kinard, 1 Hill's Ch. 380, approved.

[This case is also cited in Boyce v. Lake, 17 S. C. 486, 43 Am. Rep. 618; Tobin v. Myers, 18 S. C. 328; Dingle v. Mitchell, 20 S. C. 212; Pyles v. Bell, Id. 368; Adams v. Richardson, 32 S. C. 140, 10 S. E. 931; Smith v. Tanner, 32 S. C. 264, 10 S. E. 1008; Bredenburg v. Bardin, 36 S. C. 202, 15 S. E. 372, as to legal presumptions arising from lapse of time.]

Before Wallace, J., Newberry, February, 1880.

The nature of this action is sufficiently indicated in the opinion of the court. To these statement of facts as therein contained it will be proper to add a few other matters appearing in the brief.

The complaint alleged that no administra-

tion had ever been granted upon the estate of the said William F. Graham until that granted to this plaintiff; and this was neither admitted nor denied in the answer.

The receipts and testimony of legatees under the will of Thomas H. Henderson, showed that the executors, in settling with them in 1864, paid them in part with confederate money. To show payments to some of the legatees, the defendants were permitted to introduce, against the objection of plaintiff, the sworn returns of P. W. Chick, administrator of one of the legatees, of R. C. Chick, guardian of three of the legatees, and of Simeon Fair, guardian of three others of the legatees.

The Circuit judge charged the jury, inter alia, as follows:

The plaintiff has produced proof of the execution of the bond, which, in law, is ordinarily considered sufficient; but still the execution of the bond is a question of fact for the jury.

The defendant alleges that there is a presumption of fact that the bond has been paid. It is an ordinary rule of law that presumptions of payment will run against sealed instruments. In this case the commissioner in equity had the legal interest in said

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*bond. After a great lapse of time, a further presumption would arise that a prior administration had been granted upon the estate of a deceased person.

Notwithstanding the legal interest in the bond in suit was in the commissioner, twenty-eight years have elapsed since the death of Graham, and with a view to having the question finally determined, I charge you, under authority of the case of Witt v. Elmore, that a presumption does arise that payment has been made. Such a presumption does not arise against an infant, because of disability. It is in proof, in this case, however, that the parties in interest were sui juris; and you must take this fact into consideration, in connection with the presumption of a previous administration. After twenty years the presumption arises, and the burden is on the plaintiff to show that the bond is not paid, as much so as to prove the execution of his bond.

As to the plea of plene administravit. If a plaintiff comes into court and establishes his claim, and the executor pleads plene administravit, and that all funds have been paid out, and his accounts balanced, if he satisfies the jury that he has fully administered, unless notice of the claim be brought home to him, he is entitled to a verdict. If, however, such notice be brought home to him, the plea of plene administravit is no answer, but it is incumbent upon the plaintiff to show that he had such notice.

It is not necessary that I should charge you about the payments in confederate money and notes. The law holds that anything is payment which is accepted as such: and if the legatees accepted payment in confederate currency of their legacies, it is a good payment as against this plaintiff, and the receipts introduced are evidence of such fact.

Upon request, I will further charge that the presumption of payment could only arise upon the expiration of twenty years from the granting of letters of administration upon the estate of William F. Graham; but from the lapse of time a previous administration may be presumed.

I will likewise charge you that if the executor of Thomas H. Henderson had knowledge of his testator's liability on the bond

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*described in the complaint, the plea of plene administravit will not avail.

If you should find that the bond in suit has been paid from the presumptions, by lapse of time, of a previous administration and payment, your verdict should be for the defendant. If you should not find such payment, but should find that the executor has fully administered his testator's estate without notice of this claim, your verdict should be for the plaintiff, subject to the plea of plene administravit.

If, however, you should find that there was no such payment and shall likewise find that said executor has not fully administered the estate of Thomas H. Henderson, or that he had notice of this claim before the distribution amongst the legatees, your verdict should be for the plaintiff generally for the amount claimed in his complaint.

The plaintiff, in writing, requested his Honor to charge:

1. That payment is not pleaded, and the matter of presumption of payment cannot be considered by the jury.

2. That the non-payment of the money sued for being admitted by the answer is sufficient to rebut such presumption.

3. That any presumption of a previous grant of administration upon the estate of William F. Graham is rebutted by the admission in the answer of the defendant that no administration had in fact been granted on said estate previous to that granted to the plaintiff.

4. That presumption of payment arising from a lapse of twenty years is rebuttable.

5. That the defendant, in order to make out the plea of plene administravit, must show want of notice of the liability of the testator.

All of which requests were refused; to which refusal the plaintiff excepted.

To the admission of the testimony objected to, and to these charges and refusals to charge, the plaintiff excepted; and upon his exceptions appealed to this court.

Messrs. W. H. Lyles and Geo. S. Mower, for appellant.

Messrs. Pope & Fair, contra.

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*August 31st, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This is an action on bond of committee of lunatic against the personal representative of one alleged to be a surety. On March, 10th, 1843, one Nathan Parrott gave bond to L. J. Jones, Esq., commissioner in equity for Newberry county, as committee of one William F. Graham, a lunatic. It is alleged that Thomas H. Henderson, John H. Gilliam and J. D. Kenner were sureties on the bond. May 15th, 1848, said lunatic, Graham, died intestate, leaving, as his distributees, brothers and sisters of full age. A statement of the accounts of Parrott committee was found in the office of the commissioner in equity, of date February 1st, 1849, by which it appeared that there was in the hands of the said Parrott $2014.94. At whose instance, whether that of the commissioner or of the distributees, or of an administrator, this statement was made, does not appear. It may have been ex parte. There is no evidence that the sureties knew anything about it, or that there was any decree, by any authority, that the amount should be paid. January 15th, 1860, Thomas H. Henderson, one of the alleged sureties, died, leaving a will, of which Reuben C. Chick and P. W. Chick were executors. They qualified, gave notice for creditors to present their demands—the claim now sued was not presented—and on January 22d, 1864, finally settled and distributed the estate. R. C. Chick afterwards died, leaving P. W. Chick the surviving executor, and, afterwards, he died, leaving a will, of which Sarah E. T. Chick is executrix, and that makes her, by law, also the executrix of the estate of Thomas H. Henderson. The plaintiff, William P. Willingham, took out letters of administration on the estate of Graham, the lunatic, September, 1876, and brought this action on the bond against Sarah E. T. Chick, executrix of Thomas H. Henderson, February 5th, 1877, being thirty-four years after the bond bears date; twenty-nine years after death of Graham; twenty-eight years after the statement of the account, which was found in the commissioner's office; seventeen years after the death of Henderson, the alleged surety and debtor, and thirteen years after a final settlement and distribution of his estate under his will. Under the charge of the Circuit judge, the jury

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found for the defendant. The plaintiff *excepted to the rulings, and the case comes to this court. The exceptions are numerous, and it may contribute to clearness to consider them under three general heads.

1. In regard to the proof of the execution of the bond by the testator and alleged surety, Thomas H. Henderson, deceased.

The fourth exception alleges error on the part of the judge in ruling "that the execution of the bond described in the complaint was still a question of fact for the jury, although it had been proved, and was not denied in the answer." The first and second paragraphs of the complaint charge the execution of the bond by Henderson. The first paragraph of the answer is in these words: "This defendant cannot admit or deny the allegation set forth in the first and second paragraphs of plaintiff's complaint, but demands that plaintiff be put to strict proof thereof," and the fourteenth and fifteenth paragraphs deny generally the plaintiff's right to recover "because she says no cause of action exists against the defendant." We do not think that the answer sufficiently put in issue the execution of the bond in suit. The defendant should either deny the facts alleged in the complaint from positive knowledge, or deny that he has any knowledge of such facts sufficient to form a belief of them. To say that he cannot admit or deny them is not equivalent to saying that he neither possesses positive knowledge to the contrary or that he is destitute of knowledge on the subject, but admits of the construction that his inability to admit or deny arises from matter not disclosed, and which, if disclosed, might not be sufficient in law to justify him for neither admitting or denying. But we do not think that any material error has been committed. The judge submitted the bond as proved, prima facie at least. Unless, then, there was some evidence tending to show that the execution of the bond had not taken place, there was nothing on which the jury could overcome the prima facie proof. No such evidence appears, and it cannot be assumed that the jury took advantage of the general proposition that the question was one of fact to override the prima facie proof without evidence for that purpose. It is presumable from the whole case that the verdict did not turn on

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any question of the sufficiency *of the proof of the bond, and, therefore, there is nothing to contradict a legal presumption arising, as before stated.

2. As to the defence of plene administravit made by the defendant executrix. The fourteenth exception alleges error in the charge: "That it was incumbent upon the plaintiff to show that the executors of Thomas H. Henderson, deceased, had notice of his testator's liability under the bond in order to make the plea of plene administravit no answer." This exception makes the point as to the onus of proof upon the question of notice of the claim by the executors of Henderson before they distributed the estate. The executors advertised for creditors. This creditor did not present the claim within the time prescribed by law. He was in default, and could make no progress until it appeared that the executors had notice of the claim;

upon that subject he held the affirmative, and it was incumbent on him to prove it. The executrix could not be required to prove a negative. The law requires estates to be settled promptly. Creditors are required to present their demands within twelve months, and there are no exceptions in terms on account of alleged disabilities. The law proceeds on the assumption that creditors will look after their interests, and provides that if the creditors do not present their claims in time the "executors shall not be responsible." Here the claim was not presented in time, and if the plaintiff wished to relieve himself from the consequences of the default, it was necessary for him to prove that the executors had notice.

The first, second and third exceptions make the point that it was error to admit in evidence returns of guardians and administrators of legatees, tending to show that they had received in full their shares. One of the issues in the case was that the estate of Thomas H. Henderson had been settled and paid out to the legatees. Any evidence tending to prove this issue was admissible. It is true the legatees are not parties, but the issue of distribution was made by the executrix. The executors who made the distribution were dead, and the best evidence to prove the fact alleged was the settlement itself, or the testimony of the legatees, or receipts and returns showing that their legacies had been paid to them. What weight

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the testimony might be en*titled to was for the jury. We are only dealing with its admissibility.

The fifteenth exception alleges error in charging "that if the legatees of Thomas H. Henderson accepted payment of their legacies in confederate money it is a good payment as against this plaintiff, and that the receipts introduced are evidence of such fact." That is payment which is received as such. If the legatees chose to receive their legacies in part or in whole in confederate money, and receipt for the same, we do not see that the plaintiff has any right to complain of that, or how it bears upon the issues in this case.

3. All the other exceptions, in one form or another, allege error on the part of the judge in charging "that after a great lapse of time the liability on the bond, if it ever existed, would be presumed to be paid and discharged, and that for that purpose, if necessary, it would be presumed that letters of administration had been granted on the estate of William F. Graham, the intestate."

I. It may be doubtful whether the mere statement of account made by Parrott in the commissioner's office was in itself enough to fix the liability of a surety upon a bond for the performance of covenants without further account and making the representative of Parrott a party; but assuming that it was, the question arises whether that liability, thus fixed, is still a subsisting liability, thirty-four years after the bond was given, or is lost by lapse of time and the statute of limitations. The twenty-first statute, James I., made of force in this state, was our only statute of limitation until the adoption of the code in 1870. That statute had no limitation as to sealed instruments. The statutes now of force, both in England and South Carolina, include expressly bonds. Under the old law in force, up to 1870, which did not provide a limit to actions on bonds, it was soon seen that there was a necessity for a limit to actions in such cases. The courts at an early day applied to actions on bonds, the well-established doctrine of presumption. Twenty years possession would presume title to property, and upon the same principle they held that twenty years would presume payment and discharge of a bond. The doctrine

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is now perfectly familiar, and *is no where better stated than in Angell on Limitations, § 93: "By analogy to the statute of limitations an artificial presumption has long been established that when payment of a bond or other specialty was not demanded for twenty years, and there has been no circumstance to show that it was still acknowledged to be in existence, the jury are to presume payment at the end of twenty years. This doctrine has been so often recognized that it is not requisite to cite any of the countless authorities which sustain it."

II. Admitting the general principle, which cannot be denied, it is, however, insisted that it was error to apply it to this case on account of the state of the pleadings. Although the lapse of time here is more than sufficient, it is said that the defendant executrix answered in such a manner as to exclude the estate she represents from all benefit from the presumption; that the presumption is one of fact, and cannot be raised unless payment as such is pleaded in form. The defendant did not plead payment in form, but she did plead the statute of limitation, and denied generally the plaintiff's right of action. This omission in the answer of the executrix is not necessarily fatal to the defense of lapse of time. The presumption of payment is one which the law raises whenever the facts appear which give rise to it. Angell on Limitations, § 78; Jackson v. Sackett, 7 Wend. 94; Bass v. Bass, 8 Pick. 187; Starkie's Ev. 823; Best on Presump. 188.

III. It is further insisted that the presumption of payment, being one of fact, may be overthrown by proof, and that the omission of the defendant in her answer to controvert specifically the negative statement of the complaint that "no part of said balance found to be due as aforesaid by said Nathan Parrott has been paid," makes that statement proof. The answer of the executrix does not, as a matter of fact, make any

such acknowledgment, and the technical result, which the law declares for failing to controvert the statement, is not one of those acknowledgments in fact which affect the statute of limitation.

But if the executrix had herself made the statement in her answer, it would not have been sufficient to rebut the presumption. More than twenty years had expired before

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the action was *brought, and the perfected presumption had acquired an artificial force, and the cause of action did not exist. In analogy to the operation of the statute of limitation, after the law was complete, mere admissions by the executrix could not have the effect to make a new debt. To have that effect there must be a distinct admission of a subsisting legal obligation of the debt, unaccompanied by any conduct or expression indicative of an unwillingness to pay. As was said by Judge Wardlaw, in delivering the judgment of the court in the case of Stover & Barnes v. Duren, 3 Strob. 448 [51 Am. Dec. 634]: "The presumption is no legal bar, but originally it was admitted in analogy to the then prevailing statute of limitation, and in considering admissions which rebut it, the same principles are applicable as in considering admissions to take a cause of action out of the statute of limitation. So long as the lapse of time is merely circumstantial evidence, which, by ordinary inference, creates belief, any admission which oppose the inference of payment drawn from it, go to the jury along with it, and all are weighed together according to their natural force. But when, by the expiration of full twenty years, the presumption of payment has acquired an artificial force, so that it stands in the place of belief, an admission that the payment has not in fact been made, cannot of itself destroy the effect which considerations of policy have given to a certain period of time, whether the payment has or has not been made."

IV. But it is insisted that the time which raises the presumption of payment does not begin to run until there is some one authorized to receive payment, and that the distributees of Graham could not legally receive their shares of this debt except through an administrator, and that none was appointed before the plaintiff in 1876.

The proposition is that this claim was in a state of suspended animation from 1843 until 1876, when administration upon the estate of Graham breathed into it the breath of life. It is true that the statute of limitation does not commence to run until there is some one who can sue; but it is not certain that the distributees of Graham could not have been paid by Parrot without administration. They were sui juris, and, by consent, might have received payment directly.

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The fact that Parrot volun*tarily made a statement of the amount due in the commissioner's office would seem to favor the idea that the parties settled without administration. But, without affirming anything upon this point, both public policy and private rights require that there shall be an end of litigation. In all civilized countries some term of time has been observed, at the end of which a party is exonerated from all responsibility. There should have been an administration upon the estate of Graham soon after his death. The law requires that there should be administration upon the estate of every man who dies intestate owning property. It is the right of the next of kin and creditors to administer, and if they fail, certain officers are required to administer the estate as "derelict." If they, whose duty and interest it is to administer, can, without injury to their rights, neglect to do so for forty years, why may they not for fifty years or a century? It cannot be permitted that parties shall thus, to the injury of others, select their own time to administer and pursue their rights. It is all important that estates should be settled up promptly and finally. Those who neglect to look after their rights in a reasonable time must suffer the consequences. After thirty years the presumption arises that all parties did their duty, and that administration was granted upon the estate of the intestate Graham.

After a lapse of twenty-eight years, an executor's assent to a legacy of freedom to a slave may be presumed. Bowers v. Newman, 2 McM. 486.

Where a negro has been at large and acting as a freeman for more than twenty years, a deed of manumission, under the act of 1800, may be presumed. Miller v. Reigne, 2 Hill, 592.

Thirty years' possession will raise the presumption of deed or other intermediate conveyance. Gray v. Bates, 3 Strob. 500.

After twenty years of separation between husband and wife a deed of separation will be presumed in order to confirm title in her alienees. Jones v. Jones, 3 Strob. 319. Upon this subject we adopt the ruling of Chancellor Harper in the case of Riddlehoover v. Kinard, 1 Hill's Eq. 380: "It is said we cannot presume either a general administration or a valid will. It is hardly necessary to say that legal presumptions are not founded on actual belief. As observed by Lord Er-

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skine in Hillary v. *Waller, 12 Ves. 267: 'Mankind, from the infirmity and necessity of their situation, must, for the preservation of their property and rights, have recourse to some general principle to take the place of individual and specific belief.' * * * Presumption must be sometimes much against the well-known truth of the fact. If twenty years have elapsed without the payment of interest or any acknowledgment

of a bond, we must presume it paid, notwithstanding the fullest conviction that it never has been paid. In Hutchison v. Noland [1 Hill, 222] it was proved by the ordinary that no administration had ever been taken out until granted to the plaintiff. As said in that case, we will presume whatever is necessary to give efficacy to long possession," &c.

The exceptions are overruled and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

14 S. C. 104

(Case No. 906.)

CASTON v. BROCK.

(April Term, 1880.)

[1. *Appeal and Error* ⇐368.]

An appeal from an order granting a new trial on the minutes dismissed, because the notice of appeal did not contain an assent on the part of appellant that if the order be affirmed judgment absolute should be rendered against him.

[Ed. Note.—Cited in Daughty v. Northwestern R. Co., 92 S. C. 365, 75 S. E. 553.

For other cases, see Appeal and Error, Cent. Dig. § 1997; Dec. Dig. ⇐368.]

[2. *Statutes* ⇐200.]

Punctuation allowed some force in construction, it being, in this case, strictly consistent with one of two senses, which were equally grammatical, and inconsistent with the other.

[Ed. Note.—Cited in State v. Chastian, 49 S. C. 185, 27 S. E. 2.

For other cases, see Statutes, Cent. Dig. § 278; Dec. Dig. ⇐200.]

3. The terms bill of exceptions and exceptions taken, considered.

[4. *Appeal and Error* ⇐422.]

Application for leave to amend a notice of appeal must be in writing and on due notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2149; Dec. Dig. ⇐422.]

[5. *Appeal and Error* ⇐422.]

Such amendment would not be allowed where the appeal was based upon the hearing at chambers of a motion for new trial upon the minutes, which was noticed at the same term and entered upon his docket by the presiding judge, but its hearing postponed by agreement beyond the adjournment of the term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2149; Dec. Dig. ⇐422.]

[6. *Appeal and Error* ⇐110.]

[Cited in Lampley v. Atlantic Coast Line R. Co., 77 S. C. 326, 57 S. E. 1104, to the point that subdivision 2, § 11, Code of Civil Procedure, applies where pure questions of law are involved.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740–748; Dec. Dig. ⇐ 110.]

[This case is also cited in Kennedy v. City of Greenville, 78 S. C. 128, 58 S. E. 989, as to the effect of appeals from orders granting new trials.]

Before Kershaw, J., Chesterfield, September, 1879.

Action by Robert T. Caston to recover from Mary A. Brock certain lots of land in the

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town of Cheraw. Verdict for defend*ant. Motion by plaintiff on minutes for a new trial, which the presiding judge, with consent of counsel on both sides, noted upon the docket in the following words: "Motion for a new trial to be argued by consent, at Marlboro'."

At Marlboro' it was verbally agreed between counsel that the motion should be heard at Darlington during the succeeding term of the Circuit Court, written argument to be submitted by either counsel desiring.

About October 15th, 1879, defendant's counsel were notified, by letter, that the argument of plaintiff's counsel had been forwarded to the Hon. J. B. Kershaw, at Darlington, whereupon defendant's counsel wrote to plaintiff's counsel demanding a copy of the argument sent, or the points and authorities contained in it, in order that a reply might be framed thereto. On October ——, 1879, before the close of the Darlington court, plaintiff's counsel sent the points and authorities to defendant's counsel, in deference to said demand, but the same were not received till October 28th, 1879, after the close of the said Darlington term. Defendant's counsel then refused to consent further in the premises, or do anything to further the hearing and determination of the motion.

Plaintiff's counsel then served a notice upon defendant's counsel, that Judge Kershaw would be asked to render his decision before January 1st, ensuing. Defendant objected, upon the grounds that such motion could be heard and determined only at the term at which heard; that there was no agreement or waiver beyond the term at Darlington; and that defendant had not received plaintiff's points and authorities in time to enable him to reply at Darlington.

An order was granted by his Honor as of September Term, 1879, but dated December 31st, 1879, and filed January 5th, 1880, granting the motion for a new trial on the minutes. Defendant appealed, upon the ground that his Honor erred in granting the motion and overruling his objections. In his notice of appeal there was no assent that final judgment should be rendered against him in this court, if he failed in his appeal; and for such omission plaintiff moved to dismiss the appeal.

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*Messrs. Dudley & Newton, for appellant. Messrs. Prince & Pollock, contra.

August 31st, 1880. The opinion of the court was delivered by

WILLARD, C. J. This is an appeal from an order granting a new trial. A preliminary objection is taken to the appeal, on the

ground that no assent on the part of the appellant is contained in the notice of appeal, to the effect that if the order be affirmed, judgment absolute shall be rendered against the appellant, in accordance with sub-division 2, Section 11, of the code, and that, as a consequence of such omission, the appeal is not effectual for any purpose and should be dismissed. To this objection the appellant replies that the order for a new trial, appealed from in the present case, was made upon a motion heard upon the minutes of the Circuit judge, and is not, therefore, an order granting a new trial on a case made or a bill of exceptions, within the meaning of the proviso in sub-division 2, Section 11.

That portion of sub-division 2, Section 11, directly involved, is as follows: "But no appeal to the Supreme Court from an order granting a new trial, on a case made or a bill of exceptions, shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant that if the order be affirmed judgment absolute shall be rendered against the appellant." It is essential to the understanding of the purpose of this proviso, affecting the power of the court to entertain such appeals, to read, in connection with the foregoing citation, the provisions that immediately follow it, viz.: "Upon every appeal from an order granting a new trial on a case made or on exceptions taken, if the Supreme Court shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant."

There are two possible readings of that part of Section 11 under immediate consideration. According to the first, no assent can be demanded unless the order appealed from was made upon a motion heard upon a case or bill of exceptions. This is the construction for which the appellant contends, urg-

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ing that the *order in question having been made upon the minutes of the judge, it was not a case in which the assent of the appellant in question could be demanded, such order not having been granted on a case or bill of exceptions. The other reading will be understood by inverting two members of the sentence, as follows: "But no appeal to the Supreme Court on a case made or bill of exceptions, from an order granting a new trial," &c. The effect of this reading would be that all appeals from orders granting new trials would demand such assent on the part of the appellant, whether heard at the Circuit upon a case, with or without exceptions, or upon the minutes of the judge.

The grammatical construction of the language quoted, aided by the punctuation of the text of the code, as it appears in the general statutes, (page 564), admits, to say the least, the possibility of the reading last above indicated. The words, "on a case or bill of exceptions," act as a condition or other qualification of some antecedent phrase. As such they do not, in a grammatical sense, necessarily qualify their immediate antecedent, so as to become a definition of the kind of order that is subject to the proviso under consideration; but they may, without forced construction, qualify the prior antecedent, in this sense having the effect of enlarging rather than narrowing the sense of that which they affect, by including all appeals from orders granting new trials, both such as are brought into the Appellate Court upon a case and upon a bill of exceptions. It is perfectly consistent that a member of a sentence, limiting the scope of a precedent, general direction should be followed by one giving the greatest amplitude to that direction consistently with such limitation; and had such been the intention of the legislature, the mode adopted is a proper and customary mode of giving expression to such intention.

Punctuation is the least reliable guide to the sense of a statute, but cannot properly be said to be without any force. In itself it is ordinarily insufficient to fix the sense of a statute where that is disputable, especially where the question is one of the force of a comma; but when the punctuation is strictly consistent with one of two senses, equally grammatical, and inconsistent with the other, it should be allowed the force of opening the

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question of *construction to receiving aid from the context, and from the nature of the purpose the statute has in view. It is certainly competent to cancel the equally weak argument that arises from the relative position in the sentence of the two clauses. The punctuation in the present case is entitled to this degree of consideration, for the insertion of a comma after the words "from an order granting a new trial," and before the words "on a case or bill of exceptions," tends to the conclusion that each of these clauses is an independent member of the sentence, having each distinct and independent effect upon the precedent general declaration, and such as is demanded by the reading suggested. It must be concluded that the reading that extends the provision as to assent to all appeals from orders granting new trials, is, to say the least, possible, and that is a sufficient warrant for going to the context for the proper solution of the question.

We come now to consider what force, in settling the construction of the words just considered, should be ascribed to the language immediately following them, which declares that "upon every appeal from an order granting a new trial upon a case made, or on exceptions taken, if the Supreme Court shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant." Construing this clause as if it was an independent provision, it becomes necessary to inquire what cases are embraced

within it. The important words here differ from those in the preceding provision; there the expression was "on a case made or bill of exceptions;" here the expression is, "on a case made or exceptions taken."

Both of these expressions, "on a bill of exceptions," and "on exceptions taken," are familiar to the courts of common law, and have been so from time immemorial. Until the recent act on the subject, exceptions were always taken at the trial. They were usually taken orally, but might be taken in writing. The taking of an exception before the jury left their seats, was an act incident to the trial that laid the foundation for a bill of exceptions. The bill of exceptions was a formal statement for the purposes of a writ of error or appeal to a court possessing the

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proper juris*diction, by way of review of the exceptions that had already been taken upon the trial.

By Section 288 of the code, the use of the bills of exceptions is dispensed with, in terms, and the practice substituted of stating the exceptions that had been taken at the trial in a case containing so much of the evidence as might be necessary to show the bearing and force of the exceptions there taken. The direct meaning, then, of the clause of the section last quoted is, that whenever an exception has been taken at the trial, and an order granting a new trial has been made, based on such exception, the Supreme Court, on appeal, in determining that no error of law is involved in such exception, must give judgment absolute. The act of 1878 (16 Stat. 698) extends the right of taking exceptions for ten days after the trial, but this does not change the nature of an exception or the substantial sense of what is meant by taking an exception.

A motion in the Circuit Court for a new trial, after a verdict on an action in the nature of a suit at law, may be made either upon exceptions taken at the trial or without any such exception on certain other familiar grounds. An order for that purpose can be reviewed in this court only so far as it rests on exceptions taken at the trial. This is equally true where the motion for the new trial is made upon the minutes of the judge, as where made on a case formally prepared for that purpose. If, then, a motion for a new trial is made at the Circuit upon the minutes of the judge, it may rest, wholly or in part, on exceptions taken at the trial, or it may rest altogether on grounds independent of any exception taken. If it rests in whole or in part on exceptions taken, then it is capable of being reviewed on appeal in this court to the extent that it involves the matter of exceptions taken. If granted on grounds other than those embraced in exceptions, it cannot be reviewed on appeal in this court, except in a case, not supposable, of being granted on grounds that in themselves could not justify the granting of a new trial in any case. Therefore every order granting a new trial that is appealable to this court is, necessarily, an order on exception taken, and thus within the description of those cases in which this court must render judgment absolute upon the right of the appellant.

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*It remains to consider whether the provisions of the section that demand the assent of the appellant to the rendition of judgment absolute were intended to embrace all cases that are included in that part of the section that declares when judgment absolute shall be rendered on such appeals. It is clear that the assent of the appellant was deemed the proper justification for such judgment absolute, as the previous part of the section would otherwise have been omitted altogether, and the direction to the court to render judgment absolute in such cases would have been made compulsory without laying any special ground therefor. The purpose of requiring the assent of the appellant then being that a certain judgment may be rendered, the cases in which the assent may be demanded should be identical with the cases in which that judgment should be rendered. The end being a judgment of a certain character, and the means to that judgment being the assent of the appellant, the language that describes the means must, in doubt, find its key of construction in that part which describes the end sought to be obtained. It would follow that the intention of this section cannot be reached by reading the language demanding the assent of the appellant as restricting that demand to cases that have been heard before the Circuit Court on a formally prepared case or bill of exceptions. Unless, then, the words declaring, directly, the cases in which the assent of appellant may be demanded are free from doubt, their sense must be accommodated to the obvious purpose of the provision. That the reading contended for by the appellant is not free from doubt is apparent on other grounds than those already considered, for that reading assumes that what the code had in view in using the language defining the cases in which assent might be demanded was the observance of certain forms of proceeding, while that which is mentioned as a form of procedure in such cases, namely, a bill of exceptions is rendered absolute by another section of the code.

Even if the considerations already advanced do no more than place the reading already suggested on grounds of probability, yet when the purpose of the provision is considered with reference to its reason, that probability must be resolved into certainty.

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*The clear object of demanding the assent of the appellant to a judgment absolute is

to discourage appeals from orders granting new trials, except where the controversy is of such a nature that it may be finally disposed of upon the argument of pure questions of law in the Appellate Court. Every appealable order granting a new trial must involve the fact that a ruling or decision made by the Circuit Court has been reversed by the same court, and, in fact, by the same judge who gave such ruling or decision, according to the general provisions of Section 289, which requires that the hearing of such motion shall be at the same term, except when the judge trying the cause shall otherwise order. It is unlikely that a judge would overrule his previous determination except upon the strongest reasons and after careful consideration. While the probabilities are thus strongly in favor of the last and deliberate conclusion reached, the inconveniences arising from appeals from orders granting new trials are, as a general rule, very great. The party allowed to appeal without restrictions from such orders has two chances, he may contend for his verdict, that has been set aside, in the appellate court, and, on being dismissed from that court without relief, may return to the Circuit and have a trial, de novo, of the whole case. The decision of the Appellate Court may possibly settle nothing of importance to the case, as, on a second trial, the subject and ground of exception may be entirely eliminated from the case. When, however, the whole question is one of law, capable of being finally disposed of by the Appellate Court, no such inconvenience arises. The policy of the provision is to leave the responsibility with the appellant in such cases of deciding for himself whether the case should be treated as one capable of being finally disposed of by the Appellate Court in the event of the failure of his appeal. If that is his judgment he expresses it by a corresponding assent in his appeal; if, on the other hand, he perceives that his case cannot properly be disposed of on such appeal, then his course is to submit to the order granting a new trial, with no ultimate loss, usually beyond that of some technical advantage gained at the first trial from an unwary adversary, who will be better instructed on the second trial.

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*This being the object in view, it is apparent that drawing a distinction between cases heard on formal papers and those heard on an informal presentation on the minutes and memory of the judge, is senseless. If a case is settled, it is the minutes and the memory of the judge that, in case of dispute, must settle it. The whole distinction between motions heard upon the minutes of the judge and upon a case formally settled, turns simply on the propriety of having the facts either acted upon or placed in a position for future action while the memory of the judge is fresh, his minutes and his memory being, in both cases, the test of what occurred at the trial.

It must be concluded that the notice of appeal was irregular and the appeal should be dismissed. The counsel for appellant upon the argument, expressed a desire that in the event that the notice of appeal should be adjudged defective he might be allowed to amend. Such application for amendment should be made in writing and upon due notice, but in the present case, even if made in proper form, the court having looked into the papers and become satisfied that there is no merit in the appeal, can see no ground for the exercise of its discretion by allowing the amendment asked.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. 112

(Case No. 907.)

PARKER & CO. v. JACOBS.

(April Term, 1880.)

[1. *Chattel Mortgages* ⇨17.]

The rule at law and in equity stated, as to rights of a mortgagee of personal property in which the mortgagor had no interest, actual or potential, at the date of his mortgage.

[Ed. Note.—Cited in Holliday v. Poston & Son, 60 S. C. 106, 38 S. E. 449; Creech v. Long, 72 S. C. 32, 51 S. E. 614.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 55–58; Dec. Dig. ⇨17.]

[2. *Estoppel* ⇨37.]

Where such mortgage has been executed, and an antecedent creditor subsequently obtains judgment against the mortgagor, and levies upon the property before it is delivered to the mortgagee, the mortgagee is entitled to recover its possession from the officer making the levy.

[Ed. Note.—Cited in Hirshkind & Co. v. Israel, 18 S. C. 174; Akers v. Rowan, 33 S. C. 475, 12 S. E. 165, 10 L. R. A. 705; Perkins v. Loan & Exchange Bank, 43 S. C. 45, 20 S. E. 759; Armour & Co. v. Ross, 75 S. C. 297, 55 S. E. 315.

For other cases, see Estoppel, Cent. Dig. § 94; Dec. Dig. ⇨37.]

[3. *Chattel Mortgages* ⇨191.]

Where it was stipulated in such mortgage that the mortgaged property should be delivered to the mortgagees in Charleston to be sold by

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them *as factors, a delivery of the property to a railroad company for shipment consigned to the mortgagees, is not a delivery to them, nor a transfer of the legal title.

[Ed. Note.—Cited in Matheson v. Southern Ry., 79 S. C. 158, 60 S. E. 437; Whaley v. Atlantic Coast Line R. Co., 84 S. C. 190, 65 S. E. 1022.

For other cases, see Chattel Mortgages, Cent. Dig. § 417; Dec. Dig. ⇨191.]

[4. *Action* ⇨25.]

A plaintiff, since the code, can enforce an equitable right to property in dispute under a

form of action which seeks relief formerly obtainable only in a court of law.

[Ed. Note.—Cited in Gary v. People's Nat. Bank, 26 S. C. 548, 2 S. E. 568, 4 Am. St. Rep. 733.

For other cases, see Action, Cent. Dig. §§ 124–145, 147–149, 153, 156–159, 313; Dec. Dig. ⟸25.]

[This case is also cited in Davis v. Childers, 45 S. C. 144, 22 S. E. 784, 55 Am. St. Rep. 757, as to equitable mortgages, and in Keenan v. Leslie, 79 S. C. 473, 60 S. E. 1114, and distinguished therefrom.]

Before Fraser, J., Williamsburg, February, 1880.

Action commenced in July, 1879, by J. H. Parker & Co., against Louis Jacobs, sheriff of Williamsburg county. The presiding judge ordered a non-suit upon the motion of defendant. Plaintiff appealed. The property in dispute was levied upon as the individual property of W. A. Ward. The other facts are stated in the opinion.

Messrs. Dozier & Gilland, for appellants.

Mr. J. A. Kelley, contra.

August 31st, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover the possession of ten barrels of spirits of turpentine and forty-eight barrels of rosin, upon which the defendant had levied under an execution against Ward & Hinson, and which the plaintiffs claimed under a mortgage executed by Ward, one of the members of that firm, to them, prior to the recovery of the judgment upon which such execution was issued.

It did not appear from the original record submitted here whether the turpentine and rosin, the subject of this suit, was the product of a turpentine farm in the possession or under the control of the mortgagor, Ward, at the time the mortgage was executed, or whether it was subsequently bought by him; and the counsel engaged in the cause agreed that the Circuit judge should be requested to amend the "case" by a further statement of the evidence upon this point. In this additional statement, which has been filed with the original record, as a part thereof, the Circuit judge says: "There was no evidence before me as to whether the crude turpentine, from which the rosin and

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spirits *were made, was the product of a turpentine farm worked by W. A. Ward, or was bought by him. * * * The witness, W. A. Ward, the mortgagor, only said that the rosin and spirits of turpentine were made in his 'business in this county,' which included purchasing crude turpentine as well as making it on turpentine farms." Now, as the burden of proof is upon the plaintiffs, and as they, according to this statement, have not shown that the property in dispute was in the possession of the mortgagor at the time of the execution of the mortgage, or that it was the natural product of anything then in his possession or under his control, the precise question which we are first called upon to consider, is whether a mortgage of personal property of which the mortgagor has no possession or right of possession at the time, and which is not the natural product of something of which he then has either the possession or right of possession, confers any rights upon the mortgagee, after the property is acquired by the mortgagor, and before it is delivered to or taken possession of by the mortgagee under the mortgage.

There can be no doubt that the rule at law is that it is necessary to the validity of the mortgage that the mortgagor should have a present property, either actual or potential, in the thing mortgaged, (1 Jones on Mortgages, § 149;) but in equity the rule is different. As is said by Judge Story in Mitchell v. Winslow, 2 Story 630 [Fed. Cas. No. 9,673]: "It seems to me the clear result of all the authorities that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or if personal property, whether it is then in esse or not, it attaches, in equity, as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy." This doctrine is fully established by the case of Holroyd v. Marshall, 10 H. L. Cas. 191, and is recognized in McCaffrey v. Woodin, 65 N. Y. 459.

We take it, therefore, that a mortgage on personal property in which the mortgagor has no present interest, either actual or potential, is ineffectual to transfer the legal

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title to such property *when subsequently acquired by the mortgagor, unless, when acquired, possession thereof is given to the mortgagee or taken by him under the mortgage, (Moody v. Wright, 13 Mete. 32; Williams v. Briggs, 11 R. I. 476, and many other cases there cited,) but that, in equity, such a mortgage is effectual to charge the property, as soon as it is acquired by the mortgagor, and before possession is obtained by the mortgagee, with an equitable lien which will prevail against a subsequent judgment or attaching creditors. Holroyd v. Marshall, 10 H. L. Cas. 191; Mitchell v. Winslow, 2 Story 630 [Fed. Cas. No. 9,673]; Smithurst v. Edmunds, 14 N. J. Eq., 1 McCarter 408; McCaffrey v. Woodin, 65 N. Y. 459.

Let us apply these principles to the case under consideration. The language of the mortgage clearly shows an intention to give a lien, not only upon the spirits of turpentine and rosin then in the possession of the mortgagor, but also upon all "which he may produce or prepare for market or otherwise acquire." It is certainly broad enough to

cover, not only the turpentine and rosin which might be the product of either of the farms mentioned in the mortgage, but also any that the mortgagor might purchase or otherwise acquire. Assuming then that the property in dispute was not the product of either of the farms mentioned in the mortgage but was bought by the mortgagor subsequent to the execution of the mortgage, yet, according to the principles above established, the plaintiffs were entitled to an equitable lien thereon as soon as it was acquired by the mortgagor, though they could not be said to have a legal right thereto until it was delivered to or taken possession of by them under the mortgage.

The next inquiry is, whether the property in dispute, after it was acquired by the mortgagor, was delivered to or taken possession of by the mortgagees before the rights of third persons had intervened by the levy made by the sheriff. According to the terms of the mortgage the mortgagor bound himself to "consign, send, ship and deliver to the said J. H. Parker & Co., in Charleston, all the crude turpentine, rosin and spirits of turpentine already made by him and to be made by him, or owned or to be owned by him; * * * also, all the crude turpentine, rosin and spirits of turpentine that he shall

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purchase in his *general business, to be sold by the said J. H. Parker & Co., as factors, on the usual commissions," &c. The delivery by the mortgagor to the railroad company of the property in dispute, to be carried to the plaintiffs, in pursuance of the above recited covenant, was not, in our judgment, such a delivery to, or taking possession of, by the mortgagees under the mortgage as would perfect their legal title. The purpose was that the property should be delivered to the plaintiffs to be sold by them as factors. It never was actually delivered into the possession of the mortgagees, and the legal title was never transferred to them. The test of this is that if the property had been lost or destroyed before it reached Charleston the loss would have fallen upon the mortgagor and not upon the mortgagees. The agreement was to deliver in Charleston, and until the property reached that place it could not be said to be delivered in accordance with the terms of the agreement, and, therefore, the legal title never passed to the plaintiffs by delivery. There was no transfer, by writing, as in the cases cited upon this point, by the appellants; the mortgage, as we have seen, being insufficient for that purpose, so far as the subsequently acquired property was concerned, and, as there was no delivery, the legal title never passed.

The plaintiffs must, therefore, rely solely upon their equitable rights, which, as we have seen, they acquired by virtue of the mortgage, even before the property was delivered to or taken possession of by them. The question then is narrowed down to the inquiry whether this equitable lien of the plaintiffs can prevail against the execution under which the defendant levied upon the property in dispute. This execution was issued to enforce a judgment recovered in March, 1879, and could have no lien on the property until it was levied, and as the equitable lien of the plaintiffs arose as soon as the property was acquired by the mortgagor, it was, of course, prior, in point of time, to the lien of the execution. The real question, therefore, is whether an equitable lien can prevail against the lien of an execution subsequently acquired. In Dow v. Ker, Speers Eq. 417, Johnson, Ch. says: "The language of all the books is that an agreement to mortgage is an equitable lien and has precedence of subsequent judgments and all general cred-

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itors." To support this proposition *he cites Massey v. McIlwain, 2 Hill's Eq. 428; Reddos v. Gaillard, (which should be Read v. Administrator of Simons,) 2 Desaus. 552 [2 Am. Dec. 296]. To same effect, see, also, Welsh v. Usher, 2 Hill's Eq. 167 [29 Am. Dec. 63]: Bank v. Campbell, 2 Rich. Eq. 191. It is true that the question in all these cases arose prior to the act of 1843, and, therefore, if, as in the case of Boyce v. Shiver, 3 S. C. 515, the controversy was between an equitable mortgagee and a subsequent creditor or purchaser, the result would be different. But here there is not only no evidence that the defendant or those whom he represents occupies the position of a subsequent creditor or purchaser, but from the fact that the judgment was recovered in March, 1879, only about two months after the execution of the mortgage, the reasonable inference is that the creditor, whose execution the defendant was attempting to enforce, was an antecedent creditor.

The only remaining question is whether the plaintiffs can, in this action which seeks relief formerly obtainable only in a court of law, enforce their equitable right to the possession of the property in dispute. Prior to the code, this unquestionably, could not have been done. That statute has, however, introduced fundamental changes in the forms of proceedings for the enforcement and protection of rights in the courts of this state. One of the most important of these changes is that found in Section 92: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." Hence when one comes into court asking for the enforcement or protection of his rights, it does not matter what the nature of his rights may be, whether legal or equitable, he must pursue them

by the same form of action. If his allegations and proofs satisfy the court that he is entitled to relief he will obtain it, and the fact that his title to such relief is based upon an equitable rather than a legal right cannot affect or be affected by the form of the action, for, as we have seen, the code provides that there shall be but one form of action for the enforcement and protection

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of both classes of rights. Such is *conclusively shown to be the proper and legitimate construction of the code by Mr. Pomeroy in his work on Remedies, Chap. I., §§ 2 and 5, although a different view seems to prevail in some of the states which have adopted this system of procedure. As is said by Johnson, J., in Crary v. Goodman, 12 N. Y. 266: "Since the enactment of the code the question is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defence against the plaintiff's claim, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for." Or, as is said by Sanderson, J., in Grain v. Aldrich, 38 Cal. 514: "Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief either at law or in equity." If, therefore, the plaintiffs, while failing to show that they have a legal right to the possession of the property in dispute have succeeded in showing an equitable right to such possession, we see no reason why they should be denied the relief demanded in this action, simply because their title to such relief is based upon an equitable and not upon a legal right.

The judgment of the Circuit Court is reversed and a new trial is ordered.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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14 S. C. 118

(Case No. 908.)

STATE v. GLENN.

(April Term, 1880.)

[1. *Bastards* ⇐35.]

Under Article IV, Section 1, of the constitution of this state, it is competent for the legislature to confer upon trial justices jurisdiction of the cases mentioned in Article IV., Section 22, including bastardy. These sections, together with Article I., Section 19, construed.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 80–90; Dec. Dig. ⇐35.]

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[2. *Bastards* ⇐35.]

*No jurisdiction to hear and determine cases of bastardy has been conferred by law upon trial justices. Under Chapter LXVIII., of general statutes, original jurisdiction in such cases belongs to the Courts of General Sessions.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 80–90; Dec. Dig. ⇐35; Courts, Cent. Dig. § 1199.]

[3. *Courts* ⇐160.]

The grant to an inferior court out of the jurisdiction previously exercised by a court of general original jurisdiction, cannot operate as an exclusion of such superior court, unless made so by the terms of the grant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 405; Dec. Dig. ⇐160.]

[4. *Bastards* ⇐35.]

The Court of General Sessions is not excluded by the constitution from taking jurisdiction in cases of bastardy.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 80–90; Dec. Dig. ⇐35.]

[5. *Bastards* ⇐83.]

One convicted of bastardy cannot be sentenced to imprisonment in default of giving bond for the maintenance of the bastard child.

[Ed. Note.—Cited in State v. Quick, 25 S. C. 111.

For other cases, see Bastards, Cent. Dig. § 210; Dec. Dig. ⇐83.]

[This case is also cited in State v. Brewer, 38 S. C. 263, 16 S. E. 1001, 19 L. R. A. 362, 37 Am. St. Rep. 752, and distinguished therefrom.]

Before Northrop, J., Newberry, May, 1876.

Indictment for bastardy. Defendant was convicted and sentenced, and appealed upon the several grounds considered in the opinion of the court; but counsel for both appellant and respondent argued only the last ground, viz., whether the alternative sentence of imprisonment was within the power of the court.

Messrs. Pope & Fair, for appellant.

Mr. Solicitor Ball, contra.

August 31st, 1880. The opinion of the court was delivered by

WILLARD, C. J. The defendant was arrested under a warrant issued by a trial justice upon a charge of bastardy. Having traversed the charge, the case was transmitted to the General Sessions, and an indictment therefor found, and conviction had under such indictment, and sentence pronounced by the court under Chapter LXVIII. of the general statutes, p. 376. The first question presented by the grounds of appeal is whether the constitution has granted exclusive original jurisdiction in cases of bastardy to justices of the peace so as to exclude trial justices from assuming such jurisdiction. If the conclusion is reached that it was competent for the general assembly to confer on trial justices original jurisdiction in cases of bastardy, then it will be necessary to inquire whether, in the present instance, such jurisdiction has been conferred.

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If it should appear that no such *grant of jurisdiction has, in fact, been made to trial justices, it will become necessary to inquire whether the Court of General Sessions is competent under the constitution and the laws to assume such jurisdiction. If so, whether such jurisdiction was properly assumed in the present case, and whether the judgment of the Court of General Sessions, appealed from, is in conformity with law.

The first of these inquiries involves the question whether a trial justice can exercise the jurisdiction conferred by Section 22, Article IV. of the constitution, consistently with its provisions. That section provides "that justices of the peace, individually, or two or more of them jointly, as the general assembly may direct, shall have original jurisdiction in cases of bastardy," &c. If this is to be regarded as a grant of exclusive jurisdiction, then trial justices are excluded from exercising the jurisdiction here conferred upon justices of the peace. There are no words in the constitutional grant importing exclusive jurisdiction, and if that conferred is of that nature, it must arise by implication. If the grant of jurisdiction, in case of bastardy, is exclusive, then all the jurisdiction conferred upon justices of the peace by Section 22, Article IV., must be regarded as of the same nature, and, in that case, trial justices, and other inferior courts, must be excluded from participating in such jurisdiction. The jurisdiction conferred on justices of the peace by that section embraces, in addition to cases of bastardy, actions ex contractu and ex delicto, and for fines and forfeitures, under limitations, as it regards the amount involved, prosecutions for assault and battery and other penal offences less than felony, punishable by fines only. To this enumeration is added, by Section 19, Article I., offences less than felony, where the penalty does not exceed a fine of $100 and imprisonment for thirty days. To hold, then, that the jurisdiction conferred on justices of the peace by Section 22, Article IV., is exclusive, would be equivalent to holding that the entire jurisdiction proper to the inferior courts of this state is vested exclusively in justices of the peace, except that over offences punishable by fine not exceeding $100 and imprisonment not exceeding thirty days. Such a conclusion

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would be inconsistent *with a fair construction of the provisions of Section 1, Article IV., as will hereafter appear.

It is necessary, then, to inquire whether a proper construction of Section 1, Article IV., is consistent with the conclusion that the grant to justices of the peace in Section 22, Article IV., is exclusive in its nature; for, if it is not consistent, clearly no implication is admissible having the effect to place the language of Section 22 in antagonism with that of Section 1 of the same article of the constitution.

Section 1, Article IV., is as follows: "The judicial power of this state shall be vested in a Supreme Court, in two Circuit Courts, to wit, a Court of Common Pleas, having civil jurisdiction, and a Court of General Sessions, with criminal jurisdiction only, in Probate Courts, and in justices of the peace. The general assembly may also establish such municipal and other inferior courts as may be deemed necessary." It must be conceded that this grant of judicial power is exhaustive, so that no other courts than those named, or otherwise provided for, can be constitutionally created by the legislature. The constitution recognizes the distinction between the superior and inferior courts of law, as was held in State v. Fillebrown, 2 S. C. 404, and, accordingly, must be regarded as recognizing the distinction involved in the application of the terms *superior* and *inferior* to the respective jurisdictions conferred upon such courts. Regarding then the whole inferior jurisdiction of the state as vested, either actually or contingently, by the section in question, it remains to inquire what disposition is made by Section 1, Article IV., of that inferior jurisdiction. The effect of the clause of Section 1 that provides that "the general assembly may also establish such municipal and other inferior courts as may be deemed necessary," is the same as if the preceding clause had read *and in justices of the peace and in municipal and other inferior courts as the general assembly may deem necessary.* In the event of the creation of *municipal and other inferior courts*, their jurisdiction must of necessity embrace part of that intended to be conferred on justices of the peace, and, therefore, the grant to justices of the peace in Section 1, Article IV., cannot be read as exclusive. This section must then be read as conferring

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the en*tire inferior jurisdiction on justices of the peace and such municipal or other inferior courts as the legislature should thereafter create for such purpose, and whenever such courts should be called into existence, to the extent deemed requisite by the legislature they would have concurrent jurisdiction with justices of the peace.

If, then, an exclusive character is denied to the jurisdiction conferred upon justices of the peace by a necessary construction of the terms of Section 1, it is clear that it is not competent to enlarge the sense of the subsequent twenty-second section, by means of implication, so as to produce an opposite effect. In the one case the implication rests on the high ground of necessity, for without it the provision cannot take proper effect, while no such ground exists for enlarging the sense of Section 22. It must be concluded then that the grant contained in Section 22 to justices of the peace does not contemplate

vesting exclusive jurisdiction in such officers, but that the whole jurisdiction conferred upon justices of the peace is capable of being made concurrent in justices of the peace and such municipal or other inferior court as the legislature may see fit to create.

It may be argued that Section 19, Article I., marks out the proper jurisdiction capable of being exercised by such municipal or other inferior courts as the legislature may see fit to create, and that by reading that section with Section 1, Article IV., the conclusion may be reached that, as it regards the particular jurisdiction specified in Section 19, Article I., concurrent jurisdiction may exist between justices of the peace and municipal or other inferior courts created for that purpose, and as to the residue of the jurisdiction of justices of the peace conferred by Section 22, Article IV., such jurisdiction may be regarded as exclusive in them. In order to reach such a construction it is necessary to regard Section 19, Article I., as intended to define and circumscribe the jurisdiction proper to be exercised by such inferior courts as the legislature might see fit to establish, by limiting such inferior courts to the particular jurisdiction provided for in that section. It is necessary then to examine that section to see if such an intention can be made out from it.

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*Section 19 is as follows: "All offences less than felony, and in which the punishment does not exceed a fine of $100 or imprisonment for thirty days, shall be tried summarily before a justice of the peace or other officer authorized by law, on information under oath, without indictment or intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher crime or offence unless on presentment of a grand jury, except in cases arising in the land and naval service, or in the militia when in actual service in time of war or public danger." The direct object of this section is to regulate the method of making accusations of crime, as appears not only by the language of the section itself, but by its position in the first article of the constitution entitled the "declaration of rights," which is particularly concerned with the rights and immunities of the citizen, as such, as in the familiar bill of rights. It recognizes the fact that the jurisdiction of justices of the peace is not exclusive, as its powers are to be concurrently exercised by "a justice of the peace or other officer authorized by law." As we have seen that Section 1, Article IV., vests the whole judicial power so as to exclude all other courts and officers, not therein named or provided for, from participating in the exercise of such power, the language of Section 19 must be read as intended to apply to such municipal or inferior courts as the legislature might create for that purpose under the authority of Section 1, Article IV. Section 19, Article I., cannot be regarded as intended to define the jurisdiction proper for such inferior courts as the legislature may create under Section 1 of Article IV. Such is neither the language and import of that section nor the proper province of the article to which that section appertains. It is true it might have the incidental effect of vesting the particular jurisdiction provided for in it, if elsewhere the constitution had failed to effectually vest such powers. Section 19 does, in fact, vest jurisdiction in the inferior courts in excess of that granted by Section 22, Article IV., for under the last named section, justices of the peace had jurisdiction of penal offences less than felony, only where punishable by fines alone, while Section 19 extends that jurisdiction to offences of that

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class when punishable by im*prisonment of a limited duration. State v. Fillebrown, 2 S. C. 404. While, then, Section 19 does actually vest jurisdiction, on the principle that words creating a jurisdiction must, if possible, where necessity requires it, be regarded as vesting it for execution, yet there is nothing to lead to the conclusion that in framing Section 19 the scope of the powers of the inferior courts, other than justices of the peace, was before the minds of its framers, so as to warrant the inference that they intended it to operate as an organic disposition of the whole subject of the jurisdiction of such inferior courts. If such could be its effect, the only jurisdiction that could be exercised by municipal courts or inferior courts other than justices of the peace would be that over offences less than felony, where the punishment prescribed by law was either a fine, not exceeding $100 or imprisonment not exceeding thirty days, or where such fine or imprisonment might be in the alternative. This would not enable such municipal or other inferior courts to examine and commit for offences of a higher grade than those cognizable originally before themselves, a result that cannot be supposed to have been intended by the constitution. It would also exclude all proceedings for the enforcement of penalties or forfeitures where fines are imposed, with imprisonment as a means, merely, of enforcing the payment of such fines. It should not be concluded, as a mere inference, from doubtful language, that the intention was to prevent the legislature from conferring such powers on municipal courts, or even upon other inferior courts. It is, therefore, clear that Section 19 was not intended to mark out the jurisdiction of such courts as the legislature was authorized to create.

Trial justices courts must be regarded as inferior courts in the sense of Article IV., Section 1, and entitled to concurrent jurisdiction of the cases included in Section 22, Article IV., embracing that of bastardy, if the views already advanced are capable of

being maintained. It remains to consider what judicial support these views have received from the adjudicated cases that have arisen under the constitution.

State v. Fillebrown, 2 S. C. 404. The exact question in the present case was not necessarily passed upon in the case just cited. The question there was as to the juris-

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diction of trial *justices on prosecutions of assault and battery, a jurisdiction properly included in that conferred by Section 19, Article I., under the provisions of the act of 1870, (14 Stat. 376, 402,) making that offence punishable in accordance with the limits imposed by Section 19, Article I., where the offence was not of a high and aggravated nature. Chief Justice Moses, in the opinion of the court, places a construction on the words "inferior courts," as contained in Section 1, Article IV., in harmony with the views just expressed. He holds that the intention was that under the name of inferior courts, courts might be created by the legislature with jurisdiction and powers concurrent with those of justices of the peace, and not necessarily inferior to them. That case leaves open the question whether cases included in Section 22, Article IV., but not included in Section 19, Article I., are cognizable by any other inferior court than that of justices of the peace within which class the case of bastardy comes. It is also said in that case: "A court in which a justice of the peace presides is an inferior one, and the jurisdiction accorded to it by the constitution is not exclusive because the general assembly may establish such other inferior courts as may be deemed necessary; and the right to do so being permitted by the constitution, such other court is as much a court established by the constitution as is that of a justice of the peace." While this remark was not necessarily demanded by the nature of the question then before the court, yet it derives importance from the use that was made of it in the case that will be next considered.

Rhodes v. Railroad, 6 S. C. 385. The question in that case involved, directly, the inquiry whether the jurisdiction conferred by Section 22, Article IV., on justices of the peace was exclusive of a trial justice's court considered as an inferior court in the sense of Section 1, Article IV. It related to the cognizance of actions ex delicto when the damages laid were less than $100. It was there held that such jurisdiction could be exercised by trial justices, and the decision was placed upon the proposition already cited from State v. Fillebrown, namely, that the authority to establish inferior courts embraced that of creating courts with jurisdiction concurrent with that of justices of the peace.

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*It is apparent that the views already expressed have received the judicial sanction of this court, and no ground appears that should weaken the weight of that authority. It must then be concluded that it was competent for the legislature to confer upon the trial justices jurisdiction in cases of bastardy, which brings us to the second question, whether such jurisdiction has been conferred.

It is claimed that Chapter LXVIII. of the general statutes, p. 376, confers original jurisdiction in cases of bastardy upon trial justices. Chapter LXVIII. does not permit the truth of the charge of bastardy when denied by the defendant to be inquired into by the trial justice who has issued the warrant. It is required that in case of the denial of the charge an issue shall be made up and tried in the Court of General Sessions, and if conviction is had upon such issue, the judgment should be rendered by that court. These provisions tend to restrain the functions of the trial justices in such cases to the performance of mere ministerial acts, namely, to issuing the warrant and when the defendant admits his culpability to taking the security provided by law in such cases. By original jurisdiction we must understand power to hear and determine the cases brought within it, and incidentally to decide all questions of law and fact involved in such cases. No such power appears to have been conferred upon trial justices.

The next question presented is, whether it was competent for the Court of General Sessions to take jurisdiction of the case. It is clear that Chapter LXVIII., so far as it confers original jurisdiction in cases of bastardy, confers it upon the Court of General Sessions, as appears from the reasons already stated. Unless, then, there is some constitutional objection to such grant, the General Sessions had competent authority to proceed in the present case.

It is immaterial to the present case whether Chapter LXVIII. of the general statutes is to be regarded as confirming a jurisdiction previously existing in the Court of General Sessions, or as intending an original grant of jurisdiction, for in either case to deprive that court of the jurisdiction thus conferred,

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it would *be necessary to point to some clause of the constitution having the effect to exclude it from the exercise of such jurisdiction.

The constitution no where, in express terms, excludes the General Sessions from exercising jurisdiction in cases of bastardy or the general jurisdiction to which that case is capable of being referred. If excluded, then, it must be by implication. Such an implication may arise out of two classes of provisions, either out of such as serve to define and limit the jurisdiction of that particular court, or such as grant jurisdiction to some other court in terms inconsistent with its exercise elsewhere. If the impli-

cation contended for in this case arises, it must be from provisions conferring jurisdiction on other courts, for nothing appears in the constitution elsewhere, that is, Section 19. Article I., already considered, that can be construed as directly intended to limit and define the jurisdiction of the General Sessions beyond keeping it within the limit of criminal jurisdiction or upon which such an implication can arise. We are then to look to the constitution to see whether jurisdiction in cases of bastardy has been conferred upon some other court so effectively as to imply the exclusion of the Court of General Sessions from the exercise of such jurisdiction. In other words, the inquiry is, has some other court than the General Sessions exclusive jurisdiction in cases of bastardy? Such jurisdiction may be conferred eo nomine or as appertaining to a class made the subject of such exclusive jurisdiction. A grant of jurisdiction does not, in itself, carry the idea of an exclusive character. Our constitution is silent where concurrent jurisdiction is intended, and only speaks when the design is that it shall be exclusive. A grant of jurisdiction to a court, in terms exclusive, may properly be regarded as a limitation in express terms of the jurisdiction of all other courts to a corresponding extent. The constitution contains no express grant of exclusive jurisdiction that can possibly include the case of bastardy. The question then arises whether the terms in which jurisdiction is granted in that particular case or in the class of cases to which it appertains, imply the exclusion of all other courts from participating in such jurisdiction. It is impossible to answer fully this question in its special bearing on the case on hand without considering a much wider range of objects.

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*It necessarily brings into consideration the general scheme of the constitution as it regards the distribution of various jurisdictions that fall under the head of "judicial power." General language, as well as special, must receive attention in this inquiry. This necessity is specially imposed by the fact that in Section 1, Article IV., a distinction is clearly drawn between the classes of superior and inferior courts, while in Section 22 that particular jurisdiction in bastardy is conferred eo nomine on a court appertaining to the class of inferior courts. The argument has to be answered, that as the constitution recognizes the existence of superior and inferior courts, and must, therefore, be regarded as recognizing the corresponding distinction arising from the nature of their jurisdiction, and as it confers jurisdiction in cases of bastardy on a court of inferior jurisdiction that it has impliedly excluded the Court of General Sessions as a court of superior jurisdiction from the exercise of such jurisdiction, upon the idea that superior jurisdiction is proper to the superior courts, and, therefore, exclusive in them, while that which is inferior in its nature is proper to the inferior courts, and, for the like reason exclusive in them.

The sections of the constitution that must be construed together for the purpose just indicated, are the first, eighteenth and twenty-second sections of Article IV. Section 1, Article IV., is as follows: "The judicial power of this state shall be vested in a Supreme Court, in two Circuit Courts, to wit, a Court of Common Pleas having civil jurisdiction, and a Court of General Sessions with criminal jurisdiction only, in Probate Courts and in justices of the peace. The general assembly may also establish such municipal and other inferior courts as may be deemed necessary." Section 18 is as follows: "The Court of General Sessions shall have exclusive jurisdiction in all criminal cases that shall not be otherwise provided for by law." * * * Section 22 is as follows: "Justices of the peace, individually, or two or more of them jointly, as the general assembly may direct, shall have original jurisdiction in cases of bastardy, and in all matters of contract, and actions for the recovery of fines and forfeitures where the amount claimed does not exceed $100, and such jurisdiction as may be provided by law

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in actions ex *delicto, where the damages claimed do not exceed $100, prosecutions for assault and battery and other penal offences less than felony, punishable by fines only."

We have already considered whether the grant of jurisdiction in cases of bastardy excludes other inferior courts, such as trial justices, and it remains to be considered whether it excludes the Court of General Sessions. It is very clear that if the whole question depended upon the force of the language of Section 22, the conclusion that has been reached as it regards trial justices would contain its entire solution. But there remains for examination certain considerations growing out of the force of Section 1, Article IV., in so far as it draws a distinction between superior and inferior courts. Reverting to the argument that has been mentioned as needing an answer, it may be observed that it does not follow that because the constitution may have indicated the jurisdiction proper to the inferior courts, and thus impliedly recognized the jurisdiction proper to the superior courts, that it is hence to be inferred that such jurisdictions are to be regarded as exclusive, simply because respectively proper to the courts possessing them. No such precise distribution is possible as that which would assign to each class of courts that which is proper to it, and in its nature improper for any other court. It is in the nature of the administration of justice that jurisdiction should overlap and be, to a large extent, concurrent between courts possessing different powers and

proceeding by different methods. But if such a distribution was possible, the terms superior and inferior, for the want of the means of rendering them precise, would not serve the purpose of indicating such a distribution. It would follow from this that what is proper for one court is not necessarily improper for another, hence no implication in favor of the exclusive character of any jurisdiction can arise simply from the fact that such jurisdiction is proper to the court upon which it has been conferred.

The delegation of "judicial power" made by Section 1, Article IV., is necessarily exhaustive, for the judicial power mentioned means the whole judicial power when, as is here the case, nothing appears to give it a less extensive signification, and the effect of vesting the whole judicial power is to leave

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nothing *appertaining to such power capable of being vested in any other manner. It would therefore follow, as has been noticed in another place, that it is not competent for the legislature to create any other courts to participate in the exercise of the judicial power of the state than such as are either named or provided for in Section 1, Article IV. The grant may, consistently with the terms employed, be regarded as a grant in solido made to the courts indicated, for the purpose of excluding all other courts, and yet not operate as a partition of such judicial power among such courts. The question of partition is one of intention that must, as has been said, be reached, if at all, in the present case by implication.

The first consideration to be adverted to as bearing on the question of the office intended for Section 1, Article IV., and tending to exclude the idea that it was intended by that section to mark out the proper office for the several courts and classes of courts provided for in it, is the fact that this purpose in regard to each of these courts and classes of courts is accomplished in other independent sections. The jurisdiction of the Supreme Court is defined in Section 4, that of the Common Pleas in Section 15, that of the General Sessions in Section 18, that of the Probate Courts in Section 20, and that of justices of the peace in Section 22. While the jurisdiction of the inferior courts, though not defined fully as such, is treated of in Section 19, Article I. It is to these sections last named that we must look, in the first instance, to find the partition of the judicial power intended to be made by the constitution, and no necessity exists for resorting to Section 1 for such purposes.

It is clear that in a limited aspect, Section 1 does make a partition of power. It confers upon the Common Pleas civil jurisdiction and upon the General Sessions criminal jurisdiction. Here is an instance in which jurisdiction is distributed in a manner that implies exclusion. It recognizes a fundamental division of jurisdiction, and separately and distributively vests the several kinds each in a court of a particular designation. Under such circumstances for the Court of Common Pleas to assume the exercise of criminal administration, or for the Court of General Sessions to exercise civil jurisdic-

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tion would contra*dict the terms in which their jurisdictions are respectively conferred, and thus violate the purpose of the constitution. No such recognition of the divisible nature of jurisdiction is found in Section 1, Article IV., in its application to the Supreme Court, the Probate Courts and to justices of the peace, nor any line drawn by which their jurisdiction can be distinguished from that divided between the Common Pleas and General Sessions, nor by which these courts can be classified as superior and inferior. It is only when the subject of creating municipal and other inferior courts is dealt with that the distinction appears. Whatever difference the constitution makes in the fundamental character of the Supreme Court, the Common Pleas and General Sessions, the Probate Courts and justices of the peace, apart from the distribution of civil and criminal jurisdiction, as between the two Circuit Courts, is accomplished altogether by those sections that severally define the jurisdictions of these courts respectively. In an indirect sense, Section 1 may be regarded as operating to establish a particular jurisdiction in the Common Pleas and General Sessions. The other sections of this article that define and limit the jurisdiction of the Supreme Court, the Probate Courts and justices of the peace, leave a residuum of jurisdiction not granted away, and this necessarily appertains to the remaining courts whose jurisdictions are not limited either by their own nature or by any provision of the constitution. As then, under Section 1, no courts other than those enumerated can be created except for the exercise of inferior powers, it follows that it is not competent for the legislature to divest the Courts of Common Pleas and General Sessions of that part of their jurisdiction that answers to the designation superior.

It is evident from the foregoing that no general partition of jurisdiction was intended by Section 1, Article IV., and that as between the Courts of General Sessions and justices of the peace it furnishes no test of what matters may be concurrent between the two courts.

It is necessary then to inquire whether competency has been denied to the General Sessions by Section 22, Article IV., as it regards any of the matters brought within the jurisdiction of justices of the peace by that

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section. Is there anything in the *nature of a grant of jurisdiction to an inferior court that necessarily removes such jurisdiction from the superior courts? The object of cre-

ating inferior courts is two fold: first, to afford a simple and inexpensive mode of proceeding in cases of small magnitude; and, second, to relieve the superior courts of the burden of small suits. In practice this result has been attained by opening inferior courts in such cases, and denying costs and expenses incurred in such prosecutions in a superior court where a remedy might have been found in an inferior court. This object rests on prudential grounds and does not touch the fundamental nature of grants of jurisdiction. There is no recognized principle by which a grant to an inferior out of the jurisdiction previously exercised by a court of general original jurisdiction can operate as an exclusion of such superior courts unless made so by the terms of the grant. If the existence of concurrent jurisdiction could be regarded in no other light than as the consequence of imperfection in the distribution of jurisdiction, there might be some ground for assuming the possibility of such a principle, but, so far from that being the case, the concurrence of jurisdictions, as has been already said, is a positive aid to the administration of justice. On the other hand, our constitution undertakes to say when the jurisdiction granted by it shall be exclusive in many instances, and the absence of any expression of an intent that the jurisdiction conferred upon justices of the peace shall exclude the Courts of Common Pleas and General Sessions should be referred to the absence of any such intent, and it is manifestly improper to supply words omitted, when to do so confers characteristics or a grant of jurisdiction that do not appertain to the nature of such grants, and with no other justification than a theoretical objection to concurrent jurisdiction between a superior and inferior court. It follows that the grant of jurisdiction in cases of bastardy, in Section 22, does not operate to deprive the Court of General Sessions of jurisdiction in such cases.

Section 18 has already been construed by this court in State v. Simmons, 4 S. C. 72, as not preventing the Court of General Sessions from retaining jurisdiction in certain criminal cases, notwithstanding the creation of a court

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by the legislature for *the purpose of exercising such jurisdiction exclusively. The conclusion of the court in that case that the legislature could not constitutionally take away any part of the general criminal jurisdiction of the Court of General Sessions may be referred to the ground already presented by assuming that the criminal court of Charleston, as constituted by the act of 1872, did not answer the description of courts which the legislature, under Section 1, Article IV., was competent to create, inasmuch as it was intended to encroach upon the superior jurisdiction of the General Sessions, and, therefore, was not an inferior court. The eighteenth section was evidently intended to exclude all other courts from participating in the criminal jurisdiction in the General Sessions, except where, under the constitution itself, or some law passed in conformity therewith, competent to take such jurisdiction as might exist or be created, in which case such jurisdiction would be concurrent with that of the General Sessions, for the want of words excluding the General Sessions in any case, as the condition in that section operates alone on the grant of exclusive jurisdiction, and not upon the general competency of the General Sessions to take concurrent jurisdiction where it is not entitled to exclusive.

The foregoing construction is in harmony with all the cases decided in this court.

McIver v. Townsend, 2 S. C. 1. That case illustrates the operation of that portion of Section 1, Article IV., that distributes civil and criminal jurisdiction as between the Courts of Common Pleas and General Sessions. In the section conferring jurisdiction in the Common Pleas, the writ of mandamus is mentioned as part of that jurisdiction. This was ground for holding that the constitution recognized the change that mandamus had undergone in its practical use, being changed from a criminal to a civil proceeding, and that thus it passed to the Common Pleas and out of the General Sessions as a civil remedy.

Burge v. Willis, 5 S. C. 212. That case held that notwithstanding Section 22, of the constitution, conferred upon justices of the peace original jurisdiction "in all matters of contract" where the amount claimed did not exceed a certain sum, yet the Common Pleas did not thereby lose jurisdiction over such cases.

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*Rhodes v. Railroad, 6 S. C. 385. That case holds that the jurisdiction conferred by Section 22, on justices of the peace, is not exclusive so as to prevent the legislature from conferring such jurisdiction on such inferior courts as it might see fit to create under the authority for that purpose conferred by Section 1, Article IV.

State v. Harper, 6 S. C. 464. The exclusion of the Court of General Sessions from a portion of its criminal jurisdiction was attempted to be worked out from the provisions of Section 19, Article I., relative to certain summary proceedings. No intimation is given in that case of any exclusion of the General Sessions as the consequence of the jurisdiction conferred on justices of the peace by Section 22.

Walker v. Russell, 10 S. C. 82. The same general mode of reasoning was employed in that case to reach the conclusion that the grant of jurisdiction to Probate Courts in Section 20, Article IV., was not in its character exclusive.

It must be concluded that the Court of

General Sessions is not excluded by the constitution from taking jurisdiction in cases of bastardy.

The sentence of the General Sessions was not conformable to law. The statute provides that on conviction for bastardy, the defendant "shall be required to give the security or recognizance hereinbefore provided, and on default thereof shall be liable to execution as are defendants convicted of misdemeanors." The sentence in the present case was "that defendant, Abraham Glenn, give bond in the sum of $300 for the maintenance of the child until it reaches the age of twelve years, and in default thereof, be imprisoned in the county jail for the period of six months, and execution issue against defendant's property." The statute confers no authority to impose punishment for a fixed period, or in the nature of alternative punishment. The judgment of the General Sessions must be set aside and the case remanded for such proceedings as are by law provided.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. *135

*(Case No. 909.)

STATE v. BALDWIN.

(April Term, 1880.)

[1. *Counties* ⇐74, 101.]

In the absence of a statute providing compensation to county treasurers, such an officer has, for his services, no legal claim which can be determined by the court or jury, or asserted as a defence or discount to an action brought against him by the state to recover a balance of taxes collected by him, but retained as reasonable compensation for such services.

[Ed. Note.—Cited in State v. Corbin & Stone, 16 S. C. 541, 543.

For other cases, see Counties, Cent. Dig. §§ 107, 154; Dec. Dig. ⇐74, 101.]

[2. *Counties* ⇐197.]

In the absence of a statute authorizing compensation to county treasurers for the collection of county taxes, the amount of commissions proper to be retained in such case must be submitted to the county commissioners for audit, and cannot be determined by the verdict of a jury.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 309, 310; Dec. Dig. ⇐197.]

[3. *Counties* ⇐99.]

A county treasurer and the sureties on his official bond held liable for a defalcation committed by such treasurer more than two years after the execution of such bond, there being at that time no law limiting the tenure of office of the county treasurers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 145; Dec. Dig. ⇐99.]

[4. *Trial* ⇐339.]

In an action against A, B and C, the jury having returned a verdict, "we find for the plaintiff the sum of $3110.74, against A," the Circuit judge recommitted the case to the jury with instructions to find a complete verdict. *Held*, that there was no error in the action of the Circuit judge.†

[Ed. Note.—Cited in King & Son v. Lane, 68 S. C. 434, 47 S. E. 704.

For other cases, see Trial, Cent. Dig. § 793; Dec. Dig. ⇐339.]

Before Mackey, J., Richland, November, 1879.

Action commenced in May, 1879, by the State of South Carolina against C. H. Baldwin, W. J. Duffie and J. H. Kinard, upon the official bond of Baldwin, county treasurer of Richland, dated February 1st, 1871, to recover $1543.63 for the state, and $1611.11 for Richland county, of moneys collected for taxes during fiscal year of 1873, and ascertained to be due upon settlement made with comptroller-general in September, 1874. At such settlement, Baldwin claimed four per cent. commissions upon the amounts collected, but the comptroller-general allowed $2000 for collecting state taxes, and $500 for collecting county taxes. The complaint, in this action, conceded to Baldwin the $2500, and demanded the sums already stated, which represent the difference between the

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compensation claimed by Baldwin and *that allowed him. For all other moneys the defendant had fully accounted.

The defences relied upon were that there was no breach, all moneys received having been accounted for, and that plaintiff had no right of action against the defendants.

So much of the evidence as is material is stated in the opinion.

The Circuit judge was requested by defendants to charge inter alia—

3. That there being, in the words of the counsel for the state, no law fixing the compensation of county treasurers, there could be no charge of compensation in violation of law, and the verdict therefor must be for the defendants.

4. That there is no statute fixing the compensation of the treasurers, and that when there is no law fixing the compensation, the officer is entitled to a reasonable compensation, and that is a question of fact for the jury.

The presiding judge refused to charge as prayed, and in lieu thereof, instructed the jury that there was no law fixing the compensation of the treasurer, and that the treasurer was not entitled to any compensation whatever, for his services in that capacity, in the absence of a statute fixing it.

That the treasurer, Baldwin, was not entitled to retain anything whatever, for his compensation; but as the plaintiff's attorney had admitted that the treasurer was entitled to deduct $2500 per annum, as compensation, and had only sued for the excess,

† See State v. Corley, (3) 13 S. C. 1.

the jury could allow to the defendant, Baldwin, the sum of $2500 as compensation.

That according to the law in force at that date, there was no fixed and definite term to the office of county treasurer, but that he was appointed during good behavior, or until his successor was appointed and qualified.

The jury found the following verdict: "We find for the plaintiff the sum of $3110.-74, against C. H. Baldwin." The counsel for plaintiff then moved that the verdict be recommitted to the jury, with instructions that they should find a complete verdict, either for the plaintiff or for the defendants, and that if they found for the plaintiff, the plaintiff would be entitled to interest from the date of the defalcation.

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*The counsel for defendants objected to the verdict being recommitted. The court stated that the jury must find a complete verdict.

The counsel for the defendants then requested the court to charge the jury that they had the right to find for the plaintiff as against Baldwin, and yet to find at the same time for the defendants, Duffie and Kinard, the sureties of Baldwin.

The court refused to charge as requested by counsel for defendants, to which refusal counsel excepted.

The verdict was then recommitted to the jury with the instructions prayed for by the counsel for the plaintiff. On recommitting the verdict to the jury, the court said: "Gentlemen of the jury: This is an action against C. H. Baldwin, county treasurer, and the sureties upon his official bond. If he committed a defalcation at the date alleged in the complaint, and had not then been reappointed, his sureties are liable. You are the sole judges of the evidence, but you must find a complete verdict, either for the plaintiff or for the defendants. Whatever verdict you may find, will be satisfactory to the court, provided that it is a verdict upon which judgment may be entered up."

And the jury retired, and shortly after returned into court and rendered the following verdict:

"We find for the plaintiff the sum of $3110.74 with interest."

To all of which refusals and to the instructions granted, the defendants then and there excepted; and afterwards appealed to this court.

Mr. James Conner, for appellants.

Mr. Solicitor Abney, contra.

August 31st, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action against Baldwin, as county treasurer, and the other defendants, as his sureties on his official bond, to recover certain amounts which, it was alleged, had been collected by Baldwin, as county treasurer, and not accounted for properly to the plaintiffs. There was no dispute about the fact that the money had

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been collected, and the only *controversy was as to whether it had been properly accounted for—the defendants contending that the amounts claimed by the plaintiffs were lawfully retained by Baldwin for commissions due to him as county treasurer. The real question, therefore, is whether the law, as it stood at the time of Baldwin's appointment, and at the time of the alleged default, allowed any commissions to a county treasurer, and, if so, how much. It is conceded that there was, then, no statute fixing the compensation to be allowed county treasurers, and the Circuit judge so instructed the jury, and, further, that in the absence of any such statute the treasurer was not entitled to any compensation. To this charge exception was duly taken, and the judge was requested to charge that, in the absence of the statute fixing the compensation of a county treasurer he would be entitled to a reasonable compensation, the amount of which would be a question for the jury, which was refused. We think that there was no error in the charge or refusal to charge as requested. One who renders service to the state, for which there is no compensation provided by statute cannot, as in the case of services rendered to a private person, raise an implied assumpsit against the state, and for such service he has no legal claim, that is, no claim which can be enforced by process of law. He cannot make such claim the basis of an action against the state, for the state cannot be sued in its own courts, except by its own consent, nor can he interpose such claim as a discount or set-off, which is nothing but a cross-action to an action brought against him by the state. Treasurers v. Cleary, 3 Rich. 372. The money which Baldwin collected constituted a part of the taxes due to the state, and the law, (Gen. Stat., Chap. XIII., § 12, p. 84,) required that "all the moneys collected by him for or on account of the state taxes" should be paid to the state treasurer, and, when paid into the state treasury, not one dollar of it could be withdrawn except "in pursuance of appropriations made by law." Const., Article IX., § 12. If, then, there was no statute authorizing the county treasurer to retain anything for his commissions he was bound to forward every dollar of taxes collected by him to the state treasurer, and if there was no act appropriating any sum for the payment of his commissions, as it is not pre-

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tended that there is, *he could not lawfully claim any compensation whatever, and for payment, even assuming his claim to have been of the most righteous character, he must, like all other persons having claims against the state, resort to this petition to

the legislature, the body which is exclusively entrusted with the power of disposing of the revenue. It is clear, therefore, that the question as to what was a reasonable compensation for his services could not have been left to the jury, for as is said in Treasurers v. Cleary, supra: "If that were allowed it is obvious the revenue would be under the control of the court and jury and not the legislature."

So far as the taxes collected for the county were concerned, it is very clear, in the absence of any statnte authorizing the county treasurer to retain a certain percentage thereon for his commissions, that any claim which he might have against the county for compensation for his services in collecting the county taxes could not be determined by the verdict of a jury, but, like all other claims against the county, should have been submitted to the county commissioners to be audited, and could only be paid upon their order.

The next question is as to the tenure of office of a county treasurer. As the law stood at the time of Baldwin's appointment, and at the time of the default alleged, there was no statute fixing the term of office of a county treasurer. The original act providing for the appointment of such an officer, act of September 15th, 1868, (14 Stat. 66), simply invests the governor with power to appoint county treasurers, by and with the advice and consent of the senate, but makes no provision as to the duration of their term of office, and by a subsequent act of February 3d, 1870, (14 Stat. 329), the governor was authorized "whenever to him there appears good and sufficient cause," to remove any county treasurer and report the fact, together with his reasons therefor to the general assembly. Thus the law stood at the time, though there has been, subsequently, an act passed limiting the term of office of county treasurers to two years. Act of March 19th, 1874. 15 Stat. 777.

It is plain then that unless Baldwin was removed from office by the governor he would have had the right to hold the office from

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*the time of his original appointment in February, 1871, up to and after the time when he was alleged to be in default by a failure to account for all the taxes collected in 1873, and that his official bond, originally given, would cover that period, and for any default committed during that time his sureties would be liable. It will be observed that there is not the slightest evidence that Baldwin was ever removed from office by the governor, and if he was never removed we do not see how he could be re-appointed, unless he had resigned, of which there is no pretence. Indeed, as it appears to us, there cannot be said to be any evidence tending to show that he was ever re-appointed. Baldwin himself does not say so, but only says, what, if objected to would have been incompetent, that Governor Moses told him that he had re-appointed him. He does not pretend that he gave any new bond, but, on the contrary, says he did not give a new bond. He produced no new commission, and does not pretend to claim that he ever had a new commission, while the books of the secretary of state's office show only one appointment, and the records of the treasurer's office only one bond. Under this state of the evidence the Circuit judge might possibly have been warranted in declining to refer the issue of fact as to whether Baldwin had been re-appointed to the jury upon the ground that there was in reality no testimony upon which such issue could be raised, but, in fact, the judge practically did leave that issue to the jury by saying: "If he committed a defalcation at the date alleged in the complaint, and had not then been re-appointed, his sureties are liable."

Our next inquiry will be whether there was any error of law committed in recommitting the case to the jury after the first announcement of the verdict. It is a very common practice, one which has the sanction of long usage, and is undoubtedly correct, for a Circuit judge to recommit the record to the jury after their verdict has been announced for the purpose of enabling them to put the verdict in proper and complete legal form, and this seems to have been the purpose in this case. The action was against three persons, and the verdict, as first announced, was manifestly incomplete and not in legal form; while it determined the issues as between the plaintiffs and one of

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the *defendants, as to the other two it left the issues wholly undetermined. The jury, therefore, when they first announced their verdict, had manifestly failed to complete their task, and the judge properly recommitted the case to them for the purpose of enabling them to finish their work. The case was not recommitted because the jury had made an incorrect finding, but because they had failed to find at all as to two of the defendants. If the verdict, as first announced, had been in favor of the plaintiffs as against Baldwin, and in favor of the other two defendants, then, even though it may have been manifestly without any evidence to sustain it so far as these two defendants were concerned, the case could not have been recommitted to the jury with instructions to find another verdict, for in such case the verdict would have been complete, and, however erroneous it might be, it would have to stand until set aside by a proper proceeding for that purpose. It may be, and doubtless was true, that the jury, while satisfied that a verdict should go against Baldwin, were desirous of releasing the sureties, if they could do so legally; but when they were told, and correctly told, that if Baldwin had not been

re-appointed at the time he committed the defalcation charged, the sureties were legally liable, they could no longer hesitate, and therefore returned the verdict against all of the defendants.

The exceptions taken to the amount of interest allowed have not been pressed in the argument here, and, therefore, we are not informed of the grounds upon which it is claimed that there was error in this respect, and we have not been able to discover any.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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14 S. C. *142

*(Case No. 913.)

WALKER & TRENHOLM v. KEE.

(April Term, 1880.)

[1. *Mortgages* ⇐235.]

The transfer of a note carries with it a mortgage given to secure its payment.

[Ed. Note.—Cited in Ballou v. Young, 42 S. C. 176, 20 S. E. 84; Whitmire v. Boyd, 53 S. C. 321, 31 S. E. 306.

For other cases, see Mortgages, Cent. Dig. § 621; Dec. Dig. ⇐235.]

[2. *Bills and Notes* ⇐358.]

Promissory notes, payable to A & B, a partnership, were endorsed in blank by B with the firm name, and transferred to plaintiffs before maturity to secure advances made by plaintiffs to another firm of a different name, of which A, B & C were members; and afterwards A & B made an assignment of all their assets for the benefit of the creditors of that firm. *Held*, that whether A knew of the endorsement and transfer or not, the notes were the property of plaintiffs, they having had no notice of any misappropriation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 915; Dec. Dig. ⇐358.]

[3. *Bills and Notes* ⇐337.]

Circumstances sufficient to arouse the suspicions of plaintiffs would not impair their title to such paper.

[Ed. Note.—Cited in Citizens' Trust & Savings Bank v. Stackhouse, 91 S. C. 461, 74 S. E. 977, 40 L. R. A. (N. S.) 454.

For other cases, see Bills and Notes, Cent. Dig. §§ 856–863; Dec. Dig. ⇐337.]

[This case is also cited in Kerngood v. Davis, 21 S. C. 205, without specific application.]

Before Thomson, J., Lancaster, June, 1879.

This was an action commenced in January, 1879, by Walker & Trenholm against A. M. Kee, and against R. M. Miller and T. G. Cureton, assignees of Stevens & Cureton, to recover from Miller and Cureton a chattel mortgage given to Stevens & Cureton, in February, 1878, to secure the balance due upon three promissory notes, two of which endorsed in blank with the firm name of Stevens & Cureton, had been transferred in June, 1877, by Ardrey, Cureton & Co., acting through T. J. Cureton (a member of both firms) to secure advances promised by plaintiffs upon the faith of these collaterals, and made a few days afterwards. Judgment was also demanded against Kee for a sale of the mortgaged property, and for balance due upon the notes. Only the assignees answered. The facts are sufficiently stated in the opinion of the court. The mortgaged property was sold by the sheriff before the trial. The Circuit judge decreed that plaintiffs were entitled to the notes transferred to them, and ordered the proceeds of the mortgaged property to be turned over to them, and gave them judgment against Kee for the balance due.

[For subsequent opinion, see 16 S. C. 76.]

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*Messrs. Wylie & Hough, for appellants.

Messrs. Allison & Connors, contra.

September 6th, 1880. The opinion of the court was delivered by

McIVER, A. J. J. H. W. Stevens and T. J. Cureton were co-partners in mercantile business in the county of Lancaster, under the name and style of Stevens & Cureton, and they, together with one J. W. Ardrey, were co-partners in a mercantile business, carried on in the county of York, under the name and style of Cureton, Ardrey & Co. Stevens & Cureton entered into a written agreement with the defendant, Kee, for the sale of certain real estate, a part of the purchase money being secured by the notes hereinafter mentioned, which are the subject of controversy in this case. Cureton, having possession of these notes, which were negotiable, endorsed them in blank with the name of the payees—Stevens & Cureton—and transferred them, before maturity, to the plaintiffs to secure advances to be made by them to Cureton, Ardrey & Co. Some time after the making of these notes, the defendant, Kee, at the instance of the payees, Stevens & Cureton, executed to them a mortgage on certain personal property to secure the payment of said notes, under which the property has been sold and the proceeds of such sale is now in the hands of the sheriff awaiting the judgment of the court as to who is entitled to it. The firm of Stevens & Cureton becoming embarrassed made an assignment for the benefit of their creditors, of all their assets, to the defendants, R. M. Miller and T. G. Cureton, subsequent, however, to the transfer of the notes to the plaintiffs, and the real controversy is between the plaintiffs and these assignees as to who has the best right to the notes in question and the mortgage given to secure their payment, or rather the proceeds of the sale of the property under such mortgage. There does not seem to be any question made as to the mortgage going with the notes, and there could not well be, as the rule that the transfer or assignment of a bond or note carries with it a mortgage given to secure the payment of such bond or note is too well established to admit of

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dispute. *It is only necessary therefore to determine who has the best title to the notes.

Unless the holder of a negotiable note, transferred before it is due, is bound to inquire into the title of the person from whom he obtains it, the right of the plaintiffs is manifestly indisputable. Cureton, undoubtedly, as a member of the firm of Stevens & Cureton, had a right to endorse the notes in blank with the name of such firm, and, when so endorsed, they would pass by mere delivery, and the holder would be under no more obligation to inquire into the title of the person from whom he obtained them than he would be to inquire into the title of a person from whom he purchased a negotiable note, before maturity, payable to bearer. If the notes bore the genuine endorsement of the payees, as was unquestionably shown by the proof in this case, then the plaintiffs were not bound to inquire further. For, while it may be quite true that, as between Stevens & Cureton, or as between them and a person affected with notice, Cureton had no right to use these notes for any but partnership purposes, and, therefore, had no right to transfer them in payment of, or security for, the debt of another partnership, an innocent purchaser cannot be affected by any such considerations. In this case the Circuit judge has found, and we think his finding supported by the testimony, that the plaintiffs had no notice of any fact tending to show that the notes had been endorsed and transferred by one of the payees for an improper purpose, and, therefore, even assuming the fact to be as alleged, although the defendants have offered no proof of it, that T. J. Cureton was, without the knowledge or assent of his co-partner, using the notes due to Stevens & Cureton to secure debts contracted by Cureton, Ardrey & Co., the rights of the plaintiffs could not be affected thereby unless notice is brought home to them. We see nothing in the evidence calculated to arouse the suspicion of the plaintiffs. To secure a debt of Cureton, Ardrey & Co., they took negotiable notes, before maturity, in the usual course of business, which bore the genuine endorsement in blank of the payees, and although the notes showed upon their face that they were originally the property of Stevens & Cureton, yet at the same time the endorsement in blank showed that the origi-

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nal *owners had parted with their right to the notes, and that they were, in law, presumed to be the property of any person who held them. The plaintiffs might, therefore, very properly have assumed that these notes had been transferred by the payees to Cureton, Ardrey & Co., and that T. J. Cureton, as a member of the last mentioned firm, had a perfect right to transfer them.

But, even if the evidence showed that there was enough in the circumstances of the case to arouse the suspicions of the plaintiffs and excite them to inquire by what right T. J. Cureton, as a member of the firm of Cureton, Ardrey & Co., undertook to transfer notes due to another firm, of which he was also a member, for the purpose of securing the obligations of Cureton, Ardrey & Co., that would not be sufficient to defeat the claim of the plaintiffs. The rule that a mere suspicion that there may be a defect of title in the holder of negotiable paper, or that knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of one who buys the paper before it is due, but that such result will only follow where there has been bad faith on the part of the purchaser, is now well established both in England and in this country. Goodman v. Harvey, 4 A. & E. 870; Goodman v. Simonds, 20 How. 343 [15 L. Ed. 934]; Murray v. Lardner, 2 Wall. 110 [17 L. Ed. 857]; Cromwell v. County of Sac, 96 U. S. 51 [24 L. Ed. 681], and has, upon at least two occasions, been recognized in this state. Witte v. Williams, 8 S. C. 301 [28 Am. Rep. 294]; Walker v. State, 12 S. C. 272-3. In this case there is not the slightest evidence of any bad faith on the part of the plaintiffs, and, hence, taking the view of the evidence most favorable to the appellants, there is nothing to invalidate the title of the plaintiffs.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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14 S. C. *146

*(Case No. 914.)

HOLMES & CALDER v. COUNTY OF CHARLESTON.

(April Term, 1880.)

[1. *Costs* ⇦4.]

Where the legislature provided a special mode of ascertaining the indebtedness of Charleston county, declaring that claims then in judgment should be proven without regard to the judgment, and that no costs should be charged against the county in such proceedings —*Held*, that a creditor establishing his claim then in judgment, was not entitled to the costs of the judgment or the costs of the proceedings under this act.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 3; Dec. Dig. ⇦4.]

[2. *Counties* ⇦198.]

An open account audited by a board of county commissioners does not draw interest from the date of the audit.

[Ed. Note.—Cited in Wheeler v. County of Newberry, 18 S. C. 137.

For other cases, see Counties, Cent. Dig. § 335; Dec. Dig. ⇦198.]

[This case is also cited in Richland County v. Miller, 16 S. C. 246; Wheeler v. County of Newberry, 18 S. C. 135, 136, as to the practice in the enforcement of claims against county.]

Before Fraser, J., Charleston, July, 1879.

Petition under act of 1878, (16 Stat. 695), to establish a judgment, based upon an audit by the county commissioners of an open account. The audit fixed the amount of the claim, but not the date of payment. The case is fully stated in the opinion. Under their grounds of appeal, the plaintiffs claimed interest from the audit, interest on the judgment, and the costs of the judgment and of this proceeding.

Mr. J. B. Cohen, for appellants.

Mr. J. E. Burke, contra.

September 6th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. The petitioners were creditors of Charleston county, and had obtained judgment on their claim; others had also obtained judgments against the county. Controversy arose as to the bona fides of many of the claims upon which judgments had passed, and, by consent of all parties interested, the general assembly passed an act "to provide for funding the debt of Charleston county," &c. 16 Stat. 695. Section 10 of that act provides as follows: "That in case

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any person holding *a claim against the county of Charleston, which has been passed upon by the said commissioners, and has been disallowed by them in whole or in part, shall be dissatisfied with such finding, it shall be lawful for such person, by petition to the Court of Common Pleas for Charleston county, within twelve months after the passage of this act, to bring such finding before the court, whereupon the said court may proceed to the matters of said petition and the proceedings thereunder, or may refer the same to a master of the court, or a special referee, upon whose report the same may be heard and determined. * * * And provided also, that in such proceedings the claimant shall be required to prove his claim, notwithstanding that he may already have obtained judgment thereon, and without regard to said judgment; provided further, that no costs shall be charged against the county in such proceedings."

The claim of the petitioners was one of those "passed upon" by the commissioners referred to in the act and proved in full, but neither the costs of obtaining the judgment nor interest on the demand were allowed, and the petitioners, "dissatisfied with such finding," filed this petition under the section above cited to correct the alleged error. The questions of law and fact were referred to Master W. D. Porter, who reported against the claim, and recommended that the petition be dismissed. The Circuit Court confirmed the master's report, and from his order the appeal comes to this court.

From the view which this court takes it will not be necessary to consider all the points made in the exceptions. The act of 1878 furnished a special mode of proceeding to settle the indebtedness of Charleston county as it stood before any judgments were obtained, and not as the debts might be increased by costs in obtaining these judgments. Those who availed themselves of the machinery of the act, in recovering their claims, accepted all the terms and provisions of the act. The section under which this proceeding was instituted provides that "in such proceeding the claimant shall be required to prove his claim, notwithstanding that he may already have obtained judgment thereon, and without regard to said judgment." The petitioners, by availing themselves of the remedy provided, elected

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to give up all the *rights they might suppose they had under the judgment. They cannot get what the act gives, without regard to the judgment, and then fall back on their rights under the judgment. The claim, as it stood before judgment, was the matter referred to the commissioners. It was an account against the county of Charleston for $267.82. The commissioners were not authorized to add to that account the costs incurred in obtaining the judgment or in the appeal from the order setting it aside. As we understand it, the object of the legislature in passing the act was to relieve the settlement of the county claims from the complications produced by the judgments, which, for that reason, were carefully excluded from consideration by the terms of the act, and to pay the true and bona fide indebtedness of the county, as if no judgments had been obtained.

The demand was an open account, which did not bear interest, and we cannot say that the commissioners erred in not allowing it.

The order below is affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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14 S. C. 148

(Case No. 915.)

ROBINSON v. AMATEUR ASSOCIATION.

(April Term, 1880.)

[1. *Mortgages* ⟸362.]

A sale by a mortgagee of the mortgaged premises under a power conferred in the mortgage, and in strict compliance with the conditions of the power, is valid, and bars the equity of redemption: and at such sale the mortgagee may, himself, become the purchaser, if so authorized by the terms of the power conferred.

[Ed. Note.—Cited in Dendy v. Waite, 36 S. C. 574, 15 S. E. 712; Team v. Baum, 47 S. C. 417, 25 S. E. 275, 58 Am. St. Rep. 893.

For other cases, see Mortgages, Cent. Dig. § 1082; Dec. Dig. ⟸362.]

[2. *Mortgages* ⟸354.]

Such sale will not be set aside, because the terms of the contract were hard, the interest high, and the advertisement (which followed the description given in the mortgage) not sufficiently descriptive.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1056; Dec. Dig. ⟸354.]

[3. *Mortgages* ⟸363.]

Mere inadequacy of price is not sufficient ground for setting aside such a sale, unless the inadequacy is so great as to furnish evidence of fraud.

[Ed. Note.—Cited in Ex parte Cooley, 69 S. C. 155, 48 S. E. 92.

For other cases, see Mortgages, Cent. Dig. § 1086; Dec. Dig. ⟸363.]

[4. *Mortgages* ⟸329.]

[Cited in Johnson v. Johnson, 27 S. C. 314, 3 S. E. 606, 13 Am. St. Rep. 636; Hall v. Hall, 41 S. C. 167, 19 S. E. 305, 44 Am. St. Rep. 696, to the point that sales under such powers should be very closely scrutinized by the courts.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1012; Dec. Dig. ⟸329.]

Before Aldrich, J., Charleston, December, 1879.

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*Controversy without action upon an agreed state of facts. The bond of plaintiff, Robinson, to Mordecai matured in two years, interest from date, at rate of ten per cent. per annum, payable quarterly in advance, the failure to pay these installments of interest when due, and also to pay state, county and city taxes upon the mortgaged premises, and to keep the buildings insured and in good repair, to be a forfeiture of the bond. The bond and mortgage were assigned by Mordecai to the defendant, the Amateur Literary and Fraternal Association of Charleston. The advertisement of the property by defendant was for three weeks, and described the property in the words of the description given in the mortgage, no mention being made of buildings in either, but there was a covenant in the mortgage that the mortgagor would "insure the house and buildings on said lot." The other material facts are stated in the opinion.

Mr. T. M. Mordecai, for appellant.

Mr. E. A. Marshall, contra.

1. Although the validity of mortgages, with powers of sale, has been generally recognized, sales under such powers are scrutinized by the courts with great care, and will not be sustained unless conducted with all fairness, regularity and scrupulous integrity; the mortgagee being considered and treated as a trustee. Perry on Trusts (2d ed.) § 602, a, b, etc.; Sugd. on Vendors, (8th Am. ed.) Vol. I., 87, 96; 3 Metc. 311; 3 Meriv. 207; 2 Giffard 108.

2. When such mortgages contain a clause authorizing the mortgagee to become purchaser, and he avails himself of this privilege, thus acting as vendor and vendee, (characters that are inconsistent for "emptor emit quam minimo potest, venditor vendit quam maximo potest,") he is required to exercise unusual good faith and fairness, and if it appears that he has not used the best means to realize the largest amount of money, and the price is grossly inadequate, such sale will be set aside on application of the mortgagor within a reasonable time, and said mortgagor allowed to redeem. See 14 Allen 369; 115 Mass. 353; 122 Mass. 122.

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*3. Considering the mortgagee as trustee, he will not be allowed to speculate in trust property, and should he, after purchasing property of his cestui que trust (even though bona fide), re-sell or attempt to re-sell at a larger price, the first sale may be set aside, or the profit must go to his cestui que trust or mortgagor. Perry on Trusts, (2d ed.) §§ 254, 602, v.; Willard's Eq. Jur. (Potter's ed.) 186, 188; Story's Eq. Jur., §§ 321, 322; 1 McC. Ch. 390; 4 Rich. Eq. 167; 7 S. C. 201.

The respondent asks that the appeal in this case be dismissed, and the judgment of the court below sustained on the grounds—

1. That the mortgagees did not exercise reasonable diligence and good faith in protecting the mortgagor's interest.

2. That the property was not sufficiently advertised to attract purchasers. 2 Jones on Mort., §§ 1839, 1852, 1858.

3. That the mortgagees bought at a grossly inadequate price, and attempted to re-sell at a large profit to themselves. 4 Desaus. 715.

4. That constructive fraud will be presumed from the various circumstances of the case.

September 6th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This is a case submitted, containing the facts agreed upon by the parties. On November 27th, 1877, Alexander Robinson executed a bond to T. Moultrie Mordecai, Esq., for $450 borrowed money, and at the same time, to secure the bond, gave a mortgage of a house and lot in the city of Charleston, which contained the following power to sell: "But in case of nonpayment of the said bond, with the interest thereon, or any part thereof, &c., then and in such case it may be lawful for the said T. Moultrie Mordecai, his heirs, executors, administrators and assigns, and the said Alexander Robinson doth hereby empower and authorize the said T. Moultrie Mordecai, his heirs, executors, administrators or assigns, to grant, bargain, sell, release and convey the said premises with the appurtenances, at public auction or vendue, at which sale they or any of them, shall have the right to become the purchasers of the said premises, and on such sale to make

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and execute to the *purchaser or purchasers, his, her or their heirs or assigns, for ever, a conveyance in fee of the said premises, free and discharged from all equity of redemption," &c.

On January 3d, 1878, Mordecai, for value, assigned the bond and mortgage to the defendant corporation, who, Robinson having made default, advertised, under the power in the mortgage, the premises for sale, and sold them at public outcry April 15th, 1879, both the plaintiff and the officers of the defendant corporation being present at the sale. The corporation bid off the property for $400, complied with the terms of sale, received title and went into possession.

Subsequently the property was offered for sale at auction and bid off by one Francis Ryan for $850, but he refused to comply with the terms of sale, as in the meantime this controversy about the title had arisen.

On August 25th, 1879, Robinson made the claim that the first purchase by the defendant corporation was void, which they denied, insisting that the deed to them and possession under it, made their title absolute. The question was submitted to the court, the Circuit judge set aside the sale and adjudged that the plaintiff was entitled to redeem. The defendant appeals to this court on several grounds, but they may all be considered under the first exception, which is as follows: "Because the sale under the power and the purchase thereunder, and the conveyance in conformity therewith, and the voluntary surrender of the premises by the plaintiff to the defendant under the conveyance, made the title of the defendant absolute, and there was and is no equity of redemption in the plaintiff."

It may now be regarded as established in South Carolina that a mortgagor may, by provision in the mortgage, confer upon the mortgagee the power to sell the mortgaged premises to pay, in case of default, the debt secured. Mitchell v. Bogan, 11 Rich. 686; Webster v. Brown and Hammett, 2 S. C. 428; 2 Jones on Mort. 1752. In the case of Mitchell v. Bogan, the court say: "This power to sell real estate, conferred by the mortgagor on the mortgagee, is not familiar in our observation, but it is not liable to any legal objection. * * * Enough upon this subject may be seen by consulting Coote on Mort., Ch.

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VI., 124." *A sale under such a power is equivalent to a sale and purchase under a decree in equity, and will cut off all right of redemption, provided the mortgagee faithfully discharge, in all respects, the duties imposed upon him as donee of the power. 2 Jones on Mort. 1897; Hall v. Bliss, 118 Mass. 558. But while the courts will not set aside powers authorizing the creditor, who is the interested party, to sell lands mortgaged for the reason that they are the contracts of the parties themselves, yet such powers may be so easily used for purposes of oppression that they scrutinize sales made under them very closely.

The plaintiff Robinson executed a mortgage in which he expressly conferred upon the mortgagee or his assignee the power to sell upon default and to be the purchaser himself. The mortgagee assigned the bond and mortgage to the defendant corporation, and upon default they advertised, sold at public auction and purchased themselves—all of which they had, by terms of the plaintiffs' own warrant, the right to do; then why should their purchase be set aside? It is not alleged that they did not have express authority to do what they did do, and, therefore, if there is good ground to set aside the sale, it must in some way relate to the manner in which the sale was made. The case submitted contained no statement that the defendant corporation was guilty of any actual fraud in selling the house and lot which they purchased. Fraud being a fact, should have appeared in the case, but not appearing is taken not to exist. A number of single facts are stated in the case, and it seems that the question intended to be submitted is, whether these unconnected facts, all taken together, constitute constructive fraud sufficient to set aside the sale.

The decree of the Circuit judge sets aside the sale, but upon what ground it does not state. The case submitted charges no actual fraud, the Circuit decree charges none, unless it may be involved in the order setting aside the sale. We are left to reach an original conclusion as to the bona fides, from the facts stated, viz., the advertisement, purchase by the mortgagees, and the prospect of a re-sale at an advanced price. The grounds upon which the decree is based appear no where, unless it may be in the argument of counsel. It is there urged that the terms

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of the *bond were hard, interest high, &c. That is no ground to set aside the sale. The plaintiff made his own contract, signed the bond and mortgage, and the defendant purchased them as they stood. It is said again that the property was not sufficiently advertised to attract purchasers. It would seem to be a full answer to this that the advertisement described the premises in the identical terms by which they were described in the mortgage by the plaintiff himself, with the omission only of the words "with the buildings thereon." The land included whatever buildings were on it, and the words "buildings thereon," would have been mere surplusage, unless the omission was with a corrupt motive, which is not charged.

It is also said that the defendant corporation, as assignee of the mortgagee, purchased at their own sale, which is not allowable. The terms of this mortgage expressly authorized the mortgagee to purchase at his own sale under the power given, and that made clear the right, which, without such express

agreement, might have been doubtful. 2 Jones on Mort. 1876; Hall v. Bliss, 118 Mass. 560. But it is insisted that if there is nothing in any of the other points the lot was sold at a very inadequate price, and that alone is sufficient to set aside the sale. The inadequacy here is denied. When a public sale is open and fair, in all respects free from fraud, mere inadequacy of price is not sufficient to set aside a sale, unless the inadequacy is such as to furnish evidence of fraud upon the part of the mortgagee, which is not alleged here.

Looking at all the facts with a strong sense of the necessity of scrutinizing such sales very closely, we are unable to see any such want of fairness or good faith in these proceedings as would authorize us to set aside the conveyance to the defendant, based on the sale of April 15th. On the contrary, the acts of the plaintiff himself would seem to confirm the conclusion that there was no want of fairness or good faith. The sale was advertised regularly, and, besides, the plaintiff received personal notice. He was present at the sale and made no objection, without any murmur of complaint he yielded possession to the defendant and seemed satisfied until they had the prospect of selling the

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prop*erty at an advanced price, when he put forward his claim to redeem under the mortgage. It seems to us too late.

The Circuit decree is reversed and the case remanded for such orders as may be necessary.

WILLARD, C. J., and McIVER, A. J., concurred.

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14 S. C. 154

(Case No. 916.)

STEELE v. ATKINSON.

(April Term, 1880.)

[1. *Executors and Administrators* ⇐120.]

An administrator de bonis non cannot maintain an action to set aside a transaction between his predecessor in office and a debtor of the estate, upon the ground of a fraudulent collusion between them. Johnston v. Lewis, Rice's Eq. 40 [33 Am. Dec. 74], recognized and approved.

[Ed. Note.—Cited in Knobeloch v. Germania Sav. Bank, 43 S. C. 243, 244, 21 S. E. 13; Latimer v. Latimer, 53 S. C. 489, 31 S. E. 304.

For other cases, see Executors and Administrators, Cent. Dig. § 487; Dec. Dig. ⇐120.]

[2. *Execution* ⇐348.]

A receipt for a small amount "in full of this case," endorsed by a sheriff upon an execution, is, in the absence of proof to the contrary, a satisfaction of the execution, although the aggregate of the credits endorsed is less than the sum due.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1064; Dec. Dig. ⇐348.]

[3. *Evidence* ⇐83.]

The court will not presume that a sum of money received by the sheriff was for commissions upon a payment made outside of his office, when such sum is more than the fees allowed by law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. ⇐83.]

Before Wallace, J., Chester, October, 1879.

To the full statement of this case made by the Circuit judge, it is only necessary to add the terms of the last receipt endorsed upon the execution, viz.: "June 7th, 1873. Received of V. Atkinson, Sr., thirty dollars in full of this case. (Signed) B. G. Yocom, sheriff of Chester county."

The Circuit decree is as follows:

McKelvey died many years ago, having survived his wife. He left no lawful heirs, so far as is known or has been discovered in a quarter of a century since his death. It was not proven, but stated at the hearing, that there were no creditors of his estate. E. M. Kirkpatrick administered upon the estates of John and Elizabeth McKelvey, and, after protracted litigation, recovered a judgment on October 13th, 1871, for the sum of

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*$8434.84 against Valentine Atkinson and Elizabeth, his wife. On April 19th, 1873, Valentine Atkinson paid the sum of $1,300 on this execution. On May 29th, 1873, he took a receipt from Kirkpatrick for $6,000, which is stated in the receipt to be in full of the judgment by way of compromise. It was proved at the trial that at the time the receipt was given by Kirkpatrick, Atkinson paid to him a large sum of money and gave his note for an additional sum. On the night of the same day, Kirkpatrick left the state and never returned.

John G. Steele, the plaintiff, who was one of the sureties on the administration bond of Kirkpatrick, took out letters of administration de bonis non upon the estate of John and Elizabeth McKelvey, and brought this action to recover the whole amount of the judgment, less the $1300 paid April 19th, 1873, and $30 paid June 7th, 1873. The complaint charges that the transaction on May 29th, in which the receipt was given for $6000 and money paid and note given, was fraudulent and collusive, in that Atkinson knew that Kirkpatrick intended to misapply the money. Upon this point issues were framed and tried by a jury. The jury found as matter of fact that there was no fraud and collusion on the part of Atkinson. I approve this finding and adopt it as my own.

Out of the foregoing facts two questions arise:

1. Can the payment of a smaller sum, a part of which consists of the debtor's note which the creditor agrees to accept in full satisfaction of his demand, operate to extinguish a debt for a large amount?

Pinnell's case established the rule that the payment of a smaller sum of money would not be allowed to extinguish a debt for a larger sum, even in cases where the creditor

agreed at the time of the judgment that it should, on the ground that the agreement was nudum pactum.

In Pinnell's case, and many subsequent cases, this doctrine is broadly laid down. It seems to us that this doctrine, if fully applied according to its principle, would defeat every parol gift to any but kindred, even after delivery. No man should be allowed to enforce a contract which he had deliberately, without fraud or imposition, agreed to renounce. Yet on the principle

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*of stare decisis the rule has been allowed to stand. Regarding this rule, however, as "technical," not very well supported by reason, "allowing a violation of good faith," courts have limited its application to cases coming strictly within its terms and have departed from it upon slight distinctions. Hence the rule, that if any chattel is given and received in satisfaction of the debt, no matter how insignificant its relative value, the demand is held to be satisfied. Eve v. Mosely, 2 Strob. 206; Hope v. Johnston & Cavis, 11 Rich. 135. Kellogg v. Richards, 14 Wend. 116, cited in Eve v. Mosely, holds that the acceptance of a note of a third person for a less sum is a good accord and satisfaction; that the notes of a third person will operate as an absolute and immediate discharge of the debt for which it is given if such be the understanding and intention of the parties.

The effect of giving and receiving the debtor's own note for a smaller sum in full of the original debt, is not so well settled as the preceding rule; but it is difficult to perceive any essential abstract distinction.

The question is: Is there a sufficient consideration to support the bargain? In Myres v. Welles, 5 Hill, (N. Y.) 463, Cowen, J., held that "accepting a principal debtor's negotiable note payable at a future time was such a giving of time upon the demand as discharged the surety." The surety was not discharged unless the creditor was bound. The creditor could not be bound without consideration. Hence, the giving a negotiable note for a prior debt is supported by a consideration, because the note might be used in a way beneficial to the debtor. Of course, the effect of such a transaction depends upon the intention of the parties. Eve v. Mosely, supra; Sibree v. Tripp, 15 M. & W. Exch. 22; Draper v. Hitt, 4 Vt. 439. Cases might be multiplied from Pennsylvania, New Hampshire, Massachusetts, Alabama.

In the case under consideration, as has been already stated, money was paid and a note given with the understanding that the prior debt was paid. Under the principles above set out, if Kirkpatrick had been the absolute owner of the judgment, the transaction would have been a satisfaction of the debt and a bar to this action. But Kirk-

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patrick was administrator. The jury*have found that collusion is not imputable to Atkinson. Then the second question in the case is: Is the transaction embraced within the scope of constructive fraud? Administrators are trustees for the benefit of creditors and distributees; they hold the title of their intestates for the purposes of the trust. Before the A. A. 1824, (6 Stat. 238, § 6,) they were invested with a large discretion as to the sales of the property. They were held to the exercise of a wise and prudent discretion. It was a part of their duty to sell the property of and collect the debts due to the estate. To sell the property and collect the debts was presumably in execution of his trust, and purchasers from him and debtor who paid him were protected by the force of this presumption, unless it was made to appear from the transactions themselves or otherwise that such purchasers or debtors colluded with him or had knowledge that he intended to commit a breach of trust. They were not bound to inquire whether the transaction was necessary and judicious on the part of the administrator; that was the business of the administrator, and if he did not act within the scope of his authority those who dealt with him had a right to presume that the transaction was necessary or proper in the management of the estate. The A. A. 1824, supra, provided that sales of personal property by administrators should not be made save by and under an order from the Court of Ordinary. This act took away the discretion of the administrator as to the conversion of the personal property, and any purchaser of personal property at an administrator's sale made without an order of the [now] Probate Court takes no title. But this power over the choses in action of the estate is unaffected by the A. A. 1824; so when these are sold, pledged or collected, the purchaser, pledgee or debtor is protected by the presumption that all is done according to the exigencies of a faithful administration of the estate, unless it appears intrinsically or aliunde that he who dealt with him knew that he intended a breach of trust by diverting, misapplying or wasting the assets. If the administrator parts with demands in payment of, or pledges them as security for, an existing debt of his own, or sells them or relinquishes them to a debtor of the estate for a valuable yet grossly inadequate con-

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sideration, knowledge of the *transaction is, for the purposes of the trust, imputable to him who takes them, and further proof is not necessary, and, at the instance of those beneficially interested, the taker must account for them. In this case, Atkinson, of course, knew that Kirkpatrick had the right, and that it was his duty perhaps, to collect the debt. If Kirkpatrick agreed to take in

satisfaction a smaller sum than the amount of the debt, he had a right to presume that a more speedy conversion than could be affected by levy and sale might be important to the interest of the administration. If the amount, therefore, which Kirkpatrick did agree to take was not grossly inadequate, Atkinson is protected against the equities of those beneficially interested. The amount of the judgment was $8439.84, interest from October 13th, 1871.

On April 19th, 1873, Atkinson paid $1300.

On May 29th, 1873, he paid $6000.

On June 17th, he paid $30.

While the aggregate of the sum paid is not equal to the amount of the debt, it cannot be said that it is grossly inadequate. It is needless to enter into a discussion of the difference between mere inadequacy and gross inadequacy. It is, perhaps, impossible to lay down an arbitrary rule as to precisely where one begins and the other ends; it is a matter that is governed by the circumstances of each case and addresses itself to the sound discretion of the court. Under the circumstances of this case, I do not think the extent of the inadequacy was sufficient to suggest to Atkinson a breach of trust on the part of the administrator.

I have not thought it necessary in this decree to pass upon the liability of the administrator.

It is ordered and adjudged that the complaint be dismissed without costs.

Plaintiff appealed.

Messrs. W. B. Wilson and G. J. Patterson, for appellants.

Mr. John J. Hemphill, contra.

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*September 6th, 1880. The opinion of the court was delivered by

McIVER, A. J. E. M. Kirkpatrick, as administrator of the McKelvey's recovered a judgment against the defendants for a large sum of money, and on May 29th, 1873, gave to the defendants a receipt acknowledging the payment "by them of $6000 in full of the balance of the debt and interest in this case," a memorandum of which was entered on the execution by the sheriff. There are also two other credits entered upon the execution by the sheriff, one dated April 19th, 1873, of $1300, expressed to be "in part of this case," and another of $30, dated June 7th, 1873, expressed to be "in full of this case." The letters of administration previously granted to Kirkpatrick having been revoked, and letters of administration de bonis non having been granted to the plaintiff, he brings this action in that capacity. The plaintiff, in his complaint, recognizes the validity of the first credit of $1300, and without taking any notice whatever of the last credit of $30, which, as we have seen, is expressed to be "in full of this case," seeks to have the entry of the credit of $6000 vacated and set aside, and the judgment enforced for the balance due thereon, after deducting the credit of $1300 on April 19th, 1873, upon the ground of a fraudulent collusion between the former administrator, Kirkpatrick, and the defendants.

It appears to us that the plaintiff, in the outset, encounters an insurmountable obstacle which effectually prevents him from maintaining this action. He, as administrator de bonis non, is seeking to set aside a transaction between his predecessor and a debtor of the estate upon the ground of a fraudulent collusion between them. He is not asking that the estate be protected from a fraud practiced upon his predecessor, the former administrator, but the ground of his complaint is that such preceding administrator himself fraudulently colluded with the debtor to the prejudice of the estate. The case of Johnston v. Lewis, Rice's Eq. 40 [33 Am. Dec. 74], conclusively shows that the plaintiff cannot maintain the action. In that case the plaintiffs, as administrators de bonis non, attempted to set aside a sale of property of their intestate upon the ground that

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the same was made by a fraudu*lent collusion between their predecessor, the former administratrix, and the defendant, who was the purchaser at the sale. In the Circuit decree, Johnston, Ch., at pages 42–3, says: "It is true that both creditors and distributees, if defrauded in any manner by the sale, might bring their bill against Lewis and the administratrix, and set it aside for collusion between them. But the administratrix, as such, could never impeach a transaction for a fraud to which she was a party. Then the question is whether these plaintiffs can set the sale aside. They are neither creditors nor distributees. This bill is not filed in either of these characters. The plaintiffs come forward as successors in office to Mrs. Pickett to unravel transactions by which she was bound. But nothing seems plainer than that all acts binding upon a predecessor are equally binding upon a successor." And, Harper, Ch., in delivering the opinion of the Court of Appeals, at page 48, says: "We concur with the Chancellor that the present complainants, the administrators de bonis non, stand in the place of the first administratrix, and are bound wherever she could be bound, and concluded by whatever would conclude her. * * * The administratrix, in general, represents all creditors and distributees, and they cannot be heard but through her, and are bound by her acts. Only in the case of a fraudulent collusion to misapply the assets, these may be followed by creditors and distributees themselves, but certainly not by her successors in administration." In this case there are no creditors or distributees before the court complaining of a waste or misapplication of the assets, and from what is stated at the bar, it is not

likely there ever will be, as it is said that none have been discovered in the quarter of a century which has elapsed since the death of the intestate.

But even were the action maintainable by a person occupying the position of the plaintiff, it must fail, in this instance, for the want of sufficient proof of the allegations upon which it rests. The finding of the jury, approved by the Circuit judge, negatives the fraud charged, and it would require much more testimony than we have been able to discover in the "case" submitted here to warrant us in disregarding their concurrent finding.

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*It is contended, however, that as matter of law the payment of a smaller sum at or after the day the debt is due, can never operate as a satisfaction of a greater sum, and that the plaintiff is therefore entitled to enforce the execution for the balance which may be found due after deducting all the amounts credited on the execution. Without entering at this time into any discussion of the rule of law upon which this position is based, it is sufficient for us to say that it does not apply in the present case, for it ignores the fact that there is another credit upon the execution, subsequent in date to the one under consideration, which the sheriff acknowledges to be "in full." Such a receipt, in the absence of any proof to the contrary, must be given its full force, and amounts to an acknowledgment that the whole amount due has been paid. For though it may be shown by actual calculation that the amount mentioned in the receipt, added to the other credits endorsed, would not extinguish the whole amount due, yet the acknowledgment that it is in full presupposes that there were other payments, and, until such is shown not to be the fact, it must be given the effect of a receipt in full. Henderson v. Moore, 5 Cranch 11 [3 L. Ed. 22]; Trimmier v. Thomson, 10 S. C. 190. The answer made to this by the appellant's counsel, upon the argument here, that the amount acknowledged by this last mentioned receipt simply represented the sheriff's commissions on the $6000, rests wholly upon conjecture, and is without any testimony whatever to support it. The receipt does not specify that it was for costs or commissions, and no witness has so testified. It is a mere conjecture, and one too which we are not likely to entertain; but, on the contrary, according to well established principles, we are bound to infer that such was not the fact. The rule of law undoubtedly is that, in the absence of any evidence to the contrary, the presumption is that a public officer has done his duty —not that he has violated it. Now, according to the statute in force at the time when the $6000 payment was credited, (act of February 26th, 1873, 15 Stat. 388,) the sheriff was only entitled to one-fourth of one per cent. commissions upon all moneys paid out of his office upon executions lodged in his office; and, therefore, before we could presume that the amount mentioned in the receipt repre-

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sented the sheriff's *commissions upon the $6000, we would have to presume that this officer, in gross violation of his duty, had exacted just twice as much as he was entitled by law to claim, and had thereby rendered himself liable to heavy penalties. Such a presumption, directly opposed as it is to the rule of law above stated, is not permissible.

We do not see how, in any view of the case, the plaintiff can maintain this action, and the judgment of the Circuit Court is therefore affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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14 S. C. 162

(Case No. 917.)

ANDERSON & CO. v. HOLMES & DURHAM.

(April Term, 1880.)

[1. *Trial* ⇐194.]

A mortgage of personal property connected with the business of a turpentine distillery, containing no agreement that a suspension of operations should be regarded as a breach of the condition of the mortgage, and the proof of a suspension not being clear, there was no error in the refusal of the Circuit judge to charge "that the suspension of operations by the mortgagor was a breach of the mortgage."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⇐194.]

[2. *Chattel Mortgages* ⇐161.]

Under a mortgage of personal property given to secure the payment of moneys and interest, the mortgagee has no right to the possession of the property until the debt is due, notwithstanding that to the concluding clause, that the mortgagor shall retain possession until default, &c., are superadded the words, "but always at the will of the mortgagee."

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. ⇐282; Dec. Dig. ⇐161.]

[3. *Contracts* ⇐147.]

The general intention to be collected from the whole context and every part of a written instrument, is always to be preferred to the particular expression.

[Ed. Note.—Cited in Beasley v. Newell, 40 S. C. 23, 18 S. E. 224; Du Pont v. Charleston Bridge Co., 65 S. C. 530, 44 S. E. 86; Crawford v. Atlantic Coast Lumber Co., 79 S. C. 168, 60 S. E. 445.

For other cases, see Contracts, Cent. Dig. § 743; Dec. Dig. ⇐147.]

[4. *Partnership* ⇐242.]

A firm contracting, afterwards made a change in its membership, and informed the other contracting party of such change, who made no complaint, and the new firm brought an action for a subsequent breach of the contract—*Held*, that to the defendant's request to charge that the new firm could not bring action for this breach of the contract, the presid-

ing judge committed no error in adding "unless the contract was renewed with the new firm."

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 500–508, 663; Dec. Dig. ⟹242.]

Before Hudson, J., Williamsburg, November, 1879.

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*The opinion fully states the case. The bond and mortgage are very long, filling eight pages of the brief; but so much of them as are material to the errors assigned are stated by the court.

Messrs. Dozier & Gilland, for appellants.
Mr. J. A. Kelly, contra.

September 6th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. In January, 1879, James Anderson & Co., then consisting of James Anderson and Middleton Kelly, entered into a covenant with James H. Parker & Co., of Charleston, in which, among other things, it was agreed that James H. Parker & Co., should make advances to James Anderson & Co., in their business of raising crops of crude turpentine, rosin and spirits of turpentine, and to accept drafts for them to a certain amount, payable January 1st, 1880; and the said James Anderson & Co. agreed to send, consign, ship and deliver to the said Parker & Co., in Charleston, all the crude turpentine already made by them, or to be made and owned by them, to be sold on commission, &c. At the same time the said Anderson & Co., executed to Parker & Co., to secure the performance of their engagements and the payment of the money to be advanced under the arrangement, a mortgage of the following property, viz.: "One still, with all the fixtures and appurtenances thereto belonging, hacks, dippers, glue pots, etc.; also, all barrels, barrel staves, etc.; also, two dark horse mules; also, one wagon, and all that stock of goods, wares and merchandise."

After some transactions under the arrangement, on March 25th, Parker & Co. assigned the covenant and mortgage to Holmes & Durham, factors and commission merchants of Charleston. May 7th, Kelly, of the firm of James Anderson & Co., sold his interest to Elijah T. Finklea, who became a partner. August 15th, Louis Jacobs and Thomas Murphy, defendants, in their official capacity as sheriff and deputy sheriff, of Williamsburg county, seized the still and fixtures under

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some *proceeding for claim and delivery instituted by Holmes & Durham. This proceeding is still pending. The said Jacobs and Murphy, under a power of attorney from Holmes & Durham, a few days after they took the still, seized the wagon and mules included in the mortgage and turned them over to Holmes & Durham.

In September the plaintiffs brought this action for damages for breach of contract for refusing to make advances and for the alleged unlawful seizure of their property, as described above, by which their business was broken up and their credit ruined, etc.

The jury found a verdict for plaintiffs for $325. The defendants made a motion for a new trial, which was refused, and they now appeal to this court upon grounds which will be separately considered. It seems that another action is pending between these parties, in which the defendants in this case are plaintiffs, and that they have had the still and fixtures delivered to them, valued at $———, besides the wagon and mules seized. This produces some confusion; but the only matter before us is the alleged errors in the charge of the Circuit judge.

The first exception. The debt secured by the mortgage was not due until January, 1880, and the defendants seized the mortgaged property in August, prior to the time indicated. But it is insisted "that the suspension of operations by the plaintiffs was a breach of the mortgage, and that the defendants then became entitled to the possession of the mortgaged property, and the judge should have so charged." The bond and mortgage are very long, and contain mutual covenants of the parties, of which it will only be necessary to refer to such as affect the issues made. Each party alleges failure to perform on the part of the other. They do not, however, contain any provision that the condition should be regarded as broken upon the suspension of operations by the plaintiffs. On the contrary, there is an agreement that the plaintiffs shall remain in possession until condition broken. If suspension worked that effect, it must have been by operation of law against the terms of the mortgage. But this view proceeds on the ground that there was a suspension. The testimony is not clear that the plaintiffs had voluntarily

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*turned over the still and suspended operations. We see no error in the judge refusing to charge as requested.

The second exception objects to the charge: "That unless the mortgagors assented to the delivery, and voluntarily turned over the mules and wagon to the defendants, they were not entitled to the possession until 1880." It is claimed that by the terms of the mortgage itself, the title to the property, on the part of the mortgagees, was not postponed until the debt, secured, was due and payable and default made in payment, but that it was in them from the beginning.

There are two distinct clauses in the mortgage. The first is in these words: "And it is hereby declared, by and between the parties, that at any time and upon default of the said James Anderson & Co., in the keeping and performance of the agreements to be kept and performed by them in the payment of the moneys and interest according to the true intent and meaning of the condition thereof, then

and in such case it may be lawful for the said J. H. Parker & Co., to seize and sell," etc. At another place are these words: "And it is further agreed that the said James Anderson & Co., are to hold and enjoy the possession of said mortgaged property until default as aforesaid, or any attempt to levy, attach, or in any way dispose of or remove any of the property herein mortgaged, but always at the will of J. H. Parker & Co."

The defendants insist that the last clause controls the whole instrument, and that the mortgagees could lawfully seize and sell at any time. If such were the intention of the parties, the whole previous provision as to default was entirely unnecessary. The whole character of the instrument would be changed, and it would not be a mortgage but a conveyance absolute. The intention of the parties to make a mortgage is clear. The object of construction is to ascertain what the parties meant by the terms and expressions used, and where the intent can be clearly and distinctly ascertained it will prevail, not only in cases in which it is not fully and clearly expressed, but even when it contradicts particular terms of the agreement. The general intention, to be collected from the whole context and every part of a written instrument, is always to be preferred to the particular

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*expression. Addison on Cont. 845; 1 Wait's Act. & Def. 116; Washburn v. Gould, 3 Story 122 [Fed. Cas. No. 17,214]; Chicago v. Sheldon, 9 Wall. 50 [19 L. Ed. 594]. We find no error in the charge excepted to.

The third exception is because the judge refused to charge, when requested, "that if Kelly had sold to Finklea before the taking of the property, this was a dissolution of the firm of James Anderson & Co., the parties who made the contract with defendants, and, therefore, the plaintiffs cannot recover." The judge did charge as requested, but added, "unless the contract was renewed with the new firm."

The partnership of James Anderson & Co., consisted of two persons, James Anderson and Middleton Kelly. James Anderson never left it, but it seems that Kelly sold his interest to one Finklea, who thereby became a member. The property of the concern was never sold or removed. The style of the firm remained the same—James Anderson & Co. The defendants, Holmes & Durham, were informed by letter of the change shortly after it occurred in May, and at that time they made no complaint on that ground. It was left to the jury to say whether they accepted Finklea in the place of Kelly. We can see no error of the judge upon this subject, so far, at least, as the defendants are concerned.

The appeal must be dismissed, and it is so ordered.

WILLARD, C. J., and McIVER, A. J., concurred.

14 S. C. 166

(Case No. 918.)

SCURRY v. COLEMAN.

(April Term, 1880.)

[1. *Appeal and Error* ⇐564.]

Notice of appeal was given in due time, but appellants failed to serve or file their case within thirty days thereafter; after the time had expired, the next succeeding judge presiding in that circuit gave appellants further time to prepare and serve their case—*Held*, that the order extending the time was unauthorized, and the appeal was dismissed. Rogers v. Nash, 12 S. C. 560, approved.

[Ed. Note.—Cited in Gibbes v. Greenville & C. R. Co., 14 S. C. 391; Stribling v. Johns, 16 S. C. 112; Tribble v. Poore, 28 S. C. 570, 6 S. E. 577; Marjenhoff v. Marjenhoff, 40 S. C. 546, 18 S. E. 942.

For other cases, see Appeal and Error, Cent. Dig. §§ 2501–2506, 2555–2559; Dec. Dig. ⇐564.]

[2. *Appeal and Error* ⇐357.]

The second sub-division of Section 353, of the code of procedure, was repealed by the act of 1878. 16 Stat. 698.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1928; Dec. Dig. ⇐357.]

[3. *Appeal and Error* ⇐2.]

[Cited in Godbold v. Vance, 14 S. C. 470, to the point that the act of 1878 covers the whole field of appeals to the Supreme Court.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3–7, 1882, 2421; Dec. Dig. ⇐2.]

[4. *Appeal and Error* ⇐7.]

[Cited in Hyatt v. McBurney, 17 S. C. 148, to the point that appeals by implication are not favored.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 23; Dec. Dig. ⇐7.]

[This case is also cited in Hyatt v. McBurney, 17 S. C. 151, as covering only the mode and manner of appeals.]

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*Before Mackey, J., Fifth Circuit, November, 1879.

The case is fully stated in the opinion of the court.

Messrs. Gary & Gary, for plaintiff.

Messrs. Carroll & Norris, for defendant.

September 6th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. The plaintiff, as the widow of James Scurry, filed her petition in the Probate Court of Edgefield county for dower in certain lands in the possession of the defendant, of which the husband had been seized in his lifetime. The defendant answered, contesting the claim on various grounds. The Probate judge sustained the claim and ordered a writ for the admeasurement of dower to issue. The defendant appealed to the Court of Common Pleas, and Judge Wallace dismissed the appeal July 8th, 1879. Exceptions and notice of appeal to the Supreme Court were filed within ten days, but a case was not prepared and filed within

thirty days. On October 23d the defendant's attorney gave notice that he would move, before Judge Mackey, at Columbia, on November 3d, at 10 o'clock, A. M., for an order enlarging and extending the time in which to perfect the appeal to the Supreme Court by preparing and serving all notices, &c. With this application was served copy of affidavit of A. J. Norris, Esq., one of the attorneys for the defendant, stating the grounds for the motion, viz., that the appeal was not perfected in the time required by law, on account of the absence and oversight of defendant's attorney. On hearing the affidavit and proof of notice, Judge Mackey granted an order extending the time for preparing and serving a case or exceptions fifteen days from the date of his order. The plaintiff appeals from this order of Judge Mackey upon the following grounds:

1. Because his Honor, as the presiding judge of the Court of Common Pleas for Rich-

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land county, had no jurisdiction to pass *an order affecting a cause pending in the Court of Common Pleas for Edgefield county.

2. Because the Circuit judge had no authority to pass an order in said cause, for the reason that the plaintiff had commenced proceedings in the Supreme Court for the purpose of dismissing the appeal for want of jurisdiction.

3. Because the Circuit judge had no authority to enlarge and extend the time within which to appeal to the Supreme Court.

4. Because the motion to enlarge and extend the time within which to perfect the appeal should have been made before the time for perfecting the same had expired.

5. Because the motion to enlarge and extend the time for perfecting the appeal should have been made before the judge who heard and decided the case.

6. Because the defendant did not show sufficient and reasonable cause for extending the time for perfecting the appeal.

The second section of the act of 1878, (16 Stat. 698), provides as follows: That "within thirty days after such notice the appellant or his attorney shall prepare a case or exceptions and serve them, unless the judge before whom the cause was heard last, on ten days' notice to the opposite party, upon sufficient and reasonable cause shown, shall extend the time."

The terms of this act are clear, and have received construction by this court in the case of Rogers v. Nash, 12 S. C. 560. The court in that case say: "It also appears that the appellant failed to serve the respondent with a copy of the case and exceptions within thirty days after serving his notice of appeal. This is also required by the statute, to which reference has already been made. (1878.) The statute allows the enlargement of the time for serving the case and exceptions, but that must be accomplished in the manner pointed out by the act. As there has been no enlargement of the time, according to the provisions of the act, the appeal must be deemed waived and the appeal dismissed."

In this case the time has been extended and the case prepared within the time allowed, but it was not extended within the thirty days from notice of appeal, nor by the "judge before whom the cause was heard last," and

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the question is, whether *that order was properly made. It is insisted that Section 353, sub-division 2, of the Code of procedure, allowing the court to permit amendments where any act necessary to perfect an appeal has been omitted "through mistake," has not been repealed by the act of 1878, and that the order was properly granted under that authority.

It is true that repeals by implication are not favored; but the last act of the general assembly is the law according to its terms, and it does repeal so much of all prior laws as are inconsistent with it. We understand the principle of repeal to be as expressed in the case of State v. Branham, 13 S. C. 394: "Repeals by implication are possible, but they are not favored. To have that effect the new law must cover the whole subject exhaustively, and be absolutely inconsistent with the old law. Acts upon the same subject, which can stand together, are construed in pari materia. If they are consistent, they both stand, the last as an amendment. If part is consistent and part not, the repeal only operates upon the inconsistent part." Apply this principle here. The law governing appeals to the Supreme Court was changed by the act of 1878, as to the time in which an appeal shall be perfected, and then expressly repeals "all acts and parts of acts inconsistent therewith." It covers the whole subject of appeals to the Supreme Court. Are the provisions of the act of 1878 inconsistent with the provision of the code before referred to? Its terms are "whenever the appellant shall fail to perfect his appeal according to the provisions of either of the foregoing sections, his failure to do so shall amount to a waiver of the appeal."

There was a failure in this case to perfect the appeal according to the provisions of the act, and the extension of time was not granted "in the manner pointed out by the act" by "the judge before whom the cause was last heard." The provisions of the act are mandatory and must be enforced. This court has no right to consider the hardships of the case, but is bound to announce the law.

The motion to dismiss the appeal must be granted.

Order set aside.

WILLARD, C. J., and McIVER, A. J., concurred.

14 S. C. *170

*(Case No. 919.)

ALSOBROOK v. ALSOBROOK.

(April Term, 1880.)

[1. *Executors and Administrators* ⟸453.]

The widow of an intestate gave her note, with sureties, for personal property purchased at the estate sale, and transferred to her sureties as indemnity the property purchased and also her interest in the lands of her husband; afterwards, judgments having been obtained against her and her sureties upon this note, one of the sureties received from the administrator a release of himself alone from this judgment, in consideration of a transfer by him to the administrator of the property held by the sureties as indemnity. *Held*, that there was no consideration for the release, and that it must be set aside in favor of creditors of the intestate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1884–1908; Dec. Dig. ⟸453.]

[2. *Executors and Administrators* ⟸453; *Principal and Surety* ⟸193.]

The widow and her sureties are entitled to a credit upon such judgment to the extent of the value of so much of the property so transferred to the administrator, as was not subject to sale by the sheriff under execution against the administrator for debts of the intestate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1884–1908; Dec. Dig. ⟸453; Principal and Surety, Cent. Dig. § 602; Dec. Dig. ⟸193.]

[This case is also cited in Alsobrook v. Watts, 19 S. C. 541, as to the facts.]

Before Kershaw, J., Chesterfield, September, 1879.

In this case the Honorable Thomas B. FRASER, judge of the Third Circuit, sat in the seat of Associate Justice McIVER who had been of counsel in the cause in the court below.

This was an action by Caroline M. Alsobrook, as executrix of Lemuel H. Alsobrook, against Franklin L. Alsobrook and others. F. L. Alsobrook was a son of Willis W. Alsobrook, and administered upon his estate; Elizabeth P. Alsobrook was the widow of intestate.

The Circuit decree, after finding the facts, (which are sufficiently stated in the opinion of the court,) thus concludes:

The note upon which the judgment, whose release is the subject of this controversy is founded, is payable to Franklin L. Alsobrook, administrator. It was received by him for personal property, purchased by the widow at the sale of his intestate's estate made by him as administrator.

Since the case of Rhame v. Lewis, decided in 1867, it cannot be doubted that a security of this kind is equally with choses in action, which the intestate held at his death, assets

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in the hands *of the administrator, subject in all respects, as such, to the claims of creditors and distributees.

The same case is authority for the proposition, never doubted, that a valid alienation by way either of sale or pledge of such choses in action, may be made by the administrator to any one who takes them bona fide, and for value not grossly inadequate, and, upon such alienation, they will be discharged of all equities which attach upon them merely as assets. 13 Rich. Eq. 329. It is wholly unnecessary to go beyond the principles of law here decided, to solve the questions in this case.

They are resolved into two inquiries:

1. Was the release of the judgment complained of "bona fide?"

2. Was it for value "not grossly inadequate?"

It has already been said that I discover in the testimony no direct proof of fraud. Can it be presumed from any of the circumstances? The circumstances relied upon for that purpose are the alleged insolvency of Franklin L. Alsobrook, the administrator, and the supposed knowledge of that fact by Redfearn.

While these circumstances, fully established, would have been very high evidence of fraud, if the release of the judgment had been made in consideration of property conveyed to F. L. Alsobrook individually, it is not perceived that it can have any such effect, when the conveyance was made to him expressly as administrator, unless coupled with such gross inadequacy of consideration as would be evidence of a fraudulent intent. The case is, therefore, reduced to the point involved in the second inquiry.

2. Was the consideration so grossly inadequate as to raise the presumption of fraud?

The evidence on this point is recited above. Witnesses of equal respectability, and with equal means and capacity for forming an opinion, widely disagree as to the value of the land conveyed. Some of the evidence tends to show that it was worth from $8 to $10 per acre, while other testimony tends to reduce it to $2.50 per acre. The very quantity of land conveyed is left in such doubt

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that the court is unable to determine *whether there were six hundred, a thousand, or twelve hundred acres.

The value of the personal property, and the particulars of which it consisted, is also not established by the testimony. The burden is on the plaintiff, who alleges fraud in the transaction, to establish it by proof of such circumstances as will make it plainly to appear. Such proof has not been furnished. From the nature of the subject, the question of value is one of opinion merely, and where the estimates are so diverse, the question must remain in doubt.

The transaction was not illegal in itself, nor necessarily unfair. The presumption, therefore, is in favor of good faith, and it cannot be removed by doubtful proof.

I must, therefore, conclude that the con-

sideration for the release was not grossly inadequate, and, consequently, that there was no fraud in the transaction, actual or constructive. It is, therefore, adjudged that the complaint be dismissed, as to all the defendants, except Franklin L. Alsobrook, against whom, as administrator, an account is prayed, with leave to the plaintiff to apply at the foot of this judgment for such orders as may be necessary to procure such accounting from him, and proceedings consequent thereon.

It is also adjudged, that the plaintiff pay the costs of all the defendants herein, except Franklin L. Alsobrook, to be adjusted by the clerk.

From this decree, plaintiff appealed.

Messrs. Dudley & Newton, and M. J. Hough, for appellant.

Messrs. Prince & Caston, contra.

September 6th, 1880. The opinion of the court was delivered by

FRASER, A. A. J. Willis W. Alsobrook died intestate, and his son, Franklin L. Alsobrook, one of the defendants, administered on his estate. Elizabeth P. Alsobrook, his widow, and his sons, Franklin L. and William, were his only heirs-at-law and dis-

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*tributees. He died possessed of considerable estate, real and personal. In 1857 or 1858 the administrator made sale of the personalty, amounting in all to about $30,000. At this sale Elizabeth P., the widow, purchased property, and gave her note, under seal, to the administrator, with Townley Redfearn, Thomas H. Watts and one Bivens as sureties. It is stated in the Circuit decree that "at the time when the note was signed by Redfearn and Watts, as sureties to Mrs. Elizabeth P. Alsobrook, she transferred to them, as indemnity for such suretyship, certain real estate and some personal property, the latter derived by her purchase at the estate sale of Willis W. Alsobrook, her deceased husband, and the real estate as his heir-at-law, she being, as widow, entitled to one-third part of the estate." It does not appear what was the precise nature of this transfer, whether by way of mortgage or by deed of trust, but it appears to have been by way of indemnity. It must be inferred that it included her whole interest in the land, whether as dowress or as heir-at-law, or of the whole interest in the land by some arrangement with the other heirs. The latter seems possible, as her purchases of personalty do not seem to have amounted to one-third of the personalty of the estate. The land transferred was the same land subsequently sold as a part of the estate for eight hundred acres in one parcel and fifty acres in another, and estimated by some of the witnesses at twelve hundred acres, and estimated by witnesses at from $2.50 to $8.50 per acre. The personalty consisted, or at least so much as was left after the war, of "household and kitchen furniture, hogs, cattle and, perhaps, other articles."

On this note, separate judgments were obtained against Mrs. Elizabeth P. Alsobrook and her sureties, Townley Redfearn and Thomas H. Watts, on September 6th, 1872, for the sum of $10,577.92 and costs.

On September 21st, 1872, the defendant, Townley Redfearn, procured from Franklin L. Alsobrook a release in full of his individual liability on this judgment, the release acknowledging "full satisfaction" of the same from him. This release makes no provision for the discharge of either the principal or the other sureties.

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*Before the date of this judgment and of this release, Lemuel H. Alsobrook had recovered a judgment against the administrator on a claim against his intestate, which was entered up March 5th, 1867, for $3467.62, and $21.13 costs, and renewed September 10th, 1875, for $6167.01, and $89.40 costs.

There was also a judgment in favor of James Funderburk as administrator of Gibson Mangum against Franklin L. Alsobrook as administrator of W. W. Alsobrook, dated March 7th, 1868, for $2465.58, and $28.85 costs.

There was also another judgment in favor of A. M. Lowry for some $300 and interest.

This action was brought to set aside the release given by the administrator to Townley Redfearn on the ground that it was without consideration, and that it was executed with the intent to hinder, delay and defraud the plaintiff, Lemuel H. Alsobrook and other creditors of W. W. Alsobrook.

Under the executions of Lemuel H. Alsobrook and others against the administrator, the land transferred to the sureties as indemnity, and by Redfearn transferred to the administrator as part of the consideration of the release, has been sold by the sheriff as a part of the estate of W. W. Alsobrook for the sum of $3300. Of this amount $2690.-01 was paid on the judgment of L. H. Alsobrook, and $210.12 on the judgment of A. M. Lowry. There had been an application from a previous sale of $196 to the plaintiff's judgment, which had been returned nulla bona on March 28th, 1873, before the commencement of this action.

The consideration is thus stated by the defendant Redfearn: "Transferred to Frank (i. e. Franklin L. Alsobrook, the administrator,) the same he got as indemnity; has lost nothing but time;" * * * "gave his individual release of the property;" "the others were not there," (i. e.) the other sureties.

The defendant Redfearn, and the administrator stood in the relation of debtor and creditor, and Redfearn had a right to make the best bargain he could, provided, however, there was no fraudulent purpose, and he gave a consideration for the release not grossly inadequate. But in no view of the

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case could *the administrator, dealing with trust funds, release or sell them without any consideration at all. Rhame v. Lewis, 13 Rich. Eq. 310.

It would be difficult to reconcile this transaction with correct ideas of fair dealing. All the property transferred by Redfearn to the administrator, as consideration for this release, belonged originally to the estate, and was transferred to him and his co-sureties as indemnity by the principal debtor, yet, in his transfer to the administrator, he claims to transfer without consulting the other sureties, and, in the release, makes no provision for the benefit of the other sureties, who are equally interested with himself or for the benefit of Mrs. Elizabeth P. Alsobrook, the principal, who had furnished the means, only making the vague suggestion that in some way she would be benefited by the transaction.

As we construe this transaction, with the light before us, the whole property conveyed to the sureties as indemnity was not liable to sale under the plaintiff's execution against the administrator as a part of the estate of W. W. Alsobrook. The widow's right of dower could not have been barred by such sale, and the personalty purchased by her ceased to be a part of the estate at the sale, and was no longer liable to the debts of the estate. Both, however, were liable on her own contracts, and could have been subjected to the payment of her debts. Now, the conveyance made by Mrs. E. P. Alsobrook to Redfearn, and the other sureties was only by way of indemnity, and she had a right to pay the debt and redeem the property. She was heir-at-law and distributee of the intestate, and had a right to call on the administrator and his sureties for an account of the administration, and, so far as anything appears in this case, her share in the estate might have been sufficient to have paid her debt, for which Redfearn, Watts and Bivens were sureties. If, under these circumstances, she had conveyed this property to the administrator in payment of the debt, or if she had released her equity and right to redeem the property, we are not prepared to say that the consideration would not have been sufficient to sustain the release. But she was no party to this release, and does not appear to have consented to or been consulted about it. The sole consideration was the transfer by Red-

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fearn, as far as he *could by his individual act, of property held by the sureties jointly for their protection. Sureties have a right to all collaterals taken by the creditor from the principal, or such as are taken by a co-surety. Creditors have a right to all collaterals taken from the principal by the sureties, and this without any reference to the solvency or insolvency of the principal debtor. Field v. Pelot, McM. Eq. 388; Lowndes v. Pinckney, 1 Rich. Eq. 155; McKenna v. George, 2 Rich. Eq. 15; Pitman on Princ. & Sur. 88, 89; Story's Eq., § 520.

Under this view of the case Redfearn only gave what the administrator had a right to, and this could not be held to be a consideration for the release.

The land itself has been sold as part of the estate, and the proceeds applied to the payment of the debts, and the sale by the sheriff must be regarded as a fair test of its value. The right of dower and the personalty, or any other interest which was transferred to the administrator by Redfearn as a part of the consideration, and which was not subject to sale by the sheriff, under the execution against the administrator, should, however, be regarded as payment to the extent of its value and the administrator and his sureties are liable to the creditors for it.

There should therefore be a reference to ascertain what was the value of the property thus transferred, and the execution against Mrs. E. P. Alsobrook and her sureties should have credit for so much. The release executed by the administrator in favor of Redfearn should be set aside and a receiver appointed to administer the fund under the orders of the court in favor of the plaintiff and others who may be entitled to it.

It is, therefore, ordered that the release executed by the administrator be set aside and the case remanded to the Circuit Court for such orders as may be proper under the principles announced in this decree.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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14 S. C. *177

*(Case No. 920.)

NORTON v. LIVINGSTON.

(April Term, 1880.)

[1. *Trial* ⇐278.]

A general exception to the whole of a judge's charge to the jury is not a compliance with the law; the points of law wherein error is charged should be separately and distinctly stated.

[Ed. Note.—Cited in Godbold v. Vance, 14 S. C. 471; McDaniel v. Stokes, 19 S. C. 61; Covar v. Sallat, 22 S. C. 270.

For other cases, see Trial, Cent. Dig. § 689; Dec. Dig. ⇐278.]

[2. *Property* ⇐9.]

Where the question is, whether personal property levied upon belonged to the husband or the wife, it is not error to leave to the jury the weight to be attached to the marks upon the goods when received by railroad as evidence of ownership.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 144; Property, Dec. Dig. ⇐9.]

[3. *Executors and Administrators* ⇐273.]

If the judge submits to the jury a question which he should himself decide, his attention should be directed at the time to his error.

[Ed. Note.—For other cases, see Executors and Administrators, §§ 1058–1060; Dec. Dig. ⇐273.]

Before Pressley, J., Orangeburg, January, 1880.

The case is stated in the opinion of the court.

Messrs. De Treville & Izlar, for appellant.
Mr. Samuel Dibble, contra.

September 6th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. On August 26th, 1879, John H. Livingston, as sheriff of Orangeburg county, under executions in his hands as sheriff, against A. C. Norton, levied upon and sold "one cotton gin and steam engine" as the property of the defendant in execution. The plaintiff, Mary D. Norton, wife of the judgment debtor, A. C. Norton, claimed that the property levied upon and sold did not belong to her husband but to her, and brought this action against the defendant, sheriff, to recover its value. The cause was referred to a jury. The only question in the case was whether the property levied by the sheriff, under executions against the hus-

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band, was the property of the husband *or wife. The jury rendered a verdict for the plaintiff for $1000. The defendant moved for a new trial, which was granted nisi, unless the plaintiff would enter a remittitur of the verdict over and above the sum of $720. The plaintiff accepted the order and remitted the verdict in excess of $720, and for that sum entered judgment. The defendant appeals to this court. It does not appear that there was any request made to the judge to charge any particular point of law, or that any exceptions were made at the trial. Within ten days after the rising of the court the defendant gave notice of appeal to this court, but served no copy of exceptions other than the notice of appeal, which is as follows:

"The undersigned excepts to the judgment in this case, entered on January 29th, 1880, and to the charge of his Honor, B. C. Pressley, and appeals to the Supreme Court of South Carolina."

The plaintiff makes no objection to the appeal, but we deem it proper to state, for the information of the bar, that we do not consider this appeal a compliance with the law. The act of 1878 (16 Stat. 698), requires that when exceptions to the rulings of the presiding judge are not taken and noted at the trial they may be taken "within ten days after the rising of the court by furnishing a copy of such exceptions."

In this case no exceptions were taken at the trial, and it appears that no copy of exceptions has been furnished in the case, except the general statement that the defendant "excepts to the charge of the judge," but without stating in what particulars. We understand an "exception" to be an objection stated "to a decision on matter of law arising upon the trial." The points of law wherein error is charged should be specifically stated in exceptions, otherwise the court has no guide as to the points contested. It is not a compliance with the first section of the act of 1878 to except in general terms to the judge's charge as a whole. This court is excluded from considering the sufficiency or insufficiency of evidence, or any other question except errors of law; and it is indispensable to the satisfactory discharge of their duty that these questions, submitted for their consideration, should be separately and distinctly stated

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*There being, in this case, no such exceptions specifically alleging errors of law, this appeal, without further consideration, might be dismissed; but we gather from the printed arguments of the counsel, which are, however, no part of the case, that the principal objection to the charge is the allegation that the judge submitted to the jury, as a matter of fact, a question which should have been decided by him as matter of law. Appellant's attorney, in his argument, says that his Honor, the presiding judge, on the question of ownership of A. C. Norton, charged the jury "that all the machinery was shipped and marked, and, also, entered on the railroad bill in the name of her husband; that the gin had cards with his name attached, and the engine was marked in his name. You must say what the effect of such marking is. Are goods so invariably shipped in the name of the owner as that it is the invariable proof of ownership? If goods are marked in that way simply to show who they are to go to, and it is not regarded as proof of ownership, then you will not so regard it."

Counsel insist that it was wrong to leave to the jury "the effect" of such marking; but that it was a question of law for the court. The question in issue—whether the husband or the wife owned the property—was certainly one of fact. Upon this question, one of the items of proof was the way in which the property came marked. What weight such proof was entitled to in the minds of the jury must depend upon another question of fact, whether goods are so invariably shipped in the name of the owner as that it is the conclusive proof of ownership. The judge had no right to decide that question of fact, and, properly, left the whole question as to the weight of the testimony to the jury.

The difficulty seems to arise from the use of the word "effect." It is manifest from the issue involved, and the whole context, that the judge intended to charge the jury in something like these words: "You must say what weight such marking should have as evidence upon the question of the ownership of the property." So considered, he was right. He could not say, as matter of law, what weight it was entitled to. Besides, if the appellant considered it error

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to leave that question to the jury, *he should have so informed the judge at the trial. We can see no error.

The judgment below is affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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14 S. C. 180

(Case No. 923.)

PEGUES v. WARLEY.

(April Term, 1880.)

[1. *Adverse Possession* ⇐43.]

The possession of successive purchasers of a tract of land covered by the lien of a judgment, who derived title from the judgment debtor, cannot be united so as to make up the statutory period necessary to give title by adverse possession.

[Ed. Note.—Cited in Garrett v. Weinberg, 48 S. C. 45, 26 S. E. 3; Burnett v. Crawford, 50 S. C. 167, 27 S. E. 645; Epperson v. Stansill, 64 S. C. 488, 42 S. E. 426; Lewis v. Pope, 86 S. C. 295, 68 S. E. 683.

For other cases, see Adverse Possession, Cent. Dig. § 214; Dec. Dig. ⇐43.]

[2. *Limitation of Actions* ⇐112.]

The act of 1865, to amend the stay law, (13 Stat. 286, 305, § 4,) suspended the statute of limitations, and while that act was in existence, the statute of limitations did not run in favor of a purchaser of land covered by the lien of a judgment, as against the judgment creditor.

[Ed. Note.—Cited in Goldsmith v. Jacobs, 14 S. C. 624.

For other cases, see Limitation of Actions, Cent. Dig. § 522; Dec. Dig. ⇐112.]

[This case is also cited in Shell v. Duncan, 31 S. C. 566, 10 S. E. 330, 5 L. R. A. 821, as to the distinction between "dower" and "property," and in Garvin v. Garvin, 31 S. C. 587, 588, 10 S. E. 507, 17 Am. St. Rep. 48; Du Pont v. Charleston Bridge Co., 65 S. C. 535, 44 S. E. 86, as to the operation of the statute of limitations.]

Before Kershaw, J., Darlington, October, 1879.

Hon. T. B. FRASER, judge of the Third Circuit, sat in the place of Associate Justice McIVER, who had been of counsel.

This was an action commenced February 21st, 1879, by Samuel W. Pegues to recover the possession of a tract of land purchased by him on January 6th, 1879, under judgment obtained in October, 1860, and revived in 1872. The defendant, Rowena L. Warley, claimed by adverse possession under the circumstances stated in the opinion of court. B. S. Josey, tenant in possession under Mrs. Warley, and T. D. Wagner, who held a mortgage on the land dated May, 1866, were also defendants.

The Circuit decree is as follows:

This case was heard by the court without a jury by agreement of counsel.

The first question that presents itself is, whether the statute of limitations will protect the defendant's title against the lien of Pegues' judgment.

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*This seems now not to be an open question, if the possession was adverse and continued for the statutory period, and there were no intervening disabilities or other circumstances to prevent the operation of the statute. McRaa v. Smith, 2 Bay, 339; Lamar v. Raysor, 7 Rich. 511. Nor will it be seriously questioned that when one holds land as his own, by virtue of a purchase and regular conveyance of the legal title, with actual possession thereunder, he holds adversely to all the world. Sumner v. Murphy, 2 Hill 488 [27 Am. Dec. 397]; Simmons v. Parsons, 2 Hill 492, note. Such was undoubtedly the character of the possession in this case, since the purchase by Wagner.

The next question to be determined upon the facts is, whether the possession of the Warleys can be connected with that of Wagner, so as to make out a continuous possession for ten years, and thus protect Mrs. Warley's title.

There is no question that Wagner was seized in fee of the land claimed by the plaintiff, by an absolute and perfect title. He had not only the seisin in law, but the seisin in fact. Not only the right to the land, but the actual possession thereof. These two concurring, he had seisin "de droit et de claime, whereof no man may disseise him," as an old author hath it. This seisin, not a new one, he transferred by deed to Warley, whose estate was, therefore, the same, and Mrs. Warley, the defendant, holds by virtue of that title as devisee. Where the possession originally was wrongful, until it ripened into a right by lapse of time, or by descent cast, there was no estate, no right of property which could be conveyed by deed. Consequently, the purchaser from a party thus in possession of lands of another, acquired nothing by his deed. They were, as to the real owners, mere trespassers, who could not tack their successive trespasses together so as to defeat the right of him who had the title. This is settled law in South Carolina. Mazyck v. Wight, 2 Brev. 151; King v. Smith, Rice 11.

The current of authorities elsewhere, however, is various, as may be seen by reference to Mr. Washburn's Treatise on Real Property, Vol. III. 130, and Smith's Leading Cases, Vol. II. 416, in notes to Nepeau v. Doe, where the cases are collected. In New York, Vermont and Massachusetts, posses-

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sions may be *tacked, if one comes in under the other, and the possessory estates are connected and continuous, but not otherwise. So, in Pennsylvania, in a number of cases, in one of which, Moore v. Small, 9 Barr. 194, it is said that the contrary doctrine, "was

never acknowledged as sound by any land lawyer or judge of that state." So in Kentucky and Texas the law is the same. In Tennessee and North Carolina, it is not necessary to show even a parol agreement between successive occupants. It "is enough that the owner has been kept out of possession the requisite time, if there has been a continuous possession by successive occupants."

Mr. Washburn (Vol. III., 130) states the prevalent doctrine, thus: "In the case of successive holders of land, after a disseisin committed by one of them, the seisin thereby acquired by him will not enure to the benefit of the others who come into possession after him, unless there is a privity of estate between them and him, by purchase or descent. Their connected possessions cannot, in the language of the law, be tacked together to make a continuity of disseisin."

Again, at p. 125, he says: "But this possession need not be continued by the same person. It will be sufficient that it is held by different persons in succession, holding in privity with each other, or with the one who claims title by such possession."

There is no case in this state which determines that a conveyance of land by him who holds the same by a perfect title, to another to whom he transfers such title, accompanied with possession, breaks the continuity of such possession. On the contrary, the decisions only go to this extent that a mere trespasser, having nothing to convey, no estate in the land, can not by his deed convert the entry of his successor into anything more than a naked trespass as against the rightful owner. Mazyck v. Wight and King v. Smith, supra.

I consider, however, that the reasoning of the court in Wilson v. McLenaghan, McM. Eq. 35, is conclusive of this point.

I shall next consider the effect of the injunction against creditors, under the bill filed by the administrators of Zimmerman against Pegues and others, being a bill to

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marshal assets, etc. *This bill was filed June 2d, 1868, and dismissed on a plea to the jurisdiction in October, 1871. Shall this period be deducted in calculating the running of the statute?

In Chitty's Gen. Pr., Vol. I., 781, it is said: "It is settled that the mere pendency of a bill in chancery against the claimant, is not sufficient to take the debt out of the statute of limitations, and so it is where the bill is dismissed. But it is said, that if a party be stayed by injunction, it is otherwise, and it has been considered that when the statute has run by the retention of a bill or otherwise in a court of equity, the court will not allow the statute to be set up. But it should seem that unless the court has previously directed that the statute shall not be set up at law, it will not afterwards entertain a bill or application for that purpose, and therefore the claimant should make a proper application to the court of equity, pending the proceedings and before the statute has barred the remedy at law; or he should take care and issue, and continue proper proceedings at law. The authorities to which he refers seem fully to warrant this summary of the law. The cases of Dixon v. Gayfere and Fluker v. Gordon, 23 Eng. L. & E. 149, sustain the proposition that "the institution of a suit to establish the right of real property, (the legal estate being outstanding,) has not the effect to stop the operation of the statute of limitations." But it is said in Pulteney v. Warren, 6 Ves. 93, "that a creditor prevented by the act of the court from obtaining a judgment, is put in the same position as if he had it." This, however, would seem to be confined to a case, where the injunction was had on the application of the defendant at law, or at least to a case in which he was a party to the injunction suit. In the case of Miller v. McIntyre, 6 Pet. 64 [8 L. Ed. 320], it was held that until the defendants were made parties to the bill, the statute would not be suspended as to them. The court says it would be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice, and when a final decree in the case could not have prejudiced their rights."

And in Alexander v. Pendleton, 8 Cranch 462 [3 L. Ed. 624], it is decided, that "where a suit is dismissed, and a new bill filed, the

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plain*tiff cannot, in the computation of time to take a case out of the statute of limitations, avail himself of the pendency of the former suit, unless he can connect the two suits together." In our own cases at law, the rule of the common law is recognized, that process to take a case out of the statute, must be continued to the time of trial. Gray v. Moorehead, 2 Mills 439. After a diligent search, I am unable to find any case which determines, that at law, a reply to the statute would be good, which sets forth the pendency of a bill in equity, under which the plaintiff had been restrained by injunction from pursuing his remedy at law. On the other hand, it was held in Barker v. Millard, 16 Wend. 572, that before the adoption of the revised statutes in New York, an injunction from chancery would not suspend the running of the statute, and the party enjoined had to apply to that court to restrain his adversary from setting it up at law.

All the cases which I have examined amount only to this, that where a party is so restrained, the court, upon application, will, by order, restrain the person against whom the legal demand exists, from setting up the statute. It would seem to follow that, if as said by Mr. Chitty, the party neglects, while the equity suit is still pending,

to protect himself in this way, the statute will continue to run. This is the more evident, when the person whose rights are to be protected by the statute, is not a party to the injunction suit, as was the case here. It would be more accurate to say that the statute is never suspended by reason of the restraint imposed by the court of equity, because there is no power in the court to suspend a statute.

The utmost that a court can do, is to operate upon the party and prevent him from claiming the benefit of a statute, inequitably. This extraordinary power, not having been invoked, there is nothing to prevent the bar of the statute of limitations in this case, so far as concerns the effect of this injunction.

Furthermore, both these suits in equity were brought by the administrators of Zimmerman, to have his estate administered there, because of a deficiency of assets, and in the meantime to preserve the assets, and protect the administrators from suits at law, by enjoining legal proceedings against them.

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*It is difficult to see how an injunction in such a case could have restrained Pegues from enforcing his execution against the land in Warley's possession. There certainly was no good reason why it should.

As to the second bill filed by the administrators of Zimmerman, Pegues was specially excepted from the injunction therein, and as the cases already cited show, the mere pendency of a suit in equity cannot affect the currency of the statute. This brings me to the consideration of the bill filed in January, 1873, by Wagner and Warley to enjoin the sale of the land in question, under Pegues' judgment. Whatever might have been the difficulties in the way, prior to the adoption of the code, it is presumed that there can be none now to prevent the injunction in that case, from suspending the statute during its pendency. Section 128 of the code, is explicit in declaring that where action is stayed by injunction, the statute is suspended. That this injunction suit was dismissed, will not alter this result. The fact remains, that Pegues was restrained by injunction. The court had jurisdiction of the general subject, and the bill was dismissed for the want of equity. Wagner v. Pegues, 10 S. C. 262. Pegues was bound to obey the injunction as he did. High on Injunc., § 48.

The effect of the stay law is now to be considered.

It is sufficient to say as to the act of 1861, that the statute is not suspended, except as to "causes of action," and does not apply in terms to cases in which the execution of final process was inhibited. It may be that the general assembly supposed it had sufficiently guarded the rights of judgment creditors, by the second section of the act. However this may be, it did not provide for this case. It was so considered by the assembly of 1865, for care was taken in reenacting the stay law of that year to provide for this very case. A. A. 1865, p. 305, § 4. It is there declared that, during the continuance of that act, the statute of limitations should be suspended against the claims of all persons in possession of property of debtors on final process, and on which such process may have a lien." This act continued of force until the adjournment of the next regular session of the general assembly. Its

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effect was to suspend the *operation of the statute of limitations against Pegues for one year.

It remains to apply these conclusions to the case under consideration.

Wagner's adverse possession commenced December 31st, 1862, when the land was conveyed to him by Zimmerman. The statute then commenced and continued to run, except as affected by the stay law, until January 4th, 1873, when the injunction in the last suit was obtained by Wagner and Warley, a period of ten years and four days. Giving effect to the stay law of 1865, and deducting one year from this period, it results that the bar of the statute is not complete.

It is, therefore, adjudged that the right and title of the said plaintiff, Samuel W. Pegues, is hereby absolutely and fully established to the real property described in the complaint, free from the lien of the mortgage thereof claimed by the defendant, Theodore D. Wagner, and that the plaintiff recover of the defendants, Rowena L. Warley and B. S. Josey, the possession of the said real property; and further, that he recover from the defendant, Rowena L. Warley, his costs and disbursements in this action, to be adjusted by the clerk.

Defendants appealed.

Mr. A. C. Spain, for appellants.
Mr. R. W. Boyd, contra.

September 6th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This was an action for a tract of land. The plaintiff obtained judgment against one John P. Zimmerman, which was entered October 27th, 1860. Zimmerman, the defendant in execution, was then the owner of the land in dispute, but he sold and conveyed it to Theodore D. Wagner, December 31st, 1862. Wagner sold it to F. F. Warley, May 17th, 1866, who had it in possession until he died, April 16th, 1876, leaving his widow, Rowena L. Warley, executrix and

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*devisee, in possession. John P. Zimmerman died intestate in 1863. There were two proceedings to marshal the assets of his estate, in which the judgment of Pegues was pre-

sented but was never paid. Another proceeding was instituted by Theodore D. Wagner against Pegues to enjoin the sale of the land under his judgment. An injunction was granted January 4th, 1873, but finally dissolved November 18th, 1878. Wagner v. Pegues, 10 S. C. 259.

From the view which the court takes it will not be necessary to state the facts more at length. After many delays, and the dissolution of the injunction, the land was sold by the sheriff, January 6th, 1879, under the judgment of the plaintiff, who bid it off; took sheriff's titles, and now brings this action for its recovery. The defence is the statute of limitations. The case was heard without a jury by consent of counsel. The Circuit judge overruled the defence principally on the force of the act known as the stay law, (13 Stat. 286, 305,) suspending in certain cases the operation of the statute of limitations, and adjudged "that the plaintiff recover of the defendants the possession of the said real property."

The defendants excepted, and charged as error "so much of the judgment as holds that Section 4 of the stay law of 1865 applied to the case."

The plaintiff, content with the result of the judgment, yet, "in case the court should come to the conclusion that there was error in so much of the Circuit opinion as is appealed from," insists that the judgment shall be affirmed on other grounds, and among them "that the possession of Warley cannot be connected with that of Wagner so as to make out a continuous adverse possession for the statutory period."

We will first consider the question here raised as to the right of the defendant to unite the possessions, as it will decide the case if the conclusion should be reached that the possession of Wagner could not be united with that of Warley so as to make out ten years of adverse possession.

It seems now settled in this state that the statute of limitations runs against the lien of a judgment in favor of a purchaser from the judgment debtor without any other evi-

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dence of the adverse *character of his possession than the purchase, conveyance and possession. McRaa v. Smith, 2 Bay 339; Lamar v. Raysor, 7 Rich. 511. The authority on which these cases rest is not clearly perceived, as the statute refers in terms to title, and is silent as to a lien, which, by the law then of force, continued for twenty years, or until presumed paid. It is said in the case of McRaa v. Smith that it was so held for the reason that "judgments and executions were within the mischiefs intended to be guarded against by the statute, although not particularly mentioned in it." In the case of a purchaser from a mortgagor a different doctrine has been declared and sustained by a long line of authorities. Thayer v. Cramer, 1 McC. Eq. 395; Wright v. Eaves, 5 Rich. Eq. 81; Norton v. Lewis, 3 S. C. 25; Gillison v. S. & C. Railroad Company, 7 S. C. 181. Is there any difference in principle between the lien of a mortgage recorded and that of a judgment in the proper office, as far as the statute of limitations is concerned? Both are liens—one general on all the property, and the other specific on particular property of the debtor—one created by the law and the other by the parties. But it is difficult to see that they differ in such a manner as to make necessary and proper a construction of the statute in one case different from that in the other. It is desirable that there should be harmony in the law, and that as far as possible the same rule should be made to apply in like cases.

The case of McRaa v. Smith has, however, been recognized in other cases, and we do not propose to disturb it. But as we think it out of harmony with those of similar character, we are not willing to extend it beyond the very point decided. There was in that case no necessity to unite possessions. There was only one continuous possession in the defendant Smith for the whole period necessary. The question now presented is, whether the principle there announced requires us to go further and apply it to a case in which the bar of the statute cannot be made out against a judgment creditor without uniting the possessions of two successive occupants of the land. Can the possession of the first occupant be added to that of the second when he is sued by the purchaser at sheriff's sale?

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*It has been well settled in this state that the operation of the act of limitation depends upon actual possession of the land and not upon mere non-claim of the plaintiff, and that one in possession of land for a less time than the statutory period cannot unite his possession with that of one from whom he purchased in order to make out ten years, for, until that period has run out, they are both, as it respects the true owner, as mere trespassers. A conveyance from the first to the second tenant, under such circumstances, conveys nothing. It is said in several of the cases that "actual deed from a person who has no right conveys nothing." Mazyck v. Wight, 2 Brev. 151; King v. Smith, Rice 11; Beadle v. Hunter & Garrett, 3 Strob. 331; Dillard v. Philson, 5 Strob. 213.

But it is suggested that these authorities only refer to cases where all the occupants, whose possession it is proposed to tack, were originally naked trespassers, and do not embrace a case where the first occupant got his possession by regular conveyance from the person having the legal title. The judgment in this case states the proposition as follows: "When the possession was originally wrongful, until it ripened into right by lapse of time or by descent cast, there was no estate, no right of property which could be conveyed

by deed. Consequently the purchaser from a party then in possession of lands of another acquired nothing by his deed. They were, as to the real owner, mere trespassers, who could not tack their successive trespasses together so as to defeat the right of him who had the title. * * * There is no case in this state which determines that a conveyance of land by him who holds the same by a perfect title to another to whom he transfers such title, accompanied with possession, breaks the continuity of such possession. On the contrary the decisions only go to this extent, that a mere trespasser, having nothing to convey, no estate in the land, cannot, by his deed, convert the entry of his successor into anything more than a naked trespass as against the rightful owner."

The exact point here made has never, so far as we know, been decided in this state. The cases in the reports were actions by the real owners against persons claiming title by possession, but who did not connect themselves

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with the legal title. We have *not been referred to any case, and we have not been able to find one where possessions were united against the lien of a judgment creditor who was not the owner of the land but had a lien upon it as judgment creditor or mortgagee. We do not think that the case of dower, decided in Wilson v. McLenaghan, McM. Eq. 35, is analogous. Dower is a peculiar estate, issuing out of another estate. The necessary concession of the dowress is that hers is the title of her husband. Dower right is inchoate until established by law, and is a mere chose. Then, if that case does not control this, what rule of construction shall be adopted in the case where a judgment debtor sells land subject to a lien? We must keep in view the difference between power and property. The right to the property, as such, and the right to levy and sell are distinct. The judgment creditor was not the true owner of the land. As creditor he could not sue for the land. His right was a lien—the power to levy and sell. Possession by the defendant in execution for ten years would not bar the lien which runs for twenty years or until presumed paid. Yet it might be so considered if the judgment creditor were the real owner of the land. The judgment debtor has the legal title, subject to a lien, and, therefore, it cannot be said that he has "perfect title." If he conveys the land the right to levy and sell is not lost, but goes with it. The purchaser can take no higher right than the seller can give. He is fixed with knowledge of the lien, and takes and holds subject to it as much so as the defendant in execution himself. His possession is not necessarily adverse to the lien, but consistent with it. He buys property subject to a known encumbrance, and he holds in subordination to it. So far as the lien is concerned his title is defective—he never had it—and quoad hoc, is he not in the exact condition of the naked trespasser? Not a trespasser out and out, but entirely without title or estate so far as the lien has effect. All the cases hold that the possessions cannot be united if the first taker had no right whatever. The fact here is that the first taker had the legal right, but qualified by the lien. Would it not seem that upon principle the same result should follow to the extent of that qualification? So far as the lien was concerned, the first purchaser, Wagner, had

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no right whatever *except in subordination to it, and, before he acquired title by ten years' possession, "he could not, by his deed, convert the entry of his successor into anything more than a naked trespass as against the lien."

Warley went into possession of the land still subject to the lien. The judgment creditor, who, as to the lien, was the true owner, could not enforce it against him until he went into possession, and as his deed from Wagner conveyed nothing but the legal title subject to the lien, he could not claim the benefit of adverse possession in quieting his title as against the lien until he had possession himself for the whole period of ten years.

We do not think this case should be an exception to the well established general rule that possessions cannot be united to make out the time necessary to complete the bar of the statute.

We concur with the Circuit judge that the fourth section of the act of 1865, (13 Stat. 286, 305,) suspended the statute from running in favor of Warley during the continuance of that act. In some particulars the section is not expressed in clear technical language, but we think there is no doubt about the intention.

The judgment below is affirmed and the appeal dismissed.

WILLARD, C. J., and FRASER, A. A. J., concurred.

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14 S. C. 191

(Case No. 926.)

SIMPSON v. WILLARD.

(September Term, 1880.)

[1. *Judges* ⇨8.]

The constitution of this state, (Art. IV., § 2,) provides that a chief justice and two associate justices shall be elected for the term of six years, to be so classified that one of the justices shall go out of office every two years. *Held*, that a chief justice elected to supply a vacancy caused by the death of his predecessor was entitled to hold the office only for the remainder of the term of such predecessor, and not for the full term of six years.

[Ed. Note.—Cited in Williams v. Benet, 35 S. C. 153, 14 S. E. 311, 14 L. R. A. 825; Smith

v. McConnell, 44 S. C. 493, 494, 22 S. E. 721; McDowell v. Burnett, 92 S. C. 472, 75 S. E. 873; Geer v. City Executive Committee for City of Greenville, 94 S. C. 477, 78 S. E. 326.

For other cases, see Judges, Cent. Dig. § 39; Dec. Dig. ⟸8.]

[2. *Constitutional Law* ⟸19.]

Weight given to contemporary construction.

[Ed. Note.—Cited in Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 592, 40 Am. Rep. 705; State v. Williams, 40 S. C. 379, 19 S. E. 5.

For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. ⟸19.]

3. This case distinguished from Wright v. Charles, 4 S. C. 178; Whipper v. Reed, 9 S. C. 5.

[This case is also cited in Carolina Groc. Co. v. Burnet, 61 S. C. 206, 39 S. E. 381, 58 L. R. A. 687, as an instance of exercise of jurisdiction by Supreme Court, of a controversy submitted without action.]

Original application, Special Term, September, 1880.

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*In this case, Hon. HENRY McIVER, senior associate justice presided, and Hon. JOSHUA H. HUDSON, judge of the Fourth Circuit, sat, by appointment of the governor, as one of the court, the CHIEF JUSTICE, as a party to the cause, being disqualified.

The case is fully stated in the opinion.

Messrs. L. F. Youmans, Attorney-General; W. G. DeSaussure and J. S. Cothran, for plaintiff.

Mr. F. W. McMaster, contra.

October 15th, 1880. The opinion of the court was delivered by

HUDSON, A. A. J. By agreement between the parties, plaintiff and defendant aforesaid, a controversy without action, under Section 389 of the code of procedure, is submitted to this court, wherein is presented for determination the question whether the plaintiff has been duly elected and qualified, and is entitled to have and to hold the office of chief justice of the Supreme Court of the State of South Carolina, claimed and held by the defendant.

The controversy arises on the following facts, viz.: The Hon. F. J. Moses, Sr., was elected to the said office by a joint vote of the general assembly on July 29th, A. D. 1868. The Hon. F. J. Moses, Sr., was re-elected to the said office on January 30th, A. D. 1874, by a joint vote of the general assembly, to hold for the term of six years, commencing from the expiration of the then existing term of said office, and duly qualified and entered upon the said last mentioned term of said office, and held the same until his death, which occurred on March 6th, A. D. 1877.

That on May 15th, A. D. 1877, the general assembly, (in conformity to a concurrent resolution of the two houses, of date of May 11th, A. D. 1877,) proceeded to elect a chief justice by joint vote thereof, and the said defendant, A. J. Willard, was, by said joint vote, elected chief justice of the Supreme Court to fill the vacancy created by the death of the Hon. F. J. Moses, Sr.

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*That the defendant duly qualified and entered upon the duties of the said office on May 15th, A. D. 1877, and has continued to hold said office, and claims to hold the same until the full end and expiration of the term of six years, from and after the day on which he was so elected to said office.

That on December 17th, A. D. 1879, the two houses of the general assembly passed a concurrent resolution, under which the general assembly, on December 18th, 1879, proceeded to elect a chief justice; and the said plaintiff, W. D. Simpson, was, by joint vote, elected thereto, and qualified and was commissioned chief justice on September 6th, A. D. 1880.

The said W. D. Simpson claims that the election of A. J. Willard on May 15th, 1877, entitled the said Willard to hold the office for the unexpired term of F. J. Moses, Sr., only; that this has now expired; and that, therefore, he, W. D. Simpson, is entitled to the possession of said office.

The question submitted is, whether a vacancy in said office has occurred by reason of the expiration of the term of the office of chief justice, to which the said defendant, A. J. Willard, was elected on May 15th, A. D. 1877. If the court shall be of opinion that the office of the defendant, A. J. Willard, has expired by due course of law, judgment must be entered in favor of the plaintiff, W. D. Simpson, that he is entitled to have and to hold the office of chief justice of the Supreme Court; but if the court shall be of opinion that the defendant's term of office has not expired, judgment must be in favor of the defendant, that he is entitled to have and to hold the office of chief justice as against plaintiff.

The foregoing is almost literally the language of the controversy submitted to this court, and which we have thought best to set forth fully.

Its solution depends entirely upon a proper construction of the following sections of Article IV. of the constitution of the State of South Carolina, as ratified by the people on April 16th, A. D. 1868.

These sections are in Article IV., relating to the judicial department:

"Section 2. The Supreme Court shall con-

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sist of a chief *justice and two associate justices, two of whom shall constitute a quorum. They shall be elected by a joint vote of the general assembly for the term of six years, and shall continue in office until their successors shall be elected and qual-

ified. They shall be so classified that one of the justices shall go out of office every two years.

"Section 3. The chief justice elected under this constitution shall continue in office for six years, and the general assembly, immediately after the said election, shall determine which of the two associate justices shall serve for the term of two years, and which for the term of four years; and, having so determined the same, it shall be the duty of the governor to commission them accordingly.

"Section 11. All vacancies in the Supreme Court or other inferior tribunals, shall be filled by election as herein prescribed; provided, that if the unexpired term does not exceed one year, such vacancy may be filled by executive appointment."

In searching for the true interpretation of these sections of our constitution, and upon which the present controversy depends for determination, we naturally inquire in the outset whether they have at any time received either legislative or judicial construction—and, if so, such construction should receive due consideration by this court in its bearing upon the question now submitted for the first time to this court for adjudication. It is a rule of common sense, recognized and adopted by judges and text writers as a rule of law, that in doubtful questions of construction, arising under statutes and constitutions, due weight should be given to contemporaneous exposition and usage. Due regard should be had to the opinions entertained by men learned in the law and by the law-makers who are called upon to carry into effect the constitution. The manner in which such men have uniformly interpreted the constitution, and the mode in which they have invariably carried its provisions into effect, will be of little weight with a court when called upon to pronounce a judicial exposition of the language of a constitution in which no ambiguity appears and no room for doubt exists, but will be of material aid to the court, and carry great force in cases where ambiguity does exist and doubt does arise from the

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phraseology *of the instrument. Contemporanea expositio est fortissima in lege, is a maxim of the civil law. And whilst the rule governing judicial tribunals is that cotemporaneous construction is not absolutely binding upon them in giving judicial interpretation to a statute or constitution, yet it has, in cases of ambiguity, always been accorded full weight, and, indeed, in many cases, has been allowed to prevail in fixing judicial interpretation. In considering the constitutional authority of the justices of the Supreme Court of the United States to sit as justices of the Circuit Courts, Patterson, J., pronouncing the opinion of the Supreme Court of the United States, said: "Another reason for reversal is, that the judges of the Supreme Court have no right to sit as Circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions as such. To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest, and ought not now to be disturbed." Stuart v. Laird, 1 Cranch 309 [2 L. Ed. 115]. This decision was as early as February, 1803, when the constitution of the United States had been in operation about as long as has been that of South Carolina of April, A. D. 1868.

To the same effect is the language of Story, J., in Martin v. Hunter, 1 Wheat. 351 [4 L. Ed. 97], touching the appellate jurisdiction of the Supreme Court of the United States in cases from state courts. After enumerating many of the historical facts connected with the question, and establishing uniform acquiescence in the jurisdiction then for the first time questioned, that eminent judge says "This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the Supreme Court through so long a period, do, we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubt."

In Sedg. on Stat. & Const. L. 251, the learn-

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ed author, speak*ing of contemporaneous exposition, says: "In seeking aid to construe an obscure or doubtful statute, considerable weight is attached to the opinions in regard to it by persons learned in the law at the time of its passage." "Great regard," says Lord Coke, "ought, in construing a statute, to be paid to the construction which the sages of the law who lived about the time or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made."

In perfect harmony with this doctrine are the views expressed by Blackstone, Vattel, Story, and all standard writers on constitutional and statute law, from whose able works it is entirely unnecessary to encumber this opinion with further extracts.

Applying this well-established rule of cotemporary exposition to the case in hand, we find that the three foregoing sections of the constitution fixing the tenure of office of the justices of the Supreme Court, and prescribing the mode of filling all vacancies that may occur therein, have received perfect uniformity of construction by every legislature of the

state, from A. D. 1868 until the present day. In every instance where a vacancy has occurred in the office of chief justice or associate justice of the Supreme Court, by the death or resignation of the incumbent before the expiration of the full term, the election to fill such vacancy has been for the unexpired term only, and the justice so elected and so commissioned has, without exception, save in the present instance, acquiesced in this construction, and suffered an election to be held for a successor to the next regular full term.

On the resignation of Justice Hoge, February 1st, 1870, Justice Wright was elected and commissioned to fill his unexpired term, ending July 30th, 1870, and on December 9th, 1870, Justice Wright was elected to the full succeeding term, ending July 30th, 1876, and on December 15th, 1875, was again elected to fill the succeeding full term, beginning July 31st, 1876, and ending July 30th, 1882. On December 5th, 1877, Wright having resigned, A. C. Haskell was elected justice to fill the unexpired term of Wright. On December 11th, 1879, Haskell having resigned the associate justiceship, Samuel McGowan was elected to fill the unexpired term of said

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Haskell, to wit, the *unexpired term of Wright, the first incumbent of the full term, from July 30th, 1876, to July 30th, 1882.

On May 15th, 1877, Willard, then associate justice, was elected chief justice to fill the vacancy occasioned by the death of Chief Justice Moses.

On May 18th, 1877, Henry McIver was elected associate justice to fill the vacancy created by the promotion of Willard to the chief justiceship, and whose regular term of office as associate justice would have expired July 30th, 1878. And hence, on December 4th, 1877, Henry McIver was elected associate justice to fill the succeeding regular full term to commence July 31st, 1878, and ending July 30th, 1884. Finally on December 18th, 1879, the legislature elected W. D. Simpson chief justice to fill the full term succeeding the unexpired term of Moses, then held by Willard, and which expired July 30th, 1880.

The journals of the general assembly show that on two occasions at least the true construction of the three foregoing sections of the constitution became the subject of examination and discussion: once pending the election of a successor to Chief Justice Moses, and again pending the election of a successor to Chief Justice Willard. On both occasions the general assembly, by their action, construed Section 2, requiring that one of the justices shall go out of office every two years, as imperatively fixing a rotation which that body could not alter, and that the election to an unexpired term, provided for in Section 11, could, in no event, enlarge the term of the justice so elected so as to extend it beyond the fixed, definite and unchangeable termination of the then current and unexpired term.

This brief narrative demonstrates the fact that the general assembly of the state—the first and each succeeding legislative body for twelve years—have uniformly construed the constitution to mean that the election of a justice of the Supreme Court to fill an unexpired term gives no right to the justice elect to hold beyond said unexpired term. And the narrative likewise reveals the fact that the claim of the present defendant is without precedent in the history of the Supreme Court since its establishment in 1868.

In the examination of the question before

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us, we are further *aided by the contemporaneous and uniform exposition of another section of the constitution, wherein a like system of classification and rotation is prescribed for a portion of the legislative department of the government.

"Article II., Sec. 9. Upon the meeting of the first general assembly which shall be chosen under the provisions of this constitution, the senators shall be divided by lot into two classes, as nearly equal as may be, the seats of the senators of the first class to be vacated at the expiration of two years after the Monday following the general election, and of those of the second class at the expiration of four years, so that, except as above provided, one-half of the senators may be chosen every second year."

The preceding section (8), provides for the election of one senator from each county, except Charleston, which has two, and fixes the term of office of a senator at four years.

Pursuant to Section 9, upon the meeting of the first general assembly the classification of senators was made by lot, and a rotation fixed, which rotation has ever been kept unbroken, and can alone be kept unbroken by maintaining, in the case of each senator from each county, a term of office definite as to its beginning and ending, and, should a vacancy occur by death or resignation during any current term, by filling the same for the remaining portion of such unexpired term, and for that period of time only. This rule in filling vacancies of terms has been rigidly followed as the only mode of preserving the mandate of the organic law, which requires that one-half of the senators may be chosen every second year. Since the adoption of the state constitution in 1790, this scheme of rotation and classification has been retained in every succeeding constitution; and, under its operation, it has been an invariable rule that if the people elect a senator to fill a vacancy in an unexpired term he retains his seat until the current term expires, and no longer, unless by virtue of a re-election to a full succeeding term. Yet, under the constitution, the term of office of a senator is four years, just as that of a justice of the Supreme Court is six years.

But, nowhere can we find a more forcible

illustration of the controlling effect of this revolving scale of rotation over elections to fill vacancies than in the organization and

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uniform usage and *practice of the United States senate. Indeed, the organization of our Supreme Court seems to have been modeled upon that of the federal senate.

The provisions of the constitution of the United States in this regard are in Article I., Section 3, which reads as follows: "The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof for six years; and each senator shall have one vote.

"Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

This section bears a striking resemblance to Sections 2 and 3 of Article IV. of our state constitution, so much so that we are unhesitatingly led to believe that the framers of our state constitution intended to organize a Supreme Court upon the model of the senate of the United States as to classification of its component parts and their periodical rotation, and, also, as to the mode of perpetuating the scheme by providing elections to fill vacancies in unexpired terms. Of this section of the federal constitution, from the first organization of the senate thereunder down to the present time, there has been but one exposition and interpretation, in the senate and out of the senate, by state executives and state legislatures, by text writers, commentators, jurists and judges. That construction is that the original division of senators into three classes, to enter and to depart at stated periods in regular rotation, is a fundamental feature of the organic law, intended to be a continuing and perpetual feature of the senate so long as that august body lasts; and that this succession of entry and departure by the classes of senators cannot be interfered with nor deranged by any

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action, either executive or legis*lative, state or federal. Hence, in every instance, under the constitution, of an election of a senator to fill a vacancy created by the death, resignation or removal of an incumbent before the expiration of his term, the senator elect has only held until the expiration of the unexpired term which he was chosen to fill, and no longer. It is needless to say that by no other construction could the original, leading, fundamental scheme of rotation of classes be maintained. And that this scheme should be maintained and perpetuated was evidently the leading design and main object of the framers of the constitution; and, being so, all minor provisions must be construed to be subordinate and subservient thereto. The supplying of vacancies in unexpired terms is incidental to the preservation of an existing term of office, and hence must be so conducted and carried out as not to derange, but to preserve this fundamental and leading design of succession and regular rotation. As state after state has been admitted into the Union, two senators from each have been chosen by the legislature, invariably for the term of six years, but, immediately upon entering that body, they have each, by lot, been cast into one class or another of the three divisions of senators, and their respective terms of office have been made to conform to that of the class to which lot had assigned them.

Of the policy, the merits and wisdom of this scheme, which imperatively required that one-third of the senators shall go out of office every two years, it is not for us here to speak. It is enough to say that it was incorporated into the organic law by wise men for wise purposes, with safeguards of perpetuation thrown around it; that it has been most rigidly and scrupulously maintained in its original integrity, and its wisdom has been fully vindicated by the experience of nearly a century.

All that we design to show is the fact that this section of the constitution of the United States, so analogous in its phraseology and provisions to that of the section of our constitution now under discussion, has never received by any legislative body, state or national, nor by any learned commentator on constitutional law but one exposition, and that is that the terms of office of the three classes of senators must follow each other in duration and ending in regular order of ro-

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tation and periodical suc*cession, and can never, by election to fill unexpired terms and casual vacancies, be so deranged as to destroy this sliding scale.

Perhaps it may be said that this uniform exposition of the section by legislators, politicians and commentators is not the technical interpretation which the language calls for, and which a judicial mind must give it, but rests alone upon political views and ideas of symmetry and convenience.

To this it is a sufficient reply to say that the senate has ever been composed in part of the ablest jurists of the country; the judicial ermine has never been worn by purer and abler judges than Marshall, Story and Kent, and, as commentators upon law, the two latter are unrivalled in this country. They are all agreed in the exposition of this section of the constitution, and none have been found to differ. And the absence of a

judicial exposition of the law arises from this unanimity of construction and its removal from the jurisdiction of the judicial department. But whenever, in the judicial determination of a germain question, it has been appropriate, in illustration, to advert to the law organizing the senate of the United States and of the states, judges have uniformly interpreted the constitution in this regard the same way as have statesmen and commentators.

In People v. Green, 2 Wend. 273, a leading New York case, involving the construction of the constitution of New York relative to the office of sheriff, the court says: "The case of sheriffs has been assimilated to that of senators, who are declared by the constitution to be chosen for four years; but those chosen to fill vacancies hold only for the residue of the unexpired term of their predecessors. This limitation to their holding does not result from the fact that they are chosen to fill vacancies, but from other parts of the constitution from which it is necessarily implied. The provision classifying the senators, and vacating the seat of one from each district in every year, could not be carried into effect if a senator elected to fill a vacancy were to hold a full term of four years. But permitting a sheriff to hold for three years in case he is elected to fill a vacancy, is not like the case of a senator, incompatible with any other part of the constitution."

Pursuing this research, we are brought in

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chronological order *to the case of Whipper v. Reed, 9 S. C. 5. The issue in that case was as to the term of office of a Circuit judge elected to fill an unexpired term, and it was there held by this court that a Circuit judge elected by the legislature under Article IV., Section 11, of the constitution of the state to fill a vacancy in the office, holds, under Section 13 of the same article, for the full term of four years, and not merely for the unexpired term of the judge in whose place he was elected.

It is worthy of mention that this judgment was rendered by two of the justices then alone sitting, viz., by Chief Justice Willard, the present defendant, and Associate Justice McIver both of whom had been but recently elected to this office, and both to fill vacancies created casually. Chief Justice Willard had been elected to fill the vacancy created by the death of Chief Justice Moses, and Justice McIver had been elected to fill the vacancy created by the promotion of Willard. The judgment was rendered in June, A. D. 1877, within a month after the agitation in the legislature of the very question now before us, pending the election of Willard, chief justice.

The public mind was more or less exercised upon the question, and naturally desired a judicial exposition thereof that might put it at rest. The occasion and all the surrounding circumstances must have been, and certainly were, highly appreciated and fully understood by the learned court, both of whom, holding terms casually made vacant, were interested in this question. It is reasonable to presume, under all these circumstances, that the duration of their own terms of office would not have been made the subject of an unnecessary and idle obiter dictum; and we may reasonably infer, on the other hand, that all that was incorporated in that opinion bearing upon the tenure of office of the justices of the Supreme Court, was the result of calm deliberation and sober thought. In the learned opinion of Chief Justice Willard in this well-considered case, he proceeds to show that the law applicable to filling vacancies in the office of a Circuit judge is different from the constitutional mode prescribed for filling vacancies in the Supreme Court, so far as the effect and consequence of the election is concerned. In the one case the effect of an election to fill a

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casual vacancy is to confer upon the *officer elected a full term of four years under the controlling words of Section 13 of Article IV., whilst in the case of a vacancy in the Supreme Court the effect of an election to fill the same is to confer upon the justice so elected the vacant or unexpired term only, by reason of the controlling language of Sections 2 and 3. In the course of his remarks he says: "When the constitution fixes the duration of a term of office, and at the same time provides for its being filled at a fixed time, occurring periodically, it necessarily follows that, a casual vacancy occurring during such term of office, necessity must arise for filling it for the unexpired term; and although the mode of filling such vacancy is prescribed by the constitution, yet the incumbent only holds until the time arises for filling the office in the regular mode and at the regular time prescribed by the constitution. In that case the officer taking a term of office less than that prescribed for the office, is placed in that position by the effect of the constitution itself, reached by treating one class of provisions as necessarily a limitation of the other. * * * Having these principles in view, let us look into the constitution to see whether there is anything to sustain the conclusion that the constitution has imposed a limit to the duration of the office of Circuit judge of such a nature that persons elected to fill a casual vacancy cannot claim the full term attached to the office, but can hold only for the unexpired term.

"In the first place there is no such provision indirectly accomplishing such a result by fixing the time when the Circuit judges shall take their offices. Such a provision exists, as we have already noted, in the case of the officers described as 'state officers,' Art. IV., § 2; Art. XIV., § 10. Such a limitation is inferrable as affecting the justices of the Supreme Court from the provision re-

quiring that one of these justices shall be elected every two years, but none is found affecting the Circuit judges. This omission is evidently not accidental, but intentional. In the case of the Supreme Court, that body being composed of three justices, there was reason for placing regular intervals of two years between the elections of the respective justices, so that no sudden change should be made in the organization of the court, an important safeguard against inequality in

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the adminis*tration of the law. As the Circuit Court is held in every case by a single judge, that reasoning does not call for a similar provision as it regards the Circuit judges."

It will be observed that in quoting the last clause of Section 2 of Article IV. of the constitution of 1868, the learned chief justice inadvertently remarks that it provides that "one of these justices shall be elected every two years," whilst he should have said that "one of the justices shall go out of office every two years."

In his learned argument for the present defendant, counsel alleges that the foregoing obiter dictum in Whipper v. Reed derives its strength from this erroneous quotation; but we are unable to perceive how the force of the reasoning would be in the least impaired by using the exact words of the section instead of the phraseology used by Chief Justice Willard above. They interchangeably mean the same thing.

We have been led to extract copiously from this opinion, because, although technically an obiter dictum, yet the argument is cogent and sound, and, viewed in the light of surrounding circumstances, must be regarded as an authoritative judicial interpretation of the constitution, carrying with it great weight in the list of cotemporaneous expositions thereof.

Passing from the argument resting upon usage, acquiescence and cotemporary exposition, we find that we are not without authoritative precedent bearing directly and with great force upon the case before us. We refer to the case of The People, ex rel. Jackson, v. Potter, 47 N. Y. 376.

The facts were, that Rosekrans, at the adoption in 1869 of the judiciary amendment to the constitution, was a justice of the Supreme Court, Fourth District. His term would expire December 31st, 1871. On November 6th, 1871, he resigned. On November 7th, 1871, a general election in his district was held, and Potter was elected to succeed him. Potter was elected for a term of fourteen years. When Rosekrans resigned the governor appointed Jackson, under Section 9, to fill the vacancy. Jackson claimed to hold until December 31st, 1872. The court held that Jackson's term lasted only for Rosekrans' term, and expired December 31st, 1871.

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*The Court of Appeals sustained this view, and Folger, J., said: "Mr. Justice Rosekrans could not resign that which he did not hold. He did not hold, nor was he entitled to hold the term beginning January 1st, A. D. 1872, nor any part thereof. He could not then resign that term nor any part of it. Hence the resignation which he made could create no vacancy in the office for that term to be filled, nor for any part thereof. The vacancy which he did create was for the remainder of his unexpired term, and for no other time. This was the vacancy to be filled, and no other. * * * To sum up our views, we conceive that the whole article must be read together; that each must be made to act in unison with each other; that, where there is conflict, that which provides for a contingency must be held to be subservient to those which provide for the general purpose, and for events sure to occur at stated intervals."

Under the constitution of New York, under which this judgment was rendered, the system of classification and rotation prevailed in both the Supreme Court and Court of Appeals, somewhat similar to our Supreme Court, and hence the value of this decision to us in solving the present question.

Thus far we have considered the question presented to us in the light of contemporaneous exposition and judicial precedent, and the result of the investigation establishes the fact that the harmony and uniformity of interpretation remains unbroken, and that this well-established interpretation is the same as the full, clear, explicit and forcible exposition of this branch of the organic law, rendered by the learned defendant himself in the aforesaid well-considered case of Whipper v. Reed.

It only remains, in conclusion, to examine the sections of the constitution out of which this contention springs, and to ascertain whether this usage, acquiescence and exposition can be reconciled to the true intent and meaning of the framers of the constitution to be gathered from that instrument by established rules of judicial interpretation.

These rules are, in the main, plain, simple, and of easy comprehension. They are rules of common sense, derived from experience, and formulated into rules and maxims of law. All have a common purpose in view,

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and that is to ascertain the *real meaning, intention and main object of the law-makers in framing statutes and constitutions.

Story says: "Every word employed in the constitution is to be expounded in its plain, obvious and common sense meaning, unless the context furnishes some ground to control, qualify and enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness

or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them recondite meanings, or any extraordinary gloss." Story on Const., § 451.

Let us apply this rule of common sense to the interpretation of the section of our constitution under consideration.

Section 2 of Article IV. provides for the organization of a Supreme Court, and requires that it shall consist of a chief justice and two associate justices. The term of office of each shall be six years. They shall be elected by a joint vote of the general assembly, and "they shall be so classified that one of the justices shall go out of office every two years." Not one of the associate justices, but one of the justices, which term of expression includes all three: the chief as well as each of the associate justices, shall go out every two years. There is no ambiguity, no room for doubt, no need of construction of the language of this section. The meaning of the section is plain and manifest. It prescribes the number of justices, the mode of election, the term of office, its duration, the classification of the justices, and a system of rotation by which one of the three members of the court shall go out of office every two years. This biennial succession is thus imperatively made a feature of the court, continuing and to continue so long as the court shall last; it is a leading feature of organization, unchanging, invariable, definite and fixed, and, once put in operation, continues by virtue of its own inherent energy. Having thus,

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in Section 2, provided for the *court all the necessary elements and component parts of a symmetrical whole, Section 3, following, is designed solely to perfect the classification, and to put this judicial machinery into operation. It provides that in this classification the officer of greatest dignity shall take the first rank, viz., the full term of six years, and very properly leaves it to the legislature to say which of the associate justices shall rank second and which third, which for the term of four years, and which for the term of two years.

So soon as this duty of electing and classifying the justices was perfected by the first legislature the court was organized, and these provisions of the organic law furnished the scheme of its permanency with biennial succession of its classes. No other provision as to the court would have been necessary but for contingencies arising from uncertainty of human life and other casualties incident to office. It became necessary, therefore, to provide for the filling of casual vacancies created by death, resignation or removal from office of the incumbent, as well as the filling of vacancies of full terms. To meet this end, Section 11 provides that "all vacancies in the Supreme Court, or other inferior tribunals, shall be filled by election as herein prescribed; provided, that if the unexpired term does not exceed one year such vacancy may be filled by executive appointment."

Now the only mode of electing a justice of the Supreme Court "herein prescribed," is by joint vote of the general assembly, and to this mode of election, and to nothing else, are the words "as herein prescribed" to be referred when applied to justices of the Supreme Court. So that, in this section, full and ample provision is made to fill all vacancies in the Supreme Court, whether the vacancy be that of a full term or part of a term. This power to fill all vacancies is conferred upon the legislature, which body can, by joint vote of the two houses, fill the vacancy of a full term, or of any part of an unexpired term, whether the same be more or less than a year. But as that body meets but once annually, and as a vacancy may happen during the recess of the general assembly, power is conferred upon the executive to fill, by appointment, a casual vacancy that does not exceed a year in duration.

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*It is difficult to see how more perfect provision could be devised for keeping the Supreme Court full and operative.

Construing this eleventh section in connection with Sections 2 and 3, it is manifest that when the vacancy in the Supreme Court is that of the unexpired term of any one of the justices, whether chief or associate, and the same is filled either by the joint vote of the general assembly or by executive appointment, the term of office of the justice so elected or appointed, must end with the expiration of the term which he was chosen to fill. Otherwise there would necessarily occur a derangement of the scheme imperatively established and unalterably fixed in Section 2, viz.: "That one of the justices shall go out of office every two years." To the operation of this controlling mandate all elections are subordinated, so that it matters not when or how the justice is inducted into office, whether by virtue of an election or by appointment, he must go out when the fixed and definite period of the term upon which he enters expires.

"When the constitution fixes the duration of a term of office, and at the same time provides for its being filled at a fixed time, occurring periodically, it necessarily follows that, a casual vacancy occurring during such term of office, necessity must arise for filling it for the unexpired term; and although the mode of filling such vacancy is prescribed by the constitution, yet the incumbent only holds until the time arrives for filling the office in the regular mode and at the regular time prescribed by the constitution." Chief

Justice Willard in Whipper v. Reed, supra.

But in Wright v. Charles, 4 S. C. 178, it has been held by this court that when one is elected to fill a casual vacancy in the office of clerk of the Court of Common Pleas, he holds, not for the unexpired term, but for a full term of four years. And so, likewise, in Whipper v. Reed, it is decided that when one is elected to fill a casual vacancy in the office of Circuit judge, he holds for the full term of four years, and not merely for the unexpired term. In behalf of the present defendant it is urged that the same rule applies to elections to fill vacancies in the office of chief justice, and that the construction of the constitution, as contended for by the present plaintiff, if adopted by this court, will overthrow the doctrine of Wright v. Charles and

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*Whipper v. Reed. But in this view we cannot concur. For, in the case of a clerk of the court, there is nothing whatever in the constitution to limit the effect of the imperative words contained in Section 27, Article IV., "who shall hold his office for the term of four years," and, therefore, as was properly held in Wright v. Charles, a clerk, whenever duly elected, is entitled to hold the office for the full constitutional term of four years; and in the case of a Circuit judge, the provision of Section 11, Article IV., as to filling a vacancy in his office, must be controlled by the imperative mandate of Section 13 of Article IV., "who shall hold his office for a term of four years." Therefore, as was properly held in Whipper v. Reed, a Circuit judge, whenever duly elected, is entitled to hold his office for the full constitutional term of four years.

But in the case of a casual vacancy in the office of justice of the Supreme Court, whether chief or associate, the rule is different, because the provision fixing their term of office at six years, must, necessarily, be qualified by that other provision in the same section which requires that they shall be so classified as that one of them must go out of office every two years; otherwise this latter provision would be entirely defeated. Hence, in filling a casual vacancy in the office of justice of the Supreme Court, it must be so done as not to disturb this essential feature of classification stamped upon that tribunal by the constitution. Manifestly this can only be effectually preserved by filling casual vacancies for the unexpired term only. The reason for this distinction is obvious. The constitution makes no classification of clerks or Circuit judges. Each clerk and Circuit judge, in the discharge of the functions of his office, acts singly and alone, whilst the three justices of the Supreme Court constitute but one body, and act together in the discharge of the functions of that tribunal, and hence the requirement that they shall be so classified as that one of the justices shall go out of office every two years, is fundamental and imperative, and necessarily must control all other provisions as to tenure of office which might seem to be at variance with it. This classification fixes the end as well as the beginning of the term

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of office in this Appellate *Court, and hence limits and controls all other provisions regarding elections to fill casual vacancies.

The harmony between this construction of the constitution and the doctrine of Wright v. Charles and Whipper v. Reed, is clearly and forcibly demonstrated by Chief Justice Willard in the opinion he delivered in the latter case by a line of argument clear, logical and unanswerable, extracts from which we have already cited, and the substance of which we deem it unnecessary to reproduce in varied phraseology.

It follows, therefore, that when, on May 15th, A. D. 1877, the Hon. A. J. Willard, the present defendant, was elected chief justice to fill the vacancy occasioned by the death of the Hon. F. J. Moses, Sr., on March 6th, 1877, whose term expired July 30th, 1880, he was elected to fill such unexpired term only. That said term having expired on July 30th, A. D. 1880, the lawful term of office of the defendant as chief justice of the Supreme Court of South Carolina, ended on July 30th, A. D. 1880.

That when, on December 18th, A. D. 1879, the Hon. W. D. Simpson, plaintiff herein, was elected to the office of chief justice by joint vote of the general assembly, he was elected to fill the full term of six years, beginning July 31st, 1880, and ending July 30th, 1886.

That he is, therefore, entitled to have and to hold the said office of chief justice of the Supreme Court of South Carolina against the said defendant, and for the full constitutional term aforesaid, and it is accordingly so adjudged.

McIVER and McGOWAN, A. J.'s, concurred.

14 S. C. 210

(Case No. 927.)

GADSDEN v. WHALEY.

(April Term, 1880.)

[1. *Executors and Administrators* ⇐440.]

One of two executors qualified, and action was brought against him for a debt of his testator, and judgment obtained. Pending appeal, the qualified executor died. Meantime, under

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other proceedings had, the *estate was put into the hands of a receiver, and the receiver declined to prosecute the appeal, but the other executor named in the will then qualified, and moved to have his name substituted on the record in the place of the deceased executor. Motion granted.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1788; Dec. Dig. ⇐440.]

2. The receiver declining to prosecute the appeal, the respondent moved to dismiss it. Motion refused.

[3. *Receivers* ⇐80.]

A receiver of an estate has no right to interfere in a case pending at the time of his appointment, without an order of the court that appointed him.

[Ed. Note.—Cited in Re Fifty-four First Mortgage Bonds, 15 S. C. 314.

For other cases, see Receivers, Cent. Dig. § 149; Dec. Dig. ⇐80.]

[4. *Trusts* ⇐17, 18, 42.]

One may make gift of personal property to another, and constitute himself the trustee thereof, by declaring that he holds such property in præsenti for the donee. Such trust may be created and established by parol, and may be proved by circumstances as well as by express declarations.

[Ed. Note.—Cited in Strong v. Weir, 47 S. C. 323, 25 S. E. 157; Wulbern & Co. v. Timmons, 55 S. C. 464, 33 S. E. 568.

For other cases, see Trusts, Cent. Dig. §§ 17, 61; Dec. Dig. ⇐17, 18, 42.]

[5. *Appeal and Error* ⇐1005.]

Concurrent findings of fact in an equity case, by jury and Circuit judge, sustained, not being against the weight of the evidence.

[Ed. Note.—Cited in Pressley v. Kemp, 16 S. C. 343, 42 Am. Rep. 635; Rynerson v. Allison, 30 S. C. 537, 9 S. E. 656.

For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876, 3948–3950; Dec. Dig. ⇐1005.]

[This case is also cited in Fraser & Dill v. City Council of Charleston, 19 S. C. 394, as to the facts.]

Before Hudson, J., Charleston, March, 1879.

This was an action by Edward H. Gadsden and Rebecca H., his wife, instituted in 1873 against William Whaley, sole qualified executor of Joseph Whaley, deceased, for an account of certain moneys alleged to have been given her by her grandfather, the said Joseph Whaley, in his lifetime, and afterwards held by him as trustee for her. The plaintiff, Rebecca, was the only child of Thomas Whaley, who was a son of Joseph, and she was seventeen years of age at the time of her father's death in 1855. She afterwards intermarried with E. H. Gadsden. The testimony showed that of the property so claimed, a large part was lost by unsecured investments made for Joseph Whaley, by William Whaley, his son and agent.

Three executors were named in the will of Joseph Whaley, but William Whaley alone qualified. After the decree of Judge Hudson, and after appeal therefrom by William Whaley, William Whaley died. W. J. Whaley, another of the executors named, then qualified as such.

The receiver of the estate of Joseph Whaley, appointed in the case of Fraser & Dill v. City Council of Charleston, William Whaley, executor, and others, notified counsel in July, 1879, that he was advised that no sufficient grounds existed to justify an appeal from the decree of Judge Hudson, and that further

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*proceedings would be at the risk of the party taking them, for which neither the receiver nor the funds in his hands would be responsible.

All other matters necessary to a full understanding of the case are stated in the opinion of the court.

Mr. B. H. Rutledge, for appellant.

The preliminary, and, at the same time, ruling question in this case is, did Joseph Whaley constitute himself a trustee of the fund in question for Mrs. Rebecca Gadsden at any time? If not, there is the end of the case. There is no formal instrument of trust. If a trust exists it must have been created, and must be established by parol, and from acts and circumstances, and loose writings and expressions. Is this practicable—and, if so, under what conditions? A valid trust of personal property may be created, and proved by parol declarations. Hill on Trustees 57. But the subject matter and purposes of the trust, and the persons to take, must be clearly ascertained. Perry on Trusts, §§ 77, 86; 3 Brown's Ch. 577, note; 3 Ves., Jr., 708; 3 Cow. 580. The following recent cases contain the latest and best exposition of the legal doctrines applicable to this case. 4 DeG., F. & J. 274; 1 Chan. Ap. 28; L. R. 19 Eq. 241. See, also, Lewin on Trusts, *82, *83, *98; Perry on Trusts, §§ 96–102. And analogous cases in 1 S. C. 181; 4 Id. 152; 5 Id. 461; 2 Hill's Ch. 591; 3 Rich. Eq. 398; L. R. 20 Eq. 329; 97 U. S. 639. According to the law as declared, the elements requisite to deprive a man of his own property for the benefit of another, when there is no other than a voluntary consideration, are these:

If in the form of a gift; (1.) There must be an intention on his part to give: (2.) There must be an execution of that intention by appropriate act, so as to complete the gift.

If in the form of a declaration of trust: If the trust is to be created by parol declarations and acts and circumstances, it must be by words and acts "which admit of no other interpretation than that he himself had

ceased to be, and some other person had become the beneficial owner of the subject of the gift or transfer, and that such legal right to it, if any, as he retained, was held by him in trust for the donee."

There is no such testimony in this case.

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*Mr. James Conner, for respondent.

Was there a trust created? Perry on Trusts, § 79. That is a question of fact, and has been settled. 1 S. C. 101, 116, 325; 4 S. C. 125, 249; 6 Id. 319. A trust in personalty may be created by parol. 4 Desaus. 505; 2 McC. 255; 3 Hill 222; 6 Rich. 315. The trust created, the cestui que trust could enforce her rights. Perry on Trusts, §§ 96–99. And although without valuable consideration, equity will enforce it. 18 Ves. 140; 6 Ves. 656; 1 Keen 551; 2 Keen 124; 1 Hare 460; 1 Phillips 153. A very strong case is Gray v. Gray, 2 Simms. (N. S.) 273. No particular form of words is necessary. 1 DeG., M. & G. 176; L. R. 3 Eq. 686; L. R. 4 Eq. 562; L. R. 10 Eq. 475; 2 Hill's Ch. 591; 11 R. I. 266; 3 Cent. L. Jour. 315. As to enforcement of voluntary trusts when completed, see Perry on Trusts, § 98.

October 15th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. In order that the rulings in this case may be understood, it is necessary to make a short statement of facts.

Joseph Whaley, a man of large wealth, had two sons, Thomas and William, and one daughter. He had permitted his son Thomas to cultivate one of his plantations on Wadmalaw Island, until he died, in 1855, leaving a widow and one child, Rebecca H., who intermarried with Edward H. Gadsden, the plaintiff. Soon after the death of his son Thomas, Joseph Whaley sold the plantation and slaves on Wadmalaw for $25,577, and after some correspondence upon the subject with his granddaughter and her mother, in which, among other things, he said: "In the course of the winter I will make up my mind in what way the property shall be disposed of," he placed the proceeds of sale in the hands of his other son, William, a lawyer, living in Charleston, who, with the knowledge and consent of his father kept this fund separate from other business, and opened an account of receipts and expenditures under the caption "Colonel Joseph Whaley, Rebecca Whaley, in account with William Whaley, agent." The principal item among the expenditures was one recurring every year,

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from 1857, for money "paid to Mrs. *Whaley for support of Rebecca." This account was made up to August 10th, 1865, and then transferred to another book. A large part of the fund was lost in Confederate transactions during the war by William Whaley, agent. In 1869 Joseph Whaley executed his will, in which he made no provision for his granddaughter Rebecca, assigning as a reason that he had "already advanced and made over to his granddaughter, Rebecca Gadsden, the proceeds of the sale of his plantation and negroes on Wadmalaw Island." In 1872 Joseph Whaley died, and of those named as executors of his will, only his son William qualified at that time, and against him, as such executor, Mrs. Gadsden, in 1873, instituted this proceeding for an account of the proceeds of the Wadmalaw property. The case came on for trial in April, 1875, before Judge Reed, who referred it to a jury, and they found for the plaintiff the sum of $15,129; upon which verdict judgment was entered. This was more than the value of the remnant of assets after the war, and the defendant appealed. The Supreme Court set the verdict aside on the ground that, being clearly an equity case, it was error to base the judgment solely upon the verdict of the jury and not upon the decision of the Circuit judge. Gadsden v. Whaley, 9 S. C. 147.

The case was heard a second time, in March, 1879, by Judge Hudson, who, upon the evidence taken at the first trial, decreed for the plaintiff the identical sum which had been found by the jury, and from that judgment the defendant again appeals to this court.

In the meantime, in 1874, the case of Fraser & Dill v. City Council of Charleston was instituted, and in that case orders were made to call in the creditors, marshall the assets, and for the appointment of a receiver of the estate of Joseph Whaley. Mr. Dingle was first appointed receiver, but he declined to act, and in 1878 Thomas W. Bacot, Esq., was appointed and qualified as the receiver of the estate of Joseph Whaley, with all the authority which had been previously conferred in the orders appointing Mr. Dingle. See 13 S. C. 533.

When the case was called in this court the attorney for the defendants moved for an order substituting the name of William James Whaley, as defendant executor, in the

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place of that of *William Whaley, the defendant on the record, who had died pending the appeal. The attorney for the plaintiff objected to the order proposed, and, as Mr. Bacot, the receiver, had given notice to the defendant to abandon the appeal, he made a preliminary motion to dismiss the appeal, on the ground that the executor had no interest in the cause, or right to appeal from the decision therein.

We regard the order proposed by the defendant as within the intent of Rule 4 of this court, and the motion to substitute the name of William James Whaley, a qualified executor of the will of Joseph Whaley, in place of that of William Whaley, defendant, is granted. The appeal will proceed against

William James Whaley as executor of Joseph Whaley, defendant.

We cannot grant the preliminary motion to dismiss the appeal. An executor holds his letters testamentary from the judge of Probate, an officer of the law, but his appointment is by the testator himself. It seems that under the act of 1869, (Gen. Stat. 189), the judge of Probate, under certain circumstances, may discharge an executor upon his own application; but we think it has always been held in this state that the court of equity has not the power to remove an executor by the appointment of a receiver or otherwise. Haigood v. Wells, 1 Hill's Eq. 60; Ex parte Galluchat, Ib. 149.

In a proper case the court will appoint a receiver who is an executive officer—the hand of the court—to administer the assets of the estate under the direction of the court, which may, for the purpose of preserving the property, restrain the executor from meddling with the management of the estate, and compel him to give up the control of it to the receiver; but such appointment and administration do not remove the executor or destroy his character as the legal representative of the estate. The authority of a receiver rests only in the orders of the court by which he is appointed. By virtue of any general authority as receiver, he has no right to sue or be sued or defend. 1 Wait's Pr. 202; High on Receiv., §§ 209, 254, 724.

A receiver cannot interfere in a case pending at the time of his appointment until he has been made a party to the action by order of the court. Tracy v. First Nat. Bank of

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Selma, 37 N. Y. *Court of App., 10 Tiffany 583; High on Receiv., §§ 258, 264. In the case of Tracy v. The Bank, it is said: "The objection that the receiver has no status in court I regard as fatal. The action was commenced against the bank before the appointment of a receiver, and so far as the papers show is still in progress under that title. There is no legal objection to its continuance in that form until the final judgment is obtained, and such is the common practice in this state."

The case before us had been long pending when the receiver was appointed, and, therefore, he had no right to appear in it without an order of the court making him a defendant. No such order appears as one authorizing him to defend suits pending against the executor at the time of his appointment. The strongest words in those orders are "to take possession of all the property of the estate of Joseph Whaley, and to administer the same under the orders of the court, and that he hath leave to institute such proceedings as he may be advised may be necessary and proper to try the validity of any claims against the estate of Joseph Whaley, and defend such proceedings as may be instituted against him," &c. This case is not against him, and the order does not make him a party to a suit then pending against the executor. There being no such order, he is a stranger to this proceeding. The motion to dismiss the appeal is refused.

As it respects personal property, the law remains unchanged by the statute of frauds, and a valid trust of such property may not only be still vested, but, if necessary, established by parol declarations. Hill on Trustees 57; McFadden v. Jenkyns, 1 Phil. 153; Fogg v. Middleton, 2 Hill's Eq. 598. It was in the power of Joseph Whaley to make a parol gift of the proceeds of his Wadmalaw plantation, either by placing them in the hands of a trustee or by creating himself a trustee for that purpose. No particular form of words is necessary to create a trust or to make the person creating the trust himself the trustee. It is enough if he orally, or in writing, explicitly or impliedly declare that he holds in præsenti for another. The facts do not authorize the view that William Whaley was made trustee. He gave no bond and always styled himself "agent of his father," acting under his direction. Did Joseph Whaley create himself a trustee of this

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*fund for his granddaughter, Mrs. Gadsden? Such a trust may be proved by facts and the acts of the parties, as well as by the express declarations of the donor. Whether a trust is created or not, is a question of fact in each case, and the court, in determining the fact, will give effect to the relations of the parties, the nature and situation of the property, and the objects the settler had in view in making the disposition. We think the evidence to establish such a trust should be full and clear, for the reason that if established the relation subsisting between the giver and the recipient of his bounty, is changed—the voluntary benefactor, out of his own means, being thereby made a trustee with all the liabilities incident to a debtor. No question can arise in this case as to completing an imperfect voluntary gift, for both parties agree that a perfect gift was made at some time before 1869, when the donor executed his will, which declared that he "had already advanced and made over to Mrs. Gadsden the proceeds of the Wadmalaw property." The plaintiff insists that the proceeds were "made over," and the character of a trust impressed upon them when they were set apart and the account opened with Mrs. Gadsden in 1857; and the defendant contends that it was not done by Joseph Whaley making himself trustee at the time the account was opened, but by appointing William Whaley trustee at some time after the war, and that, therefore, the gift only covered the remnant of the fund which survived and was in existence at that time. This substantially narrows the controversy

down to the question as to the time when the proceeds were "made over." This question of fact the jury found for the plaintiff, and in that decision the Circuit judge concurred. Being an action for equitable relief, this court may reconsider all the evidence, but the safe principle upon which it generally acts is not to overrule the conclusions of the Circuit judge upon doubtful questions of fact, though the court might not have reached the same conclusion he did. The rule is more strictly adhered to when there is concurrence between a referee and the Circuit judge. As to its probable correctness, the verdict of a jury is as strong as the report of a referee. In the last case upon the subject, Adger & Co. v. Pringle, 11 S. C. 548, it is said: "The question of fact having been

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decided by the referee, and his decision *having been confirmed by the Circuit judge, their decision must be regarded by us as conclusive, unless it is without any testimony to sustain it, or is manifestly against the weight of the evidence."

We cannot say that the decree in this case is "against the weight of the evidence." On the contrary, there are facts which tend to support it.

The father of Mrs. Gadsden died in possession of the Wadmalaw plantation, and from that time her grandfather always connected her with the property. Upon the death of his son he wrote at once: "In the course of the winter I shall make up my mind in what way the property is to be disposed of. I have directed Messrs. O'Hear, Roper & Stoney to pay the proceeds of the crop to your mother for your joint support."

After the property was sold he kept the proceeds separate, and placed them in the hands of his son William as his agent, who, by his direction, or with his knowledge, opened an account of receipts and expenditures under the caption, "Colonel Joseph Whaley, Rebecca Whaley, in account with William Whaley, agent," and each year made payments out of the fund for the support of Mrs. Gadsden.

The testator, during his lifetime, told Mrs. Gadsden to go to her uncle William when she wanted money, as he had provided for her, and her uncle William would give it to her.

In 1869 Joseph Whaley executed his will, by which he gave nothing to Mrs. Gadsden, assigning as a reason for so doing that he "had already advanced and made over to her the proceeds of the sale of the Wadmalaw property." The terms of the will describe appropriately the transaction of 1857, in depositing said "proceeds" and in opening an account with Mrs. Gadsden. The natural inference is that they refer to the beginning of the business and not to any intermediate new arrangement, and cover, not a mere remnant which survived the war, but, according to the words of the will, "the proceeds of the sale of the Wadmalaw property."

The judgment of the Circuit Court is affirmed and the appeal dismissed.

McIVER, A. J., concurred.

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14 S. C. *219

*(Case No. 928.)

WILLIAMS v. McCARDELL.

(April Term, 1880.)

[1. *Executors and Administrators* ⟸315.]

In the settlement of an estate by the Court of Probate, a decree declaring that one of the distributees has been overpaid, should be accompanied by a statements of the accounts, showing how such result has been reached.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298–1314; Dec. Dig. ⟸315.]

[2. *Executors and Administrators* ⟸310.]

Where a distributee receives from the administratrix more than his share of the personal estate of his ancestor, and then dies, his interest in the ancestor's real estate cannot be exclusively subjected to the repayment of such excess, but must be applied to the payment of all his debts owing at the time of his death, including such overpayment, in the order prescribed by statute.

[Ed. Note.—Cited in Pendergrass v. Pendergrass, 26 S. C. 32, 1 S. E. 45.

For other cases, see Executors and Administrators, Cent. Dig. § 1265; Dec. Dig. ⟸310.]

Before Wallace, J., Lancaster, September, 1879.

This was an action commenced in the Court of Probate in 1874, for the partition of the real estate of A. J. Stewart, who died intestate in 1864. His widow administered, and William G. Stewart, a son of testator, and entitled to one-third of his estate, received of the personalty more than his share of the entire estate, real and personal. W. G. Stewart died in 1873, intestate, leaving as his heirs-at-law, his mother, and the other heirs of his father.

After the petition was filed, the creditors of William G. Stewart were, upon their own petition, made parties to the action. The personal estate of W. G. Stewart was insufficient to pay his debts—none of which were in judgment; nor was there any lien existing upon his interest in his father's real estate.

The judge of Probate decreed that W. G. Stewart, in his lifetime, had received of the personal estate of A. J. Stewart an amount considerably in excess of his entire enterest in both the real and personal estate of A. J. Stewart; and that the lands should be therefore partitioned and divided among the remaining heirs-at-law of A. J. Stewart.

From this decree the creditors appealed to the Circuit Court. The Circuit judge referred it back to the judge of Probate to make

a full statement of the accounts of the administratrix, and of the receipts by the several

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*distributees: and it was further *declared that the creditors of W. G. Stewart, at his death, were entitled to have his interest in the lands of his father applied as assets to the payment of all his debts, and that his co-heirs had no exclusive right thereto.

From this order the heirs-at-law of A. J. Stewart appealed, upon the grounds considered in the opinion.

Messrs. Wylie & Hough and Allison & Connors, for appellants.

Mr. T. C. Gaston, contra.

October 15th, 1880. The opinion of the court was delivered by

McIVER, A. J. No question having been raised as to whether the judgment below was such a final judgment as would authorize an appeal from it, we will waive that question and proceed to consider the case on its merits.

It is very clear that the Circuit judge was right in remanding the case to the Court of Probate for the purpose of having the account taken. The parties interested have a right to see how the account stands, and what were the various items composing it. The mere assertion of the judge of Probate that it appeared to his satisfaction that William G. Stewart had been overpaid, was not sufficient. Parties interested in his estate had a right to know how the account was made up by which such a result was reached.

The only question of law raised by the appeal is, whether the creditors of an heir-at-law are debarred from subjecting his interest in the real estate of his ancestor to the payment of their debts by reason of the fact that such heir has received from the administrator, out of the personal estate, more than the value of his share of the whole estate, both real and personal, would amount to.

When a person dies intestate, leaving an estate consisting of both real and personal property, the real estate descends at once to and vests in the heirs-at-law, who are entitled to share the same in the proportions designated by statute. The administrator, as such, has no authority over, or interest in,

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the real estate, *but at the moment of the death of the intestate it becomes the property of the heirs, and their rights therein can only be divested either by proper proceedings to subject it to the payment of the debts of the intestate, or by their own act. But in reference to the personal estate the rule is different. That goes directly to the administrator, and the distributees can only obtain their shares therein through him. If the administrator pays to any one of the distributees more than what is ascertained to be his share, the distributee thereby becomes a debtor to the administrator for the amount of such excess, and the other distributees must look to the administrator and the sureties on his bond for the refunding of such excess. Now in this case, assuming the fact to be, as stated by the judge of Probate, "that William G. Stewart, deceased, received in his lifetime of the personal estate of A. J. Stewart, deceased, an amount considerably in excess of his entire interest in both the real and personal estate of the said A. J. Stewart," the effect of it is simply to make the estate of William G. Stewart a debtor to the administrator of A. J. Stewart in the sum which the amount he received exceeded his interest in the personal estate, and, this debt, like any other debt, may be enforced against the interest of William G. Stewart in the real estate. But how it has obtained, or why it should have any preference or priority over any other debt due by William G. Stewart, it is difficult, if not impossible, to conceive. Such a debt constitutes no lien upon the interest of William G. Stewart in the real estate which descended to him and the other heirs of A. J. Stewart. It stands like any other debt due by him, and during his lifetime might have been enforced by the usual proceedings for the collection of debts against the interest of Stewart in the real estate, as well as against any of his other property, but he being dead, his entire property, including this interest in the real estate of the intestate, A. J. Stewart, must be applied to the payment of his debts in the manner prescribed by the statutes upon that subject.

The cases relied upon by the counsel for the appellants do not, in our judgment, sustain the position. In Smith v. Perdriau, Rich. Eq. Cas. 223, the rights of other creditors were not involved, and hence it was properly

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held upon well-recognized *principles of equity, that where there is a fund in court for distribution, and one of the parties interested has received payment of a part of his demand, before he could receive anything out of the common fund the other parties must be equalized, and the court, in making an order for the distribution of the common fund would provide for such equalization. In DeBrahm v. Fenwick, 1 Desaus. 111, the question presented in this case did not arise, the court, in that case, having simply ordered that estates devised to a son should be sold to pay legacies charged upon them, and to reimburse the estate of the testator for property taken away from it by such devisee. The rights of other creditors were not involved. So, too, in the case of Smith v. Huger, 1 Desaus. 247, the point which we have been considering was not made and could not properly arise in the case. There the testator directed his executors to sell all his estate not specifically devised or bequeathed, and divided the proceeds into eleven shares, one of which he gave to Charles Motte. One of the executors made sundry advances to

Charles Motte in his lifetime on account of his share, and also assumed sundry liabilities for him, and upon a bill filed by the administrator of Charles Motte against the executors for an account and settlement of what was due to Charles Motte, the court held that the executors might discount the money paid to Charles Motte, and the liabilities assumed for him against the amount of his share under the will. It is plain that in that case the executors were simply the debtors of Charles Motte, and the only effect of the decision was to allow them to discount against such debts all amounts paid to or assumed for him. It does not, therefore, reach the question under consideration here.

The judgment below is affirmed.

McGOWAN, A. J., concurred.

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14 S. C. *223

*(Case No. 929.)

CARROLL v. TOMPKINS.

(April Term, 1880.)

[1. *Judgment* ⇐306.]

Where a judgment against A was, by an order of the Circuit Court, revived against A, administrator of B, and the Circuit judge holding the next succeeding term, being satisfied that the additional words were a mere clerical mistake, amended the order to conform to the record. *Held*, that he committed no error.

[Ed. Note.—Cited in Trimmier v. Thomson, 19 S. C. 252; Heulein v. Graham, 32 S. C. 307, 10 S. E. 1012; Willis v. Tozer, 44 S. C. 15, 21 S. E. 617.

For other cases, see Judgment, Cent. Dig. § 598; Dec. Dig. ⇐306.]

[2. *Judgment* ⇐868.]

Proceedings to revive a judgment should be by summons to show cause, and not by action.

[Ed. Note.—Cited in Warren v. Raymond, 17 S. C. 192.

For other cases, see Judgment, Cent. Dig. § 1608; Dec. Dig. ⇐868.]

[3. *Judgment* ⇐868.]

In such case, it is not incumbent upon the plaintiff to show that the judgment has not been paid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1608; Dec. Dig. ⇐868.]

[4. *Judgment* ⇐868.]

Summons was issued requiring defendant to show cause, at March Term, why a judgment should not be revived against him. Defendant put in no appearance or answer, and the matter was continued. At the next, or June Term, motion to renew the judgment being made by plaintiff, defendant then offered to read an answer, which had not been served nor filed, but leave to do so was refused, and an order of revivor was granted. *Held*, that there was no error in such refusal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1608; Dec. Dig. ⇐868.]

[5. *Judgment* ⇐868.]

In such case, a motion, after default made, for further time to answer, is wholly within the discretion of the Circuit judge.

[Ed. Note.—Cited in White v. Coleman, 38 S. C. 556, 17 S. E. 21.

For other cases, see Judgment, Cent. Dig. § 1608; Dec. Dig. ⇐868.]

[6. *Appeal and Error* ⇐3.]

[Cited in Wallace v. Carter, 32 S. C. 317, 11 S. E. 97, to the point that the only way in which alleged error in cases adjudged upon the merits may be corrected is by appeal to the Supreme Court.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8–24; Dec. Dig. ⇐3.]

[This case is also cited in Adams v. Richardson, 30 S. C. 217, 9 S. E. 95, as to the sufficiency of cause shown.]

Before Wallace, J., Edgefield, June, 1879, and Mackey, J., October, 1879.

The summons to show cause, in this case, bears date January 29th, 1879, but it does not appear when it was served. The case is fully stated in the opinion of this court.

Mr. Ernest Gary, for appellant.

Messrs. Norris & Folk, contra.

October 15th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. James P. Carroll obtained a judgment for $2314.87, against the defendant, D. H. Tompkins, in Richland county, May 22d, 1873. A transcript of this

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judgment was *lodged in the clerk's office of Edgefield county, where the defendant lives, and summons issued against the defendant, requiring him "to appear at the term of the Circuit Court to be holden for said county on the 10th day of March, A. D. 1879, and then and there show cause, if any you have, why said judgment should not be revived and become a lien on all the real property of the said judgment debtor in this county according to law." No cause was shown at the said term of the court by answer or return filed or served on the plaintiff or his attorney. No order was moved for at the March Term, to which the summons was returnable, but the case was placed on the motion calendar. When, in the regular course, it was called at the next (June) term, the defendant's attorney offered to show cause by reading an answer, which had not been filed or notice given to the plaintiff or his attorney. The Circuit judge refused to receive the answer, as coming too late, and, also, refused a motion for further time to answer, but granted the plaintiff's motion to revive the judgment and make it a lien in Edgefield county. In the order passed for that purpose were inserted after the name of defendant in execution these words: "Administrator of Daniel Holland, deceased." The defendant gave notice of appeal, but, after discovering that the order contained the superadded words above stated, which destroyed its effect as a lien upon his property, he abandoned his appeal.

The plaintiff's attorney, after notice, moved at the next (October) term of the court to correct the order by striking out the words "administrator of Daniel Holland, deceased."

which, it was alleged, had been inserted by mistake of the person who drew the order. Upon the hearing of this motion the defendant's attorney again proposed to read an answer of the defendant to the original summons, of which no copy had been filed or notice served. After argument the Circuit judge granted an order to amend the former order by striking out the words "as administrator of Daniel Holland, deceased." The defendant excepted to the amending order, and the appeal comes to this court upon the following grounds:

1. "Because Hon. W. H. Wallace erred in

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not allowing ap*pellant to show cause, as demanded, in the summons in the case of James P. Carroll against Daniel H. Tompkins.

2. "Because Hon. W. H. Wallace erred in ruling that the appellant herein had no status in court, and in ruling that the time for the appellant to show cause had expired.

3. "Because Hon. W. H. Wallace erred in not allowing appellant to put in an answer after it was made to appear by counsel that he had substantial grounds of defence.

4. "Because Hon. W. H. Wallace erred in granting the order aforesaid without any proof showing that the judgment had not been paid in whole or in part, or that it was a valid legal judgment.

5. "Because Hon. T. J. Mackey erred in granting an order changing the nature of an order passed by another presiding judge at a previous term of the Court of Common Pleas.

6. "Because the whole proceeding on the part of the plaintiff (the respondent herein) was irregular, as the process should have been by action and not by summons.

7. "Because Hon. T. J. Mackey erred in granting the order without trying the merits of the case, when it was made to appear by the answer, which was read, that the appellant had a substantial ground of defence.

8. "Because the order granted by Hon. T. J. Mackey was passed on Sunday, and is, therefore, void, having been granted on Sunday morning, October 26th, 1879."

First, as to the order of Judge Mackey (October term, amending the order of Judge Wallace, made at the previous (June) term, by striking out the words "administrator of Daniel Holland, deceased." There is no evidence of the matter alleged in the eighth exception as to the time when the order was signed. As the order of Judge Mackey changed materially the import of the order signed by Judge Wallace, was it error in law to make that order? That must depend upon the nature of the amendment made. As to all matters considered and adjudged upon their merits, there is no appeal from one Circuit judge to another; nor in such cases can one Circuit judge reconsider, reverse or change an order made by another Circuit judge. The only way in which alleged error

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in such cases can be corrected, is by *appeal to the Supreme Court. But this rule is not to be so construed as to prevent the court from correcting, by amendment, manifest errors and mere clerical mistakes. The code of procedure favors all amendments made in furtherance of justice, and expressly authorizes an amendment "correcting a mistake in the name of a party, or a mistake in any other respect." Code, § 196. Even before the adoption of the code it was within the jurisdiction and the constant practice of the court to amend its own proceedings and orders, especially in cases of mere clerical mistake as to form. As was said by the court in the case of Hubbell v. Fogartie et ux., 1 Hill 169 [26 Am. Dec. 163]: "It is every days' practice to permit judgments and executions to be amended according to the right of the case, even after a sale under execution. If authority be necessary to sustain this practice, it will be found in the case of Hancocke v. Proud, 1 Sand. 336, n. 10, in which it is said: 'But if the judgment be entered de bonis propiis instead of de bonis testatoris vel si non, &c., it is considered as a mere clerical mistake, which the court below will amend on motion, even after the record has been removed by error and argument in the Court of Errors.' So, also, as sustaining this practice, Bank of Penna. v. Condy, 1 Hill, 209; Giles v. Pratt, 1 Hill, 239 [26 Am. Dec. 170]; Patton v. Massey, 2 Hill, 475; O'Driscoll v. McBurney, 2 N. & McC. 58; Ashmore v. Charles, 14 Rich. 65." The record of this proceeding shows, indeed it is not controverted, that the judgment was against Daniel H. Tompkins individually, and not against him as "the administrator of Daniel Holland, deceased." The order recites that the judge was satisfied it was a mere "clerical mistake," and we agree with him that the words stricken out were inserted by mistake of the draftsman. It was not error in Judge Mackey to amend the order of Judge Wallace so as to make it conform to the record.

But it is insisted that the correction of the mistake in the original order throws the inquiry back upon that order as amended, and that the appeal from it, once abandoned, is, in effect, revived; that the original order of Judge Wallace reviving the judgment and making it a lien, against the objections of defendant, was error in law.

It can hardly be necessary to say that

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there is no force in the *objection contained in the exception, that "the process should have been by action and not by summons." That objection could not avail if the defendant had secured a status in the case by appearing as he was required. The proceeding by summons is in exact conformity to the terms of the law. The amendments to

section 313 of the code provide expressly how judgments may be revived when they have lost their active energy, and, also, how they may be made liens: "And in cases where judgments have been obtained since March 1st, 1870, a lien may be obtained by the service of a summons upon the judgment debtor, &c., * * * to show cause, if any he or they may have, why such judgment should not be and become a lien, in accordance with the provisions of this act; and if no sufficient cause be shown to the contrary, such judgment shall be and become a lien on all the real property of the judgment debtor in the county where entered." Lynch's Code 120.

The terms of this law also answer the fourth exception, which charges error "in granting the order without proof, showing that the judgment had not been paid in whole or in part, or that it was a valid legal judgment." The judgment had already been obtained and this proceeding was only for the purpose of reviving its active energy and making it a lien. There would be no propriety in again litigating what had already been adjudicated. It would violate one of the cardinal rules of evidence to require the plaintiff to prove a negative that he had not been paid in whole or in part. The record of the judgment was sufficient proof of its existence and validity, and, therefore, it was not error to declare the lien under the law "if no sufficient cause was shown to the contrary." It was the duty of the defendant to show that cause. The onus was upon him.

It is further urged that the defendant did show sufficient cause against the motion. The summons required the defendant "to appear at the next term of the court for his county (March, 1879,) and then and there show cause, &c. He did not appear and show cause at the time indicated. It is true that the summons did not, in express terms, as the summons in a regular action does, require the defendant to answer and serve a copy of his answer within twenty days after the serv-

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ice of the summons; *but he was required, as the law directs, to appear at the term of the court to be holden for said county, on March 10th, 1879, and then and there show cause, &c. There is the same reason for notice of the defense in a case of rule as in regular actions, although the form in which it is required to be given is not precisely the same. The object of the summons is to give notice to the defendant of the motion to be made, and also to indicate the time within which the plaintiff must have notice of the defense, if any. This summons required that the defendant should show cause at the March Term of the court, and on or before the close of that term he should have given notice of his objection to the proposed order, either by filing his answer or serving a copy of it upon the plaintiff's attorney. It was not a compliance with the summons to retain his answer until the case was actually called for hearing at the next term of the court, which necessarily took the plaintiff by surprise. If the defendant had been allowed to show cause then by simply reading his answer, the result must have been at least a continuance of the case. Both parties should have reasonable notice of every issue to be tried. The defendant was in default at the June Term when Judge Wallace granted the order prayed for by the plaintiff. We have no doubt the judge would have granted further time to answer if he had been satisfied that there was merit in the defense, and that the failure to show cause at the time required was the result of accident or mistake. But be that as it may, the motion for further time to answer was addressed entirely to his discretion, and in his refusal there was no error of law which can be corrected by this court. The judgment below is affirmed and the appeal dismissed.

McIVER, A. J., concurred.

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*(Case No. 930.)

JENNINGS v. TEAGUE.

(April Term, 1880.)

[1. *Executors and Administrators* ⇐126; *Powers* ⇐30.]

A power of sale conferred by will upon the executors, may be exercised by a sole qualified executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 525; Dec. Dig. ⇐126; Powers, Cent. Dig. § 88; Dec. Dig. ⇐30.]

[2. *Powers* ⇐20, 31.]

Power was given to executors by will, executed in 1861, to sell real and personal property "so soon as the value of property shall recover from the depression caused by the existing war;" testator died in 1863, and the sole qualified executor made sale of the lands for confederate money in October, 1863. *Held*, that the executor was the proper judge of whether the contingency had happened, and, there being no grounds to suspect him of having acted contrary to his honest judgment, the sale was valid.

[Ed. Note.—Cited in Rice v. Coleman, 87 S. C. 349, 69 S. E. 516, Ann. Cas. 1912B, 1016.

For other cases, see Powers, Cent. Dig. §§ 63, 100; Dec. Dig. ⇐20, 31.]

Before Carpenter, J., Edgefield, May, 1877.

The Circuit decree is as follows:

In this cause a bill was filed by W. D. Jennings, who sued in that behalf as the next friend of the following children, minors: B. F. Calhoun, W. E. Calhoun, P. A. Calhoun, A. G. Calhoun, P. E. Calhoun, of whom he was subsequently appointed guardian ad litem, and by Robert Middleton and his wife, M. E. Middleton, M. A. Calhoun, G. C. Calhoun and T. T. Calhoun, on May 18th, 1868,

in the Court of Equity for Edgefield against Abner G. Teague, executor of the last will and testament of P. L. Calhoun, and William A. Martin.

The bill alleges the death of P. L. Calhoun in 1863, leaving as his heirs-at-law the Calhouns before mentioned, and Mrs. M. E. Middleton, formerly Calhoun, and of force his last will and testament, in which, among other things, he devised "that his executors should sell all his estate, both real and personal, of what nature or quality soever it may be so soon as the value of property shall recover from depression caused by the existing war, and after paying all his just debts, distribute the remainder between his heirs-at-law aforesaid;" that Teague only qualified as executor, and sold on October 27th, 1863, the entire personalty and realty for Confed-

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erate currency, and on the same day *sold a tract of land in said county for $32,000, Confederate currency, to defendant Martin, and gave possession to him; that testator left choses in action for large amounts which passed into the hands of the executor.

The bill alleges that in the sale the executors totally disregarded the letter and meaning of the will and the urgent objections of some of plaintiffs, and that the Confederate currency was then depreciating, and has since become entirely worthless, and that Teague has since become insolvent. The bill prays that Teague be held to a strict account for his alleged violation of the terms of the will and for his administration; that the sale of the personalty and the realty be declared null and void and without legal consideration, that the titles given to Martin be declared null and void and be canceled, and that Martin account for the rents and profits of the realty he purchased. Subpœna and relief are prayed against the executor and Martin only.

The executor died without answering, and the plaintiffs, by amendments, made his executrix, Narcissa M. Teague, a party defendant, who answered, averring her ignorance as to many of the allegations of the bill, claiming that the executor managed the estate according to his best judgment, that any loss which the devisees or legatees may have sustained is not attributable to the bad management of the executor; claims strict proof of allegations of executor's disregard of the discretion allowed him by the terms of the will, and the objections of some of the plaintiffs; refers to the Probate office for sales and action of the executor, alleges that executor was discharged from all liability to the devisees, legatees and others interested in the estate, by letters dismissory granted by the Probate judge, and that executor died insolvent and bankrupt.

Martin answered, alleging the refusal of G. C. Calhoun to qualify as executor; that the sale of the realty was made by Teague, executor, after public notice and due advertisement at public outcry; that he paid the purchase money to and received conveyance from Teague, executor. That Mrs. M. A. Calhoun, widow of testator and one of plaintiffs, executed to him renunciation of all interest and estate, and all right and claim of dower therein, before the said W. D. Jen-

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nings as notary public; *and that said conveyances were duly recorded in the register of mesne conveyance; that Teague had the legal right and power under the will to sell and convey, and that in so doing he did not in any wise disregard the letter and meaning of the will, which invested him with the power of deciding when "the value of property had recovered from the depression caused by the war," and that in point of fact the value of property at the time of the sale had recovered from the depression existing at the date of the will, August 1st, 1861, and that the sale of the real and personal estate was made with the advice and approval of the very intelligent appraisers of the property.

He further answered, that if any of the plaintiffs really questioned the power or the judicious exercise of the power of the executor, they could, and in good conscience should, (if they ever intended to test the question,) having ample time and notice between the advertisement and the sale, have resorted to the court of equity then, before innocent third persons were entrapped into becoming purchasers, or should at least have given public notice of their objections, which was not done, and is not by the allegations of the bill pretended to have been done; or should have settled the question against the sale then, if they had really wished, by G. C. Calhoun, complainant, qualifying as executor and thereby rendering Teague powerless to sell without his co-operation; that several of the complainants sanctioned and encouraged the sale by becoming purchasers, some of them to very large amounts; that from the proceeds of the sale large sums of money were paid to and expended for complainants by the executor without any objection from them and in satisfaction of debts due by the estate to creditors, W. D. Jennings being among the number.

That Confederate currency was the only currency in the state, and was paid and received in a bona fide business transaction apart from and having naught to do with politics or war; the consideration was legal, the contract executed, and that it is alike against private right or public policy for the courts to annul the transaction, and that if plaintiffs have any equities they must be restricted in their assertion to remedies against Teague only; and that complainants have waited

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until Teague has become in*solvent. He further averring formally and fully that he is an innocent bona fide purchaser for value

without notice, claims the benefit thereof of lapse of time, of the statute of limitations, of general demurrer, and of the fact that plaintiffs, if they had any remedy, had it at law, and asks that the bill be dismissed.

It was referred by consent to A. J. Norris, esquire, of the Edgefield bar, to take and report the testimony.

His report, and the documentary evidence introduced, show that the advertisement of sale was regularly published in papers of large circulation, and stated that further information would be cheerfully given by addressing the executor or the plaintiffs, T. T. Calhoun, Robert H. Middleton or Dr. W. D. Jennings.

That no objection was made to the sale by any of the devisees or legatees within the knowledge of the purchaser Martin; that the sale and conveyance by the executor, and the renunciation by the widow, plaintiff, were bona fide and regular; that at the sale purchases were made by plaintiffs, Mrs. Mary Calhoun, R. H. Middleton, P. L. Calhoun, Dr. W. D. Jennings, J. F. Calhoun and T. Calhoun, and by the executor's accounts passed before the Ordinary, payments, some of them very large, were made to some of the plaintiffs and to creditors of the estate, all of whom have not yet been paid.

On well-settled principles of law, even if the executor unquestionably exceeded his powers, the conduct of the adult complainants would seem to estop them from the relief sought. Bank v. Campbell, 2 Rich. Eq. 190; Parks v. Jennings, 14 Rich. Eq. 319.

The evidence developed a conflict of opinion as to whether property at the time of the sale had recovered from the depression caused by the war at the date of the will (the time to be regarded. Tidyman v. Rose, Rich. Eq. Cas. 298), arising principally from the element of Confederate currency. Its nominal value in dollars had certainly increased.

The testimony shows that Teague was a good financier, an able manager of money; men acted as he did with their own estates, with the same lights before them.

The actual wisdom of the sale then was in the future. The disinterested appraisers

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of the property, George D. Tillman, *George W. Morgan and W. L. Parks, in writing, advised and approved: "In view of all the circumstances, the situation of the country, the condition of the currency, and for the good of all parties, that the executor should sell the estate for cash in Confederate money. That if the property were sold on time and the purchase money secured by notes payable in coin after the war, they thought it would be sacrificed."

As early as 1866, a learned chancellor remarked that, "it was already becoming difficult for men to carry their minds back and reproduce the condition of things during the period of the war." Manning v. Manning, 12 Rich. Eq. 422. And it is still more difficult now. Independent of the general presumption that the executor had done his duty, (Turnipseed v. Hawkins, 1 McC. 276,) the fact that the executor consulted able counsel, learned in the law, who advised him that he was made by the will the proper judge to decide at what time the property had recovered from its depression, must weigh in the executor's favor. McDowall v. McDowall, Bail. Eq. 324; Bradley v. Lowry, Speers Eq. 7 [39 Am. Dec. 142].

As mere matter of fact, it may be that the value of the land has not even yet recovered from the depression caused by the existing war, particularly when reference is had to the witnesses' estimate of its annual rental. But the court cannot, in the absence of fraud charged or proved against the executor, regard this as the test of the validity of the sale or of his liability. Whether as matter of fact and finance, the sale was a wise or unwise exercise of judgment on the part of the executor; as matter of law the court concurs with his legal advice, that the will constituted him the judge of the happening of the event in, and the time at which the sale was to be made. It was a personal confidence and trust reposed in him by the testator: and the unwise exercise of his judgment is not sufficient authority for the court to set aside his acts and make him responsible for any loss which may have been incurred thereby. Greer v. McBeth, 12 Rich. Eq. 258.

In Thompson v. Wagner, 3 Desaus. 97, by a will dated in 1780, testator directed his estate to be sold "in better times"—no power being given therein to executor to sell. The court ordered the property to be sold by the master

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because the law *was not then in existence authorizing executors to sell when testator had not expressly given it.

In Atcheson v. Robertson, 3 Rich. Eq. 134 [55 Am. Dec. 634], the same argument here relied on was urged, that the power to sell conferred by the will upon the executor was conditional only, and that the state of facts justifying the sale was not proved to exist, and that the sale was therefore an unlawful act, to which the court answered that it was within the discretion of the executors.

Whatever liability might attach to the executor on its being made to appear that the exercise of his judgment was not made in good faith, the title of the purchaser would not be affected thereby, unless collusion or guilty knowledge can be traced to him. 2 Wms. on Ex'rs 841; Whale v. Booth, 4 Term R. 625, note.

As to the sale and payment being made in Confederate money, the facts here develop nothing to take the case out of the ruling of the higher tribunals, state and federal, than an executed contract, a transaction in the ordinary course of civil society, between persons at a time when and a place where the only currency was Confederate money, will not be set aside because the considera-

tion was paid or payable in that currency. Pope v. Chafee, 14 Rich. Eq. 80; Thorington v. Smith, 8 Wall. 11 [19 L. Ed. 361.]

Under the scope of their bill the complainants are however entitled to an account of the executor's administration of the estate. Whether in view of the financial condition of Teague's estate this will avail the plaintiffs anything, is for their consideraton exclusively. Entertaining these views, which go to the merits of the entire case, and prætermitting several nice questions discussed as to the proper form and effect of the statute of limitations, which strike me as unnecessary to the solution of the controversy, I find the following facts:

1. That P. L. Calhoun died prior to July 18th, 1863, leaving of force his last will and testament, bearing date August 1st, 1861, wherein he directed "that his executors should sell all his estate, both real and personal, of what nature or quality soever it may be, so soon as the value of property shall recover from the depression caused by the existing war."

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*2. That Abner G. Teague, one of the executors named therein, alone qualified as executor thereof on July 18th, 1863.

3. That on October 27th, 1863, the said Teague, after due advertisement and public notice in the newspapers, in pursuance of the powers conferred by the will, sold at public outcry to William A. Martin, the highest and last bidder, without objection on the part of any of the devisees and legatees under said will, and conveyed to him for the consideration paid of $32,000 in Confederate money, the price bid, all that tract of land on which the said Patrick L. Calhoun resided up to the time of his death, situated and lying in the county, then district, of Edgefield, State of South Carolina, on the waters of Stephens creek and of Savannah river, and adjoining lands belonging to H. Newson, Edward Howle, C. L. Blair, Sarah Bush and others, containing eighteen hundred and ninety-six and one-half acres, more or less.

4. That said sale, payment and conveyance were fair, formal and bona fide.

5. That on January 7th, 1864, Mary A. Calhoun, plaintiff, the widow of P. L. Calhoun, formally released, before W. D. Jennings, notary public, all her interest and estate and also all her right and claim of dower of, in, or to the premises aforesaid to the said William A. Martin.

6. That Abner G. Teague, after having been discharged in bankruptcy, departed this life, and that Narcissa M. Teague is the qualified executrix of his last will and testament.

7. That no final accounting has ever been had of the administration of the estate of P. L. Calhoun by the said Abner G. Teague.

I find the following conclusions of law:

1. That the will vested the qualified executor, Abner G. Teague, with power to decide when the value of property had recovered from the depression caused by the existing war.

2. That the sale and conveyance of the tract of land aforesaid by said executor to William A. Martin for $32,000 in Confederate money and the renunciation by Mrs. Mary A. Calhoun of her interest, estate and dower

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therein, are valid, and that neither the *said executor or the said Martin can in any manner be held liable therefor.

3. The plaintiffs are entitled to an account from Narcissa M. Teague, executrix of the last will and testament of Abner G. Teague, of the said Teague's administration of the estate of P. L. Calhoun, if they desire it.

Wherefore it is ordered, adjudged and decreed that the bill be dismissed with cost as to said William A. Martin, and that plaintiffs have ninety days after the filing hereof, within which to apply for an order referring the matters of account of said Abner M. Teague as said executor to a referee to be appointed.

The plaintiffs appealed.

Mr. J. P. Carroll, for appellants, cited Hill on Trust. 478; 3 Rich. Eq. 134; 9 Rich. Eq. 270; 1 McC. Ch. 393; Hill on Trust. 47, note 1; 13 Penna. St. 535; 10 Hare 290; 19 Jurist 973.

Mr. L. F. Youmans, attorney-general, contra, cited Perry on Trusts, §§ 771–785; 2 Wms. on Ex'rs 839, 840; 2 N. & McC. 589; 3 Rich. 421; Rice 55; 1 Tread. Const. R. 106; 1 Strob. 189; 1 Rich. Eq. 305, 317.

Mr. M. W. Gary, in reply, cited 2 Bla. Com. *379; 2 Bay 255; 1 Desaus. 589; 2 Id. 246, 253; 1 Bac. Ab. 318; 2 N. & McC. 591; Rich. Eq. Cas. 405; 4 Desaus. 522; 2 McC. Ch. 198; 5 Stat. 15; 6 Rich. Eq. 23; 1 Jarm. on Wills 796–799; 2 Dall. 317; 1 Tread. Const. R. 106; 2 N. & McC. 588; 3 Rich. 418; 1 S. C. 256.

October 15th, 1880. The opinion of the court was delivered by

McIVER, A. J. The principal object of this action was to have the sale of a certain tract of land set aside, the deed given therefor cancelled, and an account from the purchaser for the rents and profits since the sale. Indeed the only question made by the appeal is as to the validity of the sale.

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*The land in question originally belonged to P. L. Calhoun, who died some time in the year 1863, having first duly made and executed his last will and testament, which bears date August 1st, 1861. The clause of the will which, it is claimed, contains the power of sale under which the executor acted, is as follows: "I desire that my executors, hereinafter to be named, shall sell all my estate, both real and personal, of what nature or quality soever it may be, so soon as the value

of property shall recover from the depression caused by the existing war;" and after providing for the payment of his debts and the distribution of the remainder, the testator appointed Dr. A. G. Teague and his son, J. C. Calhoun, executors, the former of whom alone qualified. On the same day that Dr. Teague qualified as executor, he obtained from the Ordinary an order for the sale of the personalty, and on October 27th, 1863, after due advertisement, the whole estate, both real and personal, was sold for cash, in Confederate money, in accordance with the suggestions and advice of the appraisers, and a due return of the sale-bill made to the Ordinary on November 10th, 1863. This sale was attended by many of the parties now seeking to set it aside, some of whom became purchasers to a large amount. No objections appear to have been made to the sale by any of the persons interested under the will, though there is evidence that the plaintiff, W. D. Jennings, who was a creditor of the estate, did object to having the property sold for Confederate money, though his objections do not seem to have been communicated to the defendant, Martin, who was the largest purchaser at the sale, he having bid off the land now in controversy for the sum of $32,000, paid his bid in cash, in Confederate money, and received a deed from the executor. Jennings, also, notwithstanding his objections, became a purchaser at the sale to an amount not inconsiderable, a part of which, however, was, as he says, for the benefit of the widow and part for a young lady to whom he owed some money, while the remainder was for his wife. In about two months after the sale the widow of the testator, before the plaintiff, W. D. Jennings, as a notary public, formally released all her interest and estate, and all her claim of dower in the land sold to Martin, the purchaser at the executor's sale; and some of the parties interested

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*received from the executor, out of the proceeds of sale, large amounts of money.

It is very clear that at the time all parties interested considered the sale a good and valid sale, and that there is not a shadow of ground for saying that there was any fraud or concealment, or misrepresentation which would tend to invalidate it. On the contrary, all the circumstances go to show that the sale was, at the time, satisfactory to all parties concerned, unless it be W. D. Jennings, who, as a creditor, may be regarded as interested in the estate. But even he, taking all his conduct together, can scarcely be regarded as making any opposition to the sale, but merely expressing a dissatisfaction with the terms of sale by which purchasers were allowed to pay their bids in Confederate money.

But, conceding all this, the validity of the sale is challenged upon the ground of a want of power in the executor to make the sale. First. Because there were two executors appointed, and one could not sell even though the other never qualified. Second. Because the power to sell was conditional, and as the condition never happened the power never vested. As to the first ground, it is very clear that it cannot be sustained. The very object of the statute (21 Henry VIII., Ch. IV., 2 Stat. 457,) which was in force at the time this sale was made, was to obviate this objection. Britton v. Lewis, 8 Rich. Eq. 271.

As to the second ground, it is quite clear that the power of sale was a conditional one, and it is equally clear that the condition was, in its nature, precedent and not subsequent, and that, such being the case, until the condition was performed, or the contingency, upon which the power was conferred, happened, the power could not be lawfully exercised. So that the real question in this case is, whether the contingency upon which the power to sell was given had happened at the time the sale was made, and as subsidiary to this, who was to determine whether the contingency had happened. To solve these questions it will be necessary to inquire what was the nature of the condition. Was it the happening of a distinct and independent fact, or was it a condition, which, in its very nature, involved the exercise of judgment or discretion for the determination of

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whether it had hap*pened, and about which, therefore, there might well be, as there was in this very case, honest difference of opinion. It certainly was not a distinct and independent fact, as if the testator had provided that the executor should sell when a certain person should attain to a certain age, but it was a condition, the happening of which could only be determined by an exercise of judgment. When the value of property should recover from a depression caused by a war, or by any other special circumstance, must necessarily be a question to be determined by the exercise of judgment—one about which persons might and probably would honestly differ. What was to be the extent of the recovery which would authorize a sale? Somebody must judge of this, and if the executor is not permitted to do so, then it is difficult to suggest who could. If the executor commits an error of judgment in determining such a question, that, certainly, ought not to invalidate a sale made by him in the honest exercise of his judgment. If it did, then it would be impossible to tell, until after it was tested by a judicial proceeding, whether any sale made under such a power was valid, and if such a rule be established it would destroy all chances of making such a sale, for, certainly, no one would buy with the prospect of having his title inquired into and assailed years after upon the ground that the executor had committed an error of judgment in determining a question which was left to his discretion.

It is perfectly manifest that the testator in this case intended to invest his executor with power to sell in a certain contingency, the happening of which must necessarily be determined by an exercise of judgment, and unless his executor—the person whom he has selected as possessing more of his confidence than any one else—is authorized to determine this question, then the purpose of conferring upon the executor the power to sell would be practically defeated. That purpose, doubtless, was to avoid the necessity of obtaining an order of the court for the sale, which would involve delay and expense; but if the executor is denied the power of determining the time for the sale, or if his honest determination is liable to be revised and reversed by the court, then, clearly, it would have been better to have required a resort to the court in the first instance, rather than to give an

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apparent *power to the executor which would only serve to delude purchasers and result in greater delay and larger expense than if the will had required a resort to the court in the first instance. That these views are not without the support of authority, may be seen by reference to the case of Greer v. McBeth, 12 Rich. Eq. 254. The cases of McCants v. Bee, 1 McC. Eq. 383 [16 Am. Dec. 610]; and South Carolina R. R. Co. v. Toomer, 9 Rich. Eq. 270, relied upon by the appellants, do not, in our judgment, conflict with these views. In the former case the question was not really made, but it was suggested that the executor was willing to confirm a contract for the sale of a slave which had been made by the life tenant, about which the real controversy was, and the court, among several other reasons why the executor could not make the sale, said that the power given to the executor was only to sell such property as was useless to the estate, and that the court could not suppose that this conferred a power to sell the slave in question, without assuming, which it would not do, that the executor was willing to commit a fraud, for there was another provision in the will directing the executor to increase the stock of that kind of property by investing the surplus funds of the estate in the purchase of slaves; for if the court were at liberty to suppose that the slave was of such a description as to be useless to the estate, then it would have to suppose that the executor was willing to commit an actual fraud by imposing upon a female property which he knew to be worthless. In the case of S. C. Railroad Company v. Toomer, the condition upon which the power to sell was given was the happening of a distinct fact, and was not a condition which would have to be determined by the exercise of judgment or discretion.

When, therefore, as in this case, a power of sale is given to an executor, upon the happening of a contingency which can only be ascertained by the exercise of judgment and discretion, and the executor, in the honest exercise of his judgment, determines that such contingency has happened and accordingly makes the sale, such sale cannot be invalidated, even though it should be made to appear, in the light of subsequent events, that the executor had committed an error of judgment in determining whether the contingency had happened upon which he was

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authorized to *sell. If, however, it should appear that the executor erred wilfully, or from such gross negligence as would imply wilfullness, then it would be different, and the question whether the sale should be allowed to stand, would depend largely upon whether the purchaser had notice of such misconduct upon the part of the executor. In this case, as we have seen, there is no foundation for a suspicion even that the executor acted otherwise than honestly in determining whether the contingency had happened upon which he was authorized to sell, and, therefore, upon the principles above stated there is no ground for invalidating the sale.

The judgment of the Circuit Court is affirmed.

McGOWAN, A. J., concurred.

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14 S. C. 241

(Case No. 931.)

KLINCK v. BLACK.

(April Term, 1880.)

[1. *Injunction* ⇐211.]

The act of a deputy sheriff in putting a purchaser into possession after an order of injunction restraining such act was served upon the sheriff, but before such service was known, or could possibly have been made known to the deputy, is invalid.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 434; Dec. Dig. ⇐211.]

[2. *Injunction* ⇐206.]

Upon the application of one claiming a tract of land by title and possession, who was not a party to a cause under which a decree of sale was rendered, a Circuit judge, by his order at chambers, enjoined the sheriff from putting a purchaser of such land into possession, as required by the decree of sale. *Held*, that such order was within the judicial discretion of the Circuit judge, and its legality could not be questioned by the sheriff.

[Ed. Note.—Cited in Harmon v. Wagener, 33 S. C. 497, 12 S. E. 98.

For other cases, see Injunction, Cent. Dig. §§ 422, 423; Dec. Dig. ⇐206.]

[3. *Injunction* ⇐220.]

Such an order is not suspended by an appeal therefrom.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 442; Dec. Dig. ⇐220.]

[4. *Injunction* ⇐221.]

Such order having been violated by the sheriff, through the act of his deputy ignorant-

ly done, it was competent for the Circuit judge, by a second order, to command the sheriff to restore the possession thus changed by the wrongful act of his deputy.

[Ed. Note.—Cited in State v. Nathans, 49 S. C. 227, 27 S. E. 52.

For other cases, see Injunction, Cent. Dig. § 445; Dec. Dig. ⟸221.]

[This case is also cited in Simonds v. Haithcock, 18 S. C. 604, without specific application, and in State v. Nathans, 49 S. C. 227, 27 S. E. 52, as to the powers of judges at chambers.]

Before Aldrich, J., Colleton, January, 1880.

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*The tract of land, whose possession is the subject of dispute in this case, was sold by the sheriff of Colleton county, Robert Black, on sale-day, in January, 1880, under a decree of Judge Fraser, rendered in a cause to which this plaintiff, Gustavus W. Klinck, was not a party. The decree ordered a sale to satisfy the claim of Martha P. Godfrey, for dower, and directed the sheriff to put the purchaser at such sale into possession. The subsequent proceedings are stated in the opinion.

From the several orders of Judge Aldrich, the defendants, Robert Black and Martha P. Godfrey, appealed to this court.

Messrs. Tracy & Tracy and Henderson & Behre, for appellants.

Messrs. Mitchell & Smith and Robert Aldrich, contra.

October 15th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This is a contest for the possession of a plantation in Colleton county, known as "The Shrubbery." As presented here, the rights of the parties on the merits are not involved, except so far as they may be incidentally affected by possession. On January 5th, 1880 the plaintiff was in possession of the plantation under claim of title which is not now to be considered. Seeing that the plantation was advertised for sale by Robert Black, sheriff of Colleton county, under an order of Judge Fraser, at the suit of one Martha P. Godfrey, for dower, as the widow of William Godfrey, he exhibited his complaint against Robert Black, sheriff, and Martha P. Godfrey, defendants, stating his case and praying for an injunction against the proposed sale, and also for the usual restraining orders. Judge Aldrich, upon the prima facie case made, granted an order, which, for convenience, we will call No. 1, "requiring the defendants to show cause on the first day of the next term of the court why the said sheriff should not be enjoined from making the sale," &c., and it was further "ordered that the said Robert Black, sheriff as aforesaid, be, and he is hereby restrained from making the sale aforesaid, or

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if the sale has been *made prior to the service of this order upon him, he is hereby restrained from delivering title to the said premises to the purchaser at such sale, and from placing said purchaser in possession of said premises or in any way interfering with the plaintiff's possession of the same."

This order was granted at Barnwell courthouse January 5th, 1880, and on that same day Sheriff Black, at Walterboro', against the protest of the plaintiff, offered the plantation for sale, and it was bid off by one B. P. Sanders, at the price of $4000. Sanders did not comply with the terms of sale as required in two hours, and the sheriff re-sold at his risk. At the second sale the plantation was bid off for $1971 by Martha P. Godfrey, who was entitled to the purchase money, and to whom the sheriff executed titles. At the hour of 10.30 o'clock the next morning (January 6th) notice of the restraining order granted at Barnwell, was served on the sheriff at his office, but his deputy had already been dispatched "between daylight and sunup" that morning to put Mrs. Godfrey in possession under the sale, and at the hour of 1 o'clock P. M. of that day, after the sheriff had notice, but before the deputy had knowledge of it, the said deputy, in the name and by the authority of the sheriff, put the plaintiff out and Mrs. Godfrey into possession of the plantation.

On the next day (January 7th), the plaintiff, after leave granted, filed a supplemental complaint, stating the facts as they had taken place, and Judge Aldrich made another order, No. 2. This repeats the first restraining order in these words: "That in the meantime and until the further order of the court upon the hearing herein ordered, the said defendants be, and they are hereby, restrained forthwith from taking or keeping possession of the premises," &c. This order was communicated to Mr. Fishburne, agent of Mrs. Godfrey, who had been put in possession, and he "declined and refused to vacate said premises."

This disregard of his order being brought to the notice of Judge Aldrich, on January 10th, he granted order No. 3, requiring Robert Black, sheriff, Martha P. Godfrey, and L. N. Fishburne to show cause why they should not be attached for disobedience of the orders aforesaid. To this rule the parties

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*made return. They made no motion to dissolve the orders Nos. 1 and 2, but gave notice of appeal therefrom to the Supreme Court, January 13th. Black and Mrs. Godfrey, January 19th, filed answers to the complaint and supplemental complaint. Judge Aldrich heard nothing but the rule for contempt, and, finding that the returns were not sufficient, on January 26th, he made order No. 4, directing that Robert Black, sheriff, should, within two days from the order, restore to the plaintiff, Klinck, possession of the Shrubbery plantation. From this order, Martha P. Godfrey appeals, and Chief Justice Willard grant-

ed an order, No. 5, suspending the order of attachment pending the appeal.

The appellant, Martha P. Godfrey, rests her appeal from the attaching order upon the ground "that Judge Aldrich erred in determining the defendant's right to the possession of the Shrubbery plantation, regularly acquired, under an order, being a judgment upon her rights, which a judge at chambers had no right to make." As we understand, this embraces two propositions: First, that the possession of the plantation was regularly acquired by the appellant under an order which is a conclusive adjudication of her rights; and, second, that a judge at chambers had no jurisdiction to determine her right to that possession.

The sworn complaint informed Judge Aldrich that the plaintiff was in quiet possession of the Shrubbery plantation under claim of right, and being satisfied with the prima facie showing of equity, he made an order restraining the sheriff from delivering possession to the purchaser until the rights of the parties could be determined. Notice of this order was served upon the sheriff, at the hour of 10.30 o'clock A. M., on January 6th, and from that moment he was bound to obey that restraining order. The transfer of possession at the hour of 1 o'clock P. M. that same day was in violation of that order and without authority. 2 Daniell's Ch. Pl. & Pr. 1683; High on Injunc., § 352. The character of the act was not changed by the fact that when the sheriff received notice of the restraining order, his deputy had already departed on the business, and that he could not be communicated with before the hour of

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1 o'clock P. M., when the *deed was done. That might excuse the sheriff from punishment as showing that his act was not willful, but could not give authority where none existed. We cannot distinguish between the sheriff and his deputy in the performance of an official act. The deputy derives his powers from the sheriff, and his act is that of the sheriff. As soon as the sheriff ceased to have authority, that moment the deputy ceases to have any, whether he knew of the notice to the sheriff or not. The ignorance of the deputy could not legalize that which was without authority.

But it is urged for the sheriff that Judge Aldrich at chambers had no authority to make an order restraining the enforcement of Judge Fraser's order to put the purchaser in possession. Upon this point it would, perhaps, be enough to suggest that that was not a matter to be judged of by the sheriff, who, as an executive officer, had nothing to do but to obey the last order, which directed him to do nothing—merely to refrain from acting. But we may add that, even if the sheriff had the right to question the legality of the order, his view of the law was more than doubtful. It may be that, under some circumstances, the court would not enjoin a sale of land under process, in the view that the mere sale of land cannot injure the rights of any one. Wilson v. Hyatt, McBurney & Co., 4 S. C. 369. But it is a very different question whether the court has the right to enjoin the delivery of possession by the officer of the law. In ordinary sheriff's sales there is no delivery of possession, but the purchaser is left to assert, in court, his right to possession, as well as all other rights. Under the code of procedure, Section 242, sub-division 1, it was within the judicial discretion of Judge Aldrich to restrain, temporarily, the enforcement of so much of Judge Fraser's order as directed possession to be given—that was a matter beyond the sale, and might work irreparable injury to one in possession under claim of title who was not a party to the proceeding in which the order to deliver possession was made. To that extent the order of Judge Fraser was in the nature of a writ of habere facias possessionem, which may be restrained in equity pending litigation. Dorn v. Beasley, 6 Rich. Eq. 408.

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*We think that the restraining order at the time the relative condition of the parties was changed by the delivery of possession, was not suspended by appeal. It was ex parte. No motion was made to vacate it. Even notice of appeal was not given until after the possession was changed. Besides, the order in its nature was not appealable. In no sense did it "involve the merits." It determined no rights but was purely administrative—to maintain the status pending the litigation. If its effect in this respect could be suspended by an appeal at any time, its very nature would be changed and this great preventive remedy of equity rendered perfectly nugatory. High on Injunc., § 16, and authorities cited.

But if the judge had jurisdiction to make the restraining order, it is urged that he had none to make the order No. 2, (January 8th,) which was not merely a restraining order, but required the sheriff to do a positive act in restoring possession. The act required to be done by the sheriff was simply to undo his own void act done through his deputy in ignorance of the facts. Both orders were in the possession of the sheriff, and binding upon him—one commanding him to refrain from delivering possession, and the other commanding him, if delivered, to restore possession. In fact, the delivery which was made was merely by accident, resulting from the ignorance of the deputy sheriff. If, under these circumstances, Mrs. Godfrey, who got possession by that accident, could defeat the plain purpose of the orders to maintain the statu quo, it would surely disclose great inefficiency in the administration of the law. Under particular circumstances mandatory injunctions are allowable. In Howe v. Searing, part of the injunction adjudged at the

hearing was "that the defendant should not continue to use the name of 'Howe's Bakery' on any sign or wagon, and should remove a large sign with that name." Justice Hoffman, who pronounced the order, held that the power to forbid the continuance of a thing and to punish a party for continuing it, was the same thing as the power to command its removal, and that it was best to make the language express directly what was actually commanded. Hoffman's Prov. Rem. of Code 377.

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*The sheriff exhibited reluctance to disturb the statu quo of two o'clock in the evening, which had been created only an hour before by the mistake of his deputy in delivering possession. It would seem that a sense of official impartiality should make him equally reluctant to disturb the statu quo of ten o'clock that morning, or, that being disturbed by the mistake of his deputy, he should be prompt to correct the mistake.

This judgment is not intended to touch the merits of the case and is without prejudice. The only purpose being to restore the parties to the same condition in which they stood, as to possession, at the hour of 10:30 o'clock on the morning of January 6th, when the sheriff received notice of the first restraining order.

The judgment below is affirmed and the appeal dismissed.

McIVER, A. J., concurred.

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14 S. C. 247

(Case No. 933.)

FELL v. DIAL.

(April Term, 1880.)

[1. *Bills and Notes* ⇐423.]

Where one endorsed a promissory note, and after its maturity, with knowledge that there had been no demand for payment, nor notice of nonpayment, made arrangements with the endorsee to furnish a steam boiler in part payment, and also promised to pay every cent of the money—*Held*, that these were admissions of liability, and a waiver of presentment and notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1209, 1217; Dec. Dig. ⇐423.]

[2. *Bills and Notes* ⇐423.]

A promise by the endorser under like circumstances to give a new note for the amount claimed, would also be an admission and waiver, although he afterwards refused to give the new note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1215; Dec. Dig. ⇐423.]

3. Schmidt v. Radcliffe, 4 Strob. 296 [53 Am. Dec. 678], approved.

[4. *Bills and Notes* ⇐423.]

The question for the jury in such case is not what the endorser intended by his words, but whether what was said amounted to a plain admission of liability.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1209; Dec. Dig. ⇐423.]

[5. *Trial* ⇐252.]

The Circuit judge properly refused to charge the jury upon the effect of an act, as to which there had been no testimony in the case.

[Ed. Note.—Cited in Heller, Hirsh & Co. v. Charleston Phosphate Co., 28 S. C. 233, 5 S. E. 611; Hay v. Carolina Midland Ry. Co., 41 S. C. 545, 19 S. E. 976.

For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ⇐252.]

[6. *Bills and Notes* ⇐138.]

The Circuit judge properly refused to charge the jury, that if they believed from the evidence that D. agreed to renew the note past due, he being endorser thereon, and the note was not renewed, that this was not a new promise to pay the said note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339; Dec. Dig. ⇐138.]

[7. *Bills and Notes* ⇐94; *Frauds, Statute of*, ⇐16.]

The original note and not the new promise, constituted the cause of action; and hence the new promise was not nudum pactum, nor within the statute of frauds.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 206; Dec. Dig. ⇐94; Frauds, Statute of, Cent. Dig. § 26; Dec. Dig. ⇐16.]

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*Before Wallace, J., Richland, July, 1879.

This was an action commenced in February, 1879, by William J. Fell, endorsee, against the endorsers of a promissory note for $835, made by Richard Tozer, payable to the order of George L. Dial, and endorsed by George L. Dial and John C. Dial.

The note was not presented at maturity for payment, nor was notice of non-payment given to the endorsers. The plaintiff claimed that these requisites to charge the endorsers were waived by the admissions and promises made by the endorsers after the maturity of the note. There was testimony on both sides upon these points, but enough is stated in the opinion to make clear the rulings of the court.

The defendants requested his Honor to charge as follows:

1. If the jury believe, from the evidence, that George L. Dial did not intend, from what passed between the plaintiff Fell and George L. Dial, to assume the responsibility of paying this note after maturity, then he is not liable as endorser thereon, and the jury must find a verdict for the defendant. His Honor charged the jury that they were to consider what Dial said.

2. If the jury believe, from the evidence, that an offer of waiver was made by George L. Dial in offering to allow the boiler in question to be credited on the note, and the said offer was not carried out by accepting the boiler and crediting its value on said note, that then they must find a verdict for the

said defendant, George L. Dial. His Honor held that this was not involved in the case.

3. That if the jury believe, from the evidence, that John C. Dial agreed to renew the note past due, he being endorser thereon, and the note was not renewed, that this was not a new promise to pay the said note, and the jury must find a verdict for the defendant, John C. Dial. This request was refused.

4. That no verbal promise to pay the said note, made by a discharged endorser, could, under the law of South Carolina, renew the said note, or make the said endorser again liable thereon. This request was refused.

His Honor, after stating the facts to the jury, announced the law as stated in Schmidt v. Radcliffe, 4 Strob. 296 [53 Am. Dec. 678].

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To this *charge and the refusals to charge the defendants excepted; and verdict and judgment being for plaintiff, defendants appealed to this court.

Mr. John Bauskett, for appellant.

Mr. Andrew Crawford, contra.

October 16th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action against the defendants as endorsers of a promissory note. The defence was that there was no demand on the maker and no notice of non-payment given to the endorsers. To this it was replied that the defendants had waived such demand and notice. There was evidence tending to show that one of the defendants, after knowledge of the fact that there had been no demand or notice, made an arrangement with the plaintiff for the payment of the note, by agreeing to furnish the plaintiff with a boiler for a steam engine, and, in addition to this, by promising to pay the plaintiff "every cent of his money;" and that the other defendant had agreed to renew the note. The testimony as to what both of the defendants had agreed to do, was conflicting; but we must assume that the jury, by their verdict, have settled this conflict in favor of the plaintiff. The only question, therefore, for us to determine is, whether the jury were properly instructed as to the law. Exactly what the Circuit judge charged the jury the "case" does not inform us, as the only statement of the charge is, that "the court, after stating the facts to the jury, announced the law as stated in Schmidt v. Radcliffe, 4 Strob. 296 [53 Am. Dec. 678], to which defendant excepted." We do not see how such an exception can be sustained. The law, as laid down in the case cited, was certainly applicable to the facts of this case, and we see no reason for dissatisfaction with the rule, as there announced. There, as here, the question was, whether the endorser had waived the necessity for demand and notice, and O'Neall, J., in delivering the opinion of the court, says that the rule laid down by Story, in his Treatise on Bills, "that a promise by the party entitled to notice to pay the bill, is deemed a full and complete waiver

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of the want of due *notice, seems now to be settled law. It is, however, subject to the qualification stated in the same section, 'in all cases of this sort the promise must be unequivocal and amount to an admission of the right of the holder, or the act done must be of a nature clearly importing a like admission of his right.'" In that case there had been no demand on the drawer and no notice to the endorser, and when the endorser was called on for payment, he said "he would see Cramer" [the maker of the note] "and try to get the money out of him, and if he could not he would have to pay it himself, as he was the endorser on the note;" and the court said "this was a plain admission of his liability and the plaintiff's right to receive the money from him." So here we think the conduct and language of the defendants amounted to a plain admission of their liability, and they cannot now dispute it upon the ground of the absence of proof that would otherwise have been necessary to fix their liability.

It is contended, however, that there was error in refusing sundry requests to charge which are set out in the "case," and need not be quoted here. In response to the first request, that if the jury believed, from the evidence, that George L. Dial did not intend to assume the responsibility of paying the note, then he would not be liable as endorser, the Circuit judge properly instructed the jury that they were to consider what Dial said. It was possible, though we do not mean to intimate that such was the fact in the present case, that Dial may have intended to deceive or mislead the plaintiff in the belief that he would pay the note, when, in his own mind, he had no such real intention, and hence the jury were properly instructed that the questions for them to consider was what Dial said, and whether it amounted to "plain admission of his liability," and not what may have been his hidden intention.

The second request was properly refused, as not called for by any testimony in the case, as there was no pretence that the plaintiff had ever declined to accept the boiler and credit its value on the note.

The third request, that a promise to renew the note did not amount to admission of liability, was properly refused. It certainly amounted to a promise to take up

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the note in suit by *giving another, and that certainly was just as much an admission of liability as a promise to take up the note by paying it in money or giving a draft on a factor would be.

The fourth request seems, from the argument, to be based upon two grounds. First. That a promise by an endorser to pay a note

from which he had been discharged by a failure to make due presentment and notice, is nudum pactum, and therefore void. Second. That such a promise, unless in writing, is void under the statute of frauds, as being the promise to pay the debt of another. Neither of these grounds are tenable, for they both rest upon the unfounded assumption that it is the new promise, and not the original note, which is the cause of action. The new promise does not constitute the cause of action; it only operates as a waiver of the necessity of proving facts—demand and notice—which, but for such promise, would be necessary to sustain an action on the original note, which is the real cause of action, and the contract evidenced by the note cannot be said to be nudum pactum, nor is it within the statute of frauds. In support of these views, see 2 Daniel on Neg. Inst., § 1147, and 1 Ib., § 567, n. 5.

The judgment of the Circuit Court is affirmed.

McGOWAN, A. J., concurred.

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14 S. C. 251

(Case No. 934.)

DAVIDSON v. MOORE.

FICKLING v. SAME.

(April Term, 1880.)

[1. *Executors and Administrators* ⇐303.]

Testator bequeathed "to my sons, T., S. and W., in trust, for the use and benefit of my granddaughters, A., L. and B., each $10,000, when they arrive at the age of eighteen years. * * * My sons, trustees aforesaid, may, if they deem it necessary and prudent, invest the above legacies in stocks or other property for the use and benefit of my said granddaughters severally," and the rest of his estate was given to his three sons. S., who alone undertook the trust set apart to two of

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the grand*daughters, at the age of eighteen, in 1863 and January, 1865, certain notes, all of which were due to a firm composed of testator and his three sons, except one note made in 1863, and payable to a new firm formed by the sons. The notes were appraised good when so set apart, but were only partially realized. There was no written assignment, and the notes were afterwards sued, presented against bankrupt estates, proved in court, &c., in the firm name. *Held*, that the pretended investments were not payments of the legacies.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1229; Dec. Dig. ⇐303.]

[2. *Executors and Administrators* ⇐303.]

The amounts received upon the notes of the firm of testator and sons, should be added to the firm assets, of which one-fourth belonged to testator; and the payments made by the executor to the cestuis que trust should be credited upon his accounts as executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1229–1242, 1245; Dec. Dig. ⇐303.]

[3. *Appeal and Error* ⇐1022.]

A referee's finding of fact upon the conflicting testimony of witnesses examined before him, which was overruled by the Circuit judge, sustained by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇐1022.]

[4. *Executors and Administrators* ⇐475.]

Certain stock in chartered companies, sold by the executor, charged to him at the appraisement, there being no other proof of value.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2061; Dec. Dig. ⇐475.]

[5. *Executors and Administrators* ⇐500.]

Executors are not entitled to commissions for years in which they failed to make returns prior to the adoption of the general statutes in February, 1872; since then, there is no law depriving them of commissions for such neglect.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2135; Dec. Dig. ⇐500.]

[6. *Executors and Administrators* ⇐495.]

Executors are entitled to commissions on the final balance in their hands paid over. Gee v. Hicks, Rich. Eq. Cas. 5.

[Ed. Note.—Cited in Tompkins v. Tompkins, 18 S. C. 30.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2089, 2106, 2108; Dec. Dig. ⇐495.]

[7. *Executors and Administrators* ⇐315.]

Decree for the legacies against this executor personally, should only be for assets which came, or should have come into his hands, exclusive of the value of the slaves emancipated.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298–1314; Dec. Dig. ⇐315.]

[8. *Trusts* ⇐161.]

The trustee having attempted to sustain such improper investment, and being antagonized by this litigation, should no longer hold his office of trustee without bond and security.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 209–211; Dec. Dig. ⇐161.]

[This case is also cited in Moore v. Davidson, 22 S. C. 93, as to the facts.]

Before Wallace, J., York, November, 1879.

These two actions were tried together, being actions against Samuel R. Moore, executor, for the payment of legacies under the will of John S. Moore, to Laura S. Springs, now Davidson, and Buena V. Springs, now Fickling.

The report of C. E. Spencer, Esq., referee, in the case of Davidson v. Moore, thus states the facts:

1. John S. Moore, defendant's testator, died on September 21st, 1859, leaving in force his last will and testament, which was duly admitted to probate by the Ordinary of York county on January 4th, 1860. Defendant, T. A. Moore and W. A.

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*Moore, the three sons of the testator, were named as executors therein, but the defendant alone qualified.

2. The said testator bequeathed to his three said sons the sum of $10,000, in trust, for the use and benefit of his granddaughter,

the plaintiff, Laura B. Davidson, upon her attaining eighteen years of age, for and during her natural life, with limitations over in the event of dying without issue alive. The defendant alone undertook the execution of the trust.

3. The plaintiff, Laura B. Davidson, on October 18th, 1862, attained the age of eighteen years, and subsequently, on September 10th, 1867, intermarried with the plaintiff, Joseph S. M. Davidson.

4. The will of the testator provided that the trustees may, if they deem it necessary and prudent, vest the above legacies in stocks or other personal property, for the use and benefit of the said granddaughters as aforesaid, referring to his three granddaughters, of whom the plaintiff, Laura B. Davidson, was one, and to each of whom he had left a similar legacy upon her, each of them, attaining the age of eighteen.

5. The entire residue of the estate, after payment of debts, was willed to testator's three sons above named, to be equally divided between them.

6. The testator died seized and possessed of a considerable real and personal estate, a statement of which, together with the value thereof at the time of his death, is hereto attached, marked Exhibit A. He was also, at the time of his death, the owner of one-fourth interest in the firm of J. S. Moore & Sons, composed of testator and his three sons, each of whom owned a fourth interest. A statement of the assets of the firm at that time is attached to this report, and marked Exhibit B.

7. The estate of the testator was never sold by the executor. He admits that he has appropriated the entire estate, however, with the exception of the negroes, (who were emancipated in 1865,) the King's Mountain Iron Company stock, (which he traded off in good faith during the war with a view to benefit the estate, without ever having realized anything upon it,) and the King's Mountain Railroad stock, (which he claims still to hold in behalf of the estate, and

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which he has done in good faith, *having a care to the interest of the estate, although he might have realized as much as $10 a share for several years after the war, and although he has taken the new certificate of stock from the C. and L. Railroad Company in the name of different members of his own and his brother's family.)

8. The account, as executor of the estate, is attached hereto, marked Exhibit C; an account of the receipts and disbursements of the survivors of J. S. Moore & Sons is also attached, marked Exhibit D. The settlement of the firm business has been conducted by the defendant.

9. On November 20th, 1862, defendant, with the knowledge, consent and approval of the other survivors of J. S. Moore & Sons, and with the expectation of being reimbursed at some future time out of the testator's estate, set aside from the assets of said firm the notes described in Exhibit E, hereto attached, in payment of the legacy of his testator to the plaintiff, Laura B. Davidson. The parties owing these notes were solvent at the time, and would, doubtless, have continued so but for the results of the war. At the time of this setting aside no money investment was practicable, though the trustees might have made the debts more secure by the individual endorsements of the survivors, or, if the others could not have been obtained, by his own endorsement. Requiring a mortgage of a debtor's real estate was entirely impracticable at the time. I have not the least doubt in my mind that, aside from involving himself personally, the arrangement to secure the legacy was the best that presented itself to defendant, and that he undertook it with the best of motives. With the legal question whether, under the will, it was a proper investment, I have nothing to do. Defendant's account, as trustee of Mrs. Davidson, is hereto attached, marked Exhibit F.

The bill of appraisement is only prima facie evidence of the amount and value of a decedent's property. While testimony was offered to show that the stock of the King's Mountain Iron Company and the King's Mountain Railroad had no marketable value at the time of testator's death, yet no real value was proved, and, as I am satisfied, there was some real value, I accept that assessed by the appraisers.

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*In the payments of 1860 of the testator's debts, defendant has included an item of $3181.99, being the amount of the account of Miss J. A. Springs, a granddaughter of testator and one of the legatees provided for in his will. Defendant claims that under an arrangement between testator and two certain paternal uncles of the three granddaughters, (whose father had become insolvent,) entered into in 1857, the testator undertook to support the said Miss J. A. Springs until her education should be completed, each of said uncles undertaking, at the same time, to render similar support to one of the other granddaughters. As regards the undertaking of the testator, the testimony was conflicting, but I think the weight of the testimony fully warrants the conclusion that the testator did so undertake, and I so find. But I hold that the undertaking was discharged upon her attaining eighteen years of age in December, 1859, at which time, under the will, she became entitled to the income from her legacy, the interest on which was actually paid to her in December, 1860, out of the estate, and regularly thereafter until 1863, when the legacy was invested

Up to December, 1859, her account aggregated $1698.46, and to this extent I allow defendant credit.

In the case of Fickling et ux. v. Moore, the referee submitted a similar report, except as follows:

Buena V. Fickling attained the age of eighteen years March 24th, 1865, and married Jeremiah Fickling in February, 1875. On January 1st, 1865, defendant, with the knowledge, consent and approval of the other survivors of J. S. Moore & Sons, and of the members of the other firm of W. A. Moore & Co., to wit, W. A. Moore and T. A. Moore, his brothers, (who were also named as executors and trustees in the will of J. S. Moore, but who never qualified,) and with the expectation of being reimbursed at some time out of the testator's estate, set aside the notes described in Exhibit E 2, hereto attached, (all of which belonged to the assets of J. S. Moore & Sons, except the note of J. M. Smarr, which belonged to W. A. Moore & Co.) in the payment of the legacies of his testator to plaintiff, Buena Fickling. The parties owing these notes were solvent

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at the time, except that *J. M. Smarr could hardly have been considered entirely good for a debt of $6000, on a strict property basis. All of the notes would doubtless have been realized on, however, but for results of the war. Of course, no money investment was practical in January, 1865, though the trustee might have made these claims more secure by the individual endorsement of the members of the firm, defendants, W. A. Moore and T. A. Moore, or secured by his endorsement alone in case the other could not have been obtained. Requiring a mortgage of a debtor's real estate was entirely impracticable at the time, as the collection of debts was stayed. The note of J. M. Smarr was given for the loan of Confederate money on May 16th, 1863, to wit, $5600, worth in good money $1458.33; and while I have no doubt that the testimony of the defendant is true, that Smarr was to pay back in good money after the war, as he (Smarr) proved to be totally insolvent, the defendant cannot ask (against his own plan of making up accounts involving Confederate currency) that the investment be recognized for more than enough to cover the value of the said Confederate currency to the firm of W. A. Moore & Co., with interest to the date of the investment, to wit, $1621.67. With the exception of the Smarr note, I am satisfied the arrangement to secure the legacy was the best that presented itself to the defendant, aside from involving himself and his brothers personally, and even in the case of that note he acted with good motives, of course, as in the other case. I have nothing to do with the legal question whether the investments were proper, within the meaning of the will. Defendant's account as trustee of Mrs. Fickling is hereto attached, marked Exhibit F 2.

Upon exceptions to this report, the Circuit judge filed the following decree:

These causes were tried together and came before me on exceptions by plaintiffs to the report of the referee, to whom it had been referred to take the testimony, state the accounts of the defendant, as executor under the will of J. S. Moore, deceased, and as trustees for plaintiff, and to report any special matter.

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*The will of the testator, John S. Moore, upon which these actions are founded, provides, inter alia, as follows: I will and bequeath unto Theodore A., Samuel R. and William A. Moore, in trust for my granddaughters, Amanda J. Springs, Laura B. Springs and Buena V. Springs, each $10,000, when they arrive at the age of eighteen years old, for and during their natural lives; and should either of them die, then to her issue; but if either die leaving no issue alive, then to her surviving sisters or their surviving issue forever. * * * My sons, trustees as aforesaid, may, if they deem it necessary and prudent, vest the above legacies in stocks or other property for the use and benefit of my said granddaughters severally, but the property so obtained to be held by said trustees upon and subject to the same terms and conditions aforesaid.

The testator died in 1859, and the defendant, S. R. Moore, alone qualified as executor, and assumed the trusts created under the will. The plaintiff, Laura B. Davidson, one of the beneficiaries of this trust, attained the age of eighteen years on October 18th, 1862, and the plaintiff, Buena V. Fickling, another beneficiary, attained said age on March 24th, 1865.

The testator seems to have been possessed at the time of his death of very considerable estate, both real and personal, and largely in excess of what was necessary to provide for all the legacies mentioned in said will. Besides he held an interest of one-fourth part in a mercantile firm conducted under the name of J. S. Moore & Sons, of which the testator and the three sons named in the will are the partners, each to the extent of one-fourth part.

No part of testator's estate was sold by the executor, and it suffered serious depreciation in consequence of the emancipation of slaves after the war and the loss of debts due. Shortly after the plaintiff, Laura B. Davidson, reached the age of eighteen years, to wit, on October 18th, 1862, the defendant claimed to have set apart sundry notes payable to the firm of J. S. Moore & Sons, of the estimated value of $10,000, in satisfaction of her legacy, and as an investment for her use under the terms of the will. And on January 1st, 1865, sundry other notes, payable to said firm and to the firm of W. A. Moore & Co.,

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(in which *testator had no interest), of the like value, were claimed to have been set apart by the executor in satisfaction of the legacy of the plaintiff, Buena V. Fickling, and as an investment for her use under said will.

These alleged investments are attacked by plaintiffs and sought to be sustained by the defendant. The referee reports that these notes were set apart in good faith and computes the amount collected on each of the parcels of notes, and charges the defendant with the amounts actually realized upon said notes and interest as satisfaction in full of the legacies. The corpus realized for the plaintiff, Laura B. Davidson, from said notes is computed at $4255.69, and that realized for the plaintiff, Buena V. Fickling, from the notes set apart for her is computed at $2706.66 as of January 1st, 1865. The remaining estate of the testator in the hands of his executor, after deducting commissions, and including the allowance of sundry credits hereinafter mentioned, is reported by the referee at $29,053.72.

I cannot hold that the setting aside of these notes for the respective plaintiffs amounted to a satisfaction of the legacies; nor was it such an investment, under the will, of their respective shares as can be sustained.

It appears that neither of the beneficiaries was consulted as to the alleged investments, nor were they informed thereof, nor was any return filed stating such investment. That the notes were payable one day after date and were all over due at the time they were set apart; that there was no endorsement on any or either of them indicating a transfer to the trust estate; that the notes were without security and the members of the firm continued to treat the notes as partnership property long afterwards by putting them in suit and proving them against the estates of the debtors in the names of the original payees. One of the notes claimed to have been set apart for the plaintiff, Mrs. Fickling, was a note of over $6000, dated in May, 1863, and was admitted to have been in consideration of confederate currency at that time loaned. It was afterwards proved in bankruptcy by the defendant in the name of W. A. Moore & Co. against the estate of the debtor and alleged in the proof to have been worth only

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its value in such currency at the time it *was made. It was alleged by the defendant that at the time these notes were set apart an entry was made in a private book in defendant's possession, in which a list of notes due the firm was entered, showing an appropriation to the trust estates of the notes in question. Accepting this as true, it cannot alter the effect of the parties afterwards dealing with the notes as their own. Under this state of facts, I would find difficulty in holding that there had been such an appropriation of these notes to the trust estates as to distinctly make them out as trust property, even were I able to overcome the more serious obstacle to sustaining such an investment as one authorized by law. I am therefore compelled, both as to matters of law and fact, to hold that there had been no investment of the legacies of these plaintiffs by the defendant as trustee pursuant to the directions contained in the will.

Exception is also taken by plaintiffs to an item of credit claimed by defendant as executor in the sum of $3181.99 and interest, alleged to be a disbursement on behalf of testator's estate in payment of an account to J. S. Moore & Sons for the maintenance of Miss A. J. Springs, another of the granddaughters, prior to her attaining the age of eighteen years.

The referee concluded that the weight of testimony is in favor of sustaining this account as a proper voucher up to the time that Miss Springs reached the age of eighteen years, when her legacy vested. He allows defendant credit for $1698.46 and interest thereon from the date of the alleged payment, being that part of the account which accrued prior to her attaining the age of eighteen years. After a careful consideration of the testimony, I am compelled to differ from the referee on this point, and to disallow the credit in the account of the defendant as executor. Exception is further taken to the allowance of commissions to the defendant, both as executor of the estate of the testator and as trustee for plaintiffs. The testimony is conclusive that he filed no returns as executor, and it seemed to be a matter of question whether he ever filed an inventory of the estate of testator in the proper office. Under this state of facts the law is imperative, and the defendant's commissions, as executor, cannot be allowed. He is entitled, however, to

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his proper *commissions as trustee on the amount of funds actually received and appropriated to the trust estates, and to the extent of the latter the plaintiff's exceptions are overruled.

The referee omitted to charge the defendant with the appraised value of certain railroad and other stocks belonging to the testator. The subsequent appropriation of these stocks among the family of testator seems to me to forbid the view taken by the referee, and I hold that the defendant should be charged therewith. Exceptions were also taken by the plaintiffs to sundry items of credit in defendant's account as executor for notes paid in behalf of testator's estate, the allegations being that, although sundry of these notes were signed by the testator, they were given for money borrowed and put in the firm of J. S. Moore & Sons, and that their payment after testator's death should have been charged to this firm and not to the estate of testator. While there is some testimony that creates a doubt in my mind upon these points, I do not see sufficient force in it to cause me

to overrule the decision of the referee allowing defendant these credits. It appears from the report of the referee that $3000 of the estate of Laura B. Davidson was invested by consent on December 13th, 1871, in a note and life policy of her husband. Also, that all the payments made by the trustee, with interest thereon to January 1st, 1879, including interest on the above $3000 to same date, amount to $6074. As this mode of accounting by the referee has not been objected to by either party, I shall follow it, though not strictly accurate. The account will then stand thus: * * *

It is, therefore, adjudged that the plaintiff, Laura B. Davidson, do recover of the defendant, Samuel R. Moore, personally and as executor of the estate of John A. Moore, deceased, the sum of $4084.92. It further appears from the report of the referee that all the payments made Buena V. Fickling by the trustee, with interest thereon to January 1st, 1879, amount to $5355.72. As this mode of accounting by the referee has not been objected to by either party, I shall follow it, though not strictly accurate. The account will then stand thus: * * *

It is, therefore, adjudged that the plaintiff, Buena V. Fickling, do recover of the defend-

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ant, Samuel R. Moore, deceased, the sum *of $2704.65. The views I entertain upon the law and facts of these cases make a further inquiry into the amount of the assets of the estate of John S. Moore, deceased, now or formerly in the hands of the defendant as executor, unnecessary.

I have herein decided all the points raised respecting this part of the case. The assets and the real estate were sufficient in amount, as I have heretofore found, to pay all debts and the legacies provided in the will. Hence I adjudge the recovery against the defendant personally and as executor. The endeavor of the trustee to sustain, as an investment, the notes received by him, his necessary antagonism growing out of this litigation, and his antagonistic attitude towards cestuis' que trust claims under him, without any impeachment of his integrity of purpose or good faith, make him an improper person to be entrusted longer with the trust estates, unless he enter into bonds to secure the forthcoming of the same, as required by the provisions of the will of the testator, and the payment of the same annually to the cestuis que trust.

It is, therefore, adjudged and decreed that the defendant forthwith pay over to the clerk of this court the sum of $7,000, as the corpus of the trust estate of Laura B. Davidson now in his hands; also the sum of $10,000, the corpus of the trust estate of Buena V. Fickling, unless he, the said defendant, do give bonds to the said clerk, each with two good sureties, one in the penal sum of $14,000, and the other in the penal sum of $20,000, conditioned for the faithful discharge of his duty as trustee of Laura B. Davidson and of Buena V. Fickling, respectively, in accordance with the provision of the will of John S. Moore, deceased. It is further adjudged and decreed that the plaintiffs, Laura B. Davidson and Buena V. Fickling, do respectively recover from the defendant, Samuel R. Moore, personally, as executor as aforesaid, their costs and disbursements in these actions, to be taxed by the clerk of this court. It is ordered that it be referred to Charles E. Spencer, Esq., the referee herein, to report a proper person in the case of each trust estate, to be appointed trustee of such estate respectively; and that upon the appointment of such persons by this court, and their qualification as such trustees and giving bonds, as hereinbefore specified, as the condition for

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the *defendant to retain the management of the trust estate, the clerk of the court do pay over to such trustees the corpus of the estates that may have been paid over to him by the defendant in pursuance of this decree.

The defendant excepted to this decree upon the following grounds:

1. For error in holding that, both as matters of law and fact, there had been no investments of the legacies by the defendant as trustee, pursuant to the directions contained in the will.

2. For error in holding that the members of the firm of J. S. Moore & Sons continued to treat the notes as partnership property, because, in bringing suit and proving them against the estate of debtors, the names of the payees were used, though the same was done for the benefit of the plaintiffs and the trustee charged himself with all the collections made.

3. For error in holding that said notes were only entered in a "private book" in defendant's possession, when the evidence is uncontradicted that the entry was made at the date of the investments in a "firm book" open to inspection, and in utterly ignoring the positive evidence of J. A. McLean, P. J., as to the investment for Mrs. Davidson, and Exhibit A, filed with answer.

4. Because, if the investments were not valid, then his Honor should have decreed that the survivors of J. S. Moore & Sons be first refunded out of the estate of testator, the amounts, with interest, collected (on the notes set apart) and expended for the benefit of the legatees.

5. For error in excluding the credit of $1698.46 and interest (allowed by the referee in his report,) contrary to the overbearing weight of the evidence.

6. For error in charging the defendant with the appraised value of the railroad stock and iron stock.

7. For error in allowing a right in plaintiffs to object to defendant's commissions as executor.

8. For error in excluding defendant's com-

missions as executor on amounts to be paid.

9. For error in holding that the assets and the real estate in the hands of the defendant

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as executor, were sufficient in amount *to pay all debts and the legacies provided in the will, when the uncontradicted evidence shows to the contrary.

10. Because, while the balance of the estate after paying debts, as reported by the referee up to January 1st, 1879, (viz., $29,053.-72,) in addition to the appraised value of the railroad and iron stocks and interest, executor's commissions and interest thereon, the item of $1698.46 and interest, only aggregate up to January 1st, 1879, $43,403.16, the three legacies and interest to said date amount to over $60,000.

11. For error in decreeing that Laura Davidson recover of the defendant $4084.72, and Buena V. Fickling $2704.66, when it appears from the referee's report and the overbearing weight of the testimony, that each is in debt to the defendant for advances of income.

12. For error in decreeing against the defendant personally, as well as executor, as to debt, costs and disbursements.

13. For error in decreeing the removal of the defendant as trustee, though his integrity and good faith are unimpeached.

14. Because the plaintiffs have realized more, both in corpus and income, than they could have done had the investments been postponed until the executor had paid the debts of the testator.

15. Because the decree is in conflict with law, equity and the evidence, and entails results never contemplated by the testator, and contrary to the intent and purposes of the will.

Upon these exceptions defendant appealed to this court.

[For subsequent opinion, see 22 S. C. 92.]

Mr. W. B. Wilson, for appellant.

Messrs. J. H. Rion and J. F. Hart, contra.

October 18th, 1880. The opinion of the court was delivered by

McIVER, A. J. These cases depending upon the same principles, were heard together on Circuit, and the appeals will be considered together here.

The conclusion of the Circuit judge, that the investments of the trust funds claimed to have been made by the appellant, cannot be allowed, is so fully sustained by his rea-

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soning that it *would be difficult for us to add anything to it. These cases differ materially from the case of Bolling v. Child, MS. decision filed March 5th, 1879, which has been cited by the counsel for the appellant. There the executor, who was also trustee, in pursuance of the directions of the will, had sold the whole estate and converted it into "well-secured" notes, and the court said that the executor having, as trustee, simply received the share of the cestui que trust "in the incidental assets in which the estate consisted, from which this share was derived, and allowed the investment to remain as it was, in notes, which both the referee and Circuit judge have found to have been then well secured, and to have become worthless only by reason of the results of the war and other causes over which the trustee had no control, and for which, therefore, he was not responsible, it is difficult to conceive of any principle of law or equity upon which the trustee could be held liable." In that case the property really given to the trustee for the benefit of the cestui que trust was, practically, the very notes which were in question, for the testator had directed his executor to sell his whole estate and divide the proceeds into four equal shares, to be held by the executor in trust for certain persons named. Here, however, the testator did not direct a sale of his estate, and it was not, in fact, sold, but he simply gives pecuniary legacies to the ex ecutors in trust for his granddaughters, the wives of the plaintiffs, and directs that the executors "may, if they deem it necessary and prudent, vest the above legacies in stocks or other property," and then gives the remainder of his estate to his three sons, who were also appointed executors. So that, practically, he said to his sons, "I give you all of my property, charged with the payment of my debts and these pecuniary legacies, and you may either continue debtors to my granddaughters for the amount of the legacies given to them, or, if you think it best to do so, you may invest the amount of these legacies in stocks or other property." If the executor, who alone qualified, chose, as he claims to have done, to adopt the latter alternative, his conduct in making the investment must be tested by the same rules as would apply in the case of any other trustee whose duty it was to invest trust funds. So tested, there cannot be a doubt but that these investments

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must be dis*allowed. The notes in which it is claimed the investments were made were not notes constituting a part of the testator's estate, specially given for the benefit of the cestui que trust, as in the case of Bolling v. Child, and which the executor, in his capacity as trustee, simply allowed to remain in the same form in which they came into his hands. Certainly the testator never had any interest in the note of Smarr to W. A. Moore & Co., and even the note to J. S. Moore & Sons did not constitute any part of the estate of the testator, for, upon his death, these notes became the property of the survivors of that concern, and the only claim that the estate of the testator had was against the survivors for an account. The transaction, then, simply amounted to this—that the executor, acting as trustee, purchased notes from third per-

sons, many of which were past due and entirely unsecured, as an investment of the trust funds, and did not even take the precaution of having such notes legally transferred to him as trustee, but, on the contrary, left them in the hands and under the control of the payees, who continued to deal with them, in some respects at least, as their own property, and if disaster had overtaken the payees it might have proved a very difficult matter to rescue such notes from the creditors of the payees. Such a transaction cannot, certainly, be sustained as a proper investment of trust funds.

As to the appellant's fourth exception to the decree of the Circuit judge, we think, the investments being disallowed, the best way to make up the accounts is to treat the notes claimed to have been set aside as investments as continuing to be the property of J. S. Moore & Sons, for all of which the survivors should account, in order to ascertain the interest of the testator therein, and that such interest so ascertained should be charged to the executor as part of the assets of the testator's estate, and that any payments made to the legatees, whether such payments were made from collections on such notes, or from other sources, should be credited to the trustee in his accounts as such. The result will be that all money which may have been collected on these notes will be regarded as belonging to J. S. Moore & Sons, of which the testator's estate would only be entitled to one-fourth, and if the estate has already got the benefit of more than that

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*proportion of such money, its interest in the other assets of the partnership will be reduced to the extent of what the estate has already got the benefit of exceeds such one-fourth. This, it seems to us, would practically effect what we understand to be the object of that exception.

We are unable to discover any sufficient reason for overruling the finding of fact by the referee in regard to the credit of $169S.-46, allowed the executor for the expense incurred in the support of Miss A. J. Springs up to the time she attained the age of eighteen years. It is true that the testimony upon this point is somewhat conflicting, but the referee, who had the witnesses before him, has reached the conclusion that the weight of the testimony was in favor of allowing the credit, and we think his conclusion should have been adopted, unless it was shown, as we do not think it has been, that his conclusion could not be sustained by the testimony. Dewitt v. Atkinson, 6 S. C. 140. The judgment of the Circuit Court is, in this respect, reversed, and the report of the referee, as to this matter, is confirmed.

Appellant's sixth exception cannot be sustained. The executor certainly undertook to dispose of the stock in question, and he has not accounted for the proceeds of it. He must, therefore, in the absence of any other proof as to its value, be charged with that fixed by the appraisers.

Upon the subject of the commissions claimed by the executor, there is no doubt that the Circuit judge was right in disallowing commissions on all receipts and disbursements prior to the adoption of the general statutes, upon the ground that the executor had failed to make annual returns, (Lay v. Lay, 10 S. C. 208,) but inasmuch as the act of 1789 was repealed by the general statutes, and the provisions enacted in lieu thereof do not contain a clause declaring that a failure to make annual returns shall work a forfeiture of the executor's commission, it is clear that the executor is entitled to commissions on all his receipts and disbursements since the adoption of the general statutes; and it is equally clear that the executor should, under the case of Gee v. Hicks, Rich. Eq. Cas. 5, be allowed commissions on the final balance. In these respects, therefore, the judgment of the Circuit Court is modified so as to conform to these views.

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*How the accounts will stand after these modifications, it will be for the Circuit Court to ascertain, and until that is done it is impossible to say whether the decree should be against the executor personally as well as in his representative character. If it shall appear that assets of the estate of the testator, including therein the real estate, and excluding the value of the slaves, have come or ought to have come into the hands of the executor, sufficient to enable him to pay the debts and the legacies, then the decree should be against him personally as well as in his representative character; but if the contrary appears, then the decree should be against him personally, only to the extent of the assets which have or ought to have come into his hands.

The reasons assigned by the Circuit judge for a change of trustee are quite sufficient, and in this respect the decree below is affirmed.

The cases are remanded to the Circuit Court for such further proceedings as may be necessary or proper to carry out the views herein announced.

McGOWAN, A. J., concurred.

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(Case No. 935.)

IVY v. CLAWSON.

(April Term, 1880.)

[1. *Depositions* ⟸88.]

Testimony taken by plaintiff before the clerk under the act of 1872, (15 Stat. 41,) under an order made at chambers before suit commenced, is inadmissible upon the trial of the cause, although the original defendant, since deceased, had notice of the application for the order, and was present at the examination, and cross-examined the witness.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 17, 234–236½, 242–245; Dec. Dig. ⟸88.]

[2. *Equity* ⟸381.]

The Circuit judge may decree contrary to the findings of a jury upon an issue of fact submitted to them in a suit in equity.

[Ed. Note.—Cited in Small v. Small, 16 S. C. 64.

For other cases, see Equity, Cent. Dig. § 816; Dec. Dig. ⟸381.]

[3. *Appeal and Error* ⟸1014.]

The findings of fact by a Circuit judge, reversing the verdict of a jury on an issue ordered out of chancery, sustained by this court.

[Ed. Note.—Cited in Ostendorff v. Brown, 15 S. C. 616; Peake v. Peake, 17 S. C. 427.

For other cases, see Appeal and Error, Cent. Dig. § 3995½; Dec. Dig. ⟸1014.]

[4. *Trial* ⟸388.]

[Cited in Rynerson v. Allison, 28 S. C. 85, 5 S. E. 218, to the point that the judge, sitting as chancellor, must give his own opinion on the issues involved.]

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908–911, 915; Dec. Dig. ⟸388.]

Before Pressley, J., York, April, 1879.

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*This was an action commenced June 21st, 1876, by James M. Ivy against W. I. Clawson, and after the death of defendant in 1877, revived against T. W. Clawson and C. E. Spencer, his executors. The prayer of the complaint was for an injunction to restrain the defendant from selling the property of the plaintiff, (who derived title through Sadler,) under an execution of W. I. Clawson against said Sadler.

The Circuit decree is as follows:

W. I. Clawson, having paid a debt as surety of L. P. Sadler, entered judgment for it against him on April 4th, 1867. He then owned real estate near Rock Hill, and, wishing to sell it free from encumbrance, he offered to pay Clawson fifty per cent. of said judgment in full satisfaction, which offer Clawson refused. On February 12th, 1869, Sadler sold his land to Kerr & Roach, who next day sold it to plaintiff for full value. He did not know of Clawson's judgment—never heard of it until 1876; but Kerr & Roach knew of it. They agreed with Sadler to settle for it with Clawson out of the price they were to pay Sadler and account to him for the remainder. Whether they ever made such settlement is not proved, and Kerr, who is supposed to have made it, is dead. The only proof of any payment by him to Clawson is a credit on his execution of $303.54, on September 2d, 1870, which refers to a receipt given to Kerr at same time. Clawson's answer states that the full terms of that settlement were inserted in said receipt, but it has not been offered in evidence.

At the time of the alleged settlement the executors of Blair held a large judgment against Sadler, and against Clawson as surety. This judgment was pressed against the latter, and he was compelled to pay it by a decree entered in March, 1876. Just before that decree he commenced to renew his execution against Sadler, and the order for that was entered on April 8th, 1876. Soon after that plaintiff commenced this suit, and his first step was an order, May 17th, 1876, by Judge Mackey, at Lancaster to take the testimony of Sadler who was then very feeble, and soon after died. Clawson had notice of the application for said order, but did not appear when it was moved for; he, however, cross-examined Sadler when his

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testimony was *taken. It was ruled out as incompetent on the trial in this case because Clawson had died before, and plaintiff excepted to that ruling.

The complaint in this case alleges that Clawson had agreed with Sadler to receive one-half of said judgment in full satisfaction, which sum he had paid; but Clawson had not satisfied the judgment, and was about to sell plaintiff's land to pay the same.

Defendant denies the alleged compromise; admits one which was to take effect in case he should not be required to pay any part of the Blair debt, and which had failed because he had been required to pay it.

The case was referred by Judge Mackey to a jury, which was to try the issue of fact whether there was an unconditional compromise or only one "upon condition." That issue was tried before Judge Aldrich, and the jury found for the plaintiff; but I see nothing in the testimony to sustain their verdict. There is no proof whatever of any compromise by Clawson, except the admission in his answer; nor is there a particle of proof of any payment on said judgment except his admission and the credit which he entered on his execution. That credit was nearly two years after the alleged compromise and the sale of the land by Sadler, and in February, 1876, he had due notice of the motion to renew the judgment and did not resist it. All these circumstances corroborate Clawson's answer, and would sustain it against pretty strong evidence to contradict it. I, therefore, cannot decree against it upon the mere verdict, which has no evidence to support it.

Plaintiff's prayer for injunction is refused;

but Clawson's answer admits that his execution is subject to a deduction for a bill for supplies which Sadler held against him. The amount of that bill is not stated, but, added to the credit of September 2d, 1870, it would have made that payment one-half of the judgment debt. Let it be thus credited of that date, and then the executors of Clawson have leave to proceed on their execution for the remainder.

Plaintiff appealed.

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*Mr. W. B. Wilson, for appellant.

Mr. J. S. R. Thomson, contra.

November 5th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This was an action in the nature of a suit in equity to enjoin the sale of a tract of land (which the plaintiff held through L. P. Sadler) under an execution which W. I. Clawson, the testator of defendants, had against the said Sadler. The facts are so clearly stated in the Circuit decree that it will be unnecessary to repeat them here. The plaintiff alleged that the judgment was settled by a compromise to take one-half in full satisfaction between Clawson, the plaintiff, and Sadler, the defendant in execution. The question of the alleged compromise had been referred to a jury under an issue ordered at a previous term of the court, and the jury had found that issue for the plaintiff. This verdict, as well as the whole testimony in the case, was considered by the Circuit judge, who held that there was nothing in the evidence to sustain the verdict, and refused to grant the injunction. The plaintiff appeals to this court on the following exceptions:

"1. Because the verdict having been rendered before Judge Aldrich, and not set aside, was conclusive of the issue of fact tried, and it is respectfully submitted that Judge Pressley erred in discarding said verdict.

"2. Because his Honor erred in excluding as competent, the testimony of L. P. Sadler.

"3. Because the testimony of Sadler having been taken in the judicial proceeding under oath, in writing, and in the presence of W. I. Clawson, who cross-examined him, the testimony so given should not have been excluded on account of the subsequent death of Clawson.

"4. Because his Honor having held on the trial that there was sufficient evidence of consideration to support the compromise if the same was made, should have decreed in favor of the plaintiff."

The last exception is founded on a misapprehension of the decree. The Circuit judge

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held nothing as to the consideration *of the alleged compromise. He held that there was no proof of any compromise except the answer of W. I. Clawson, which stated that it was conditional and the condition never performed.

The second and third exceptions relate to the exclusion of the depositions of L. P. Sadler as to transactions and communications between him and Clawson. Sadler and Clawson were both living at the time Sadler made his depositions, but at the time of the trial were both dead. If Sadler had been living at the time of the trial—Clawson being dead—the testimony would have been inadmissible, whether it was read from the depositions taken de bene esse or delivered orally by the witness himself. 1 Greenl. on Ev., § 163. It is insisted, however, that the death of Sadler between the time the depositions were taken and the trial made them admissible. It will not be necessary to consider the question whether depositions competent at the time taken, but afterwards becoming incompetent by the death of one of the parties, will be again made competent by the death also of the witness. Aside from the objection to these depositions as obnoxious to the code, section 415, on account of the character of the testimony, they were not testimony at all. The record shows that they were taken under an order made at chambers, before the suit was instituted in which they were to be offered. They could not be regarded as testimony taken before the clerk under the act of 1872, (15 Stat. 41,) which authorizes testimony to be taken "in all civil causes or proceedings hereafter to be instituted or now pending or at issue, * * * upon the application of either party to such cause or proceeding." That is clearly after such cause or proceeding has been instituted. The order was not a commission under the seal of the court "in a suit pending in the Court of Common Pleas." Gen. Stat. 511. Nor was that order a judgment in an action to perpetuate testimony, as no such case was made. The depositions, taken without proper authority, were, therefore, not testimony, and might, on motion, have been suppressed. Besides, the plaintiff really suffered no injury, for, while the depositions, as such, were rejected, the judge allowed Wallace, the clerk, to testify as to the substance of the depositions made before him as statements made by Sadler in the presence of Clawson. These exceptions are overruled.

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*The first exception is "that the verdict of the jury should have been regarded as conclusive of the issue referred." Since the abolition of the Court of Equity in this state and the adoption of the system of administering both law and equity by the same court there has been a tendency to confusion in regard to the modes of procedure appropriate to the new system. The constitution recognizes "chancery cases" as distinct from law cases, and for several reasons, and especially in view of the difference in the functions of this court in reviewing

appeals in the two classes of cases, it is important that they should be kept separate and distinct. The code of procedure abolishes the distinction between actions at law and suits in equity, and declares that there shall be but one form of action. That, however, does not reach the underlying principles of equity, which are untouched, although the tribunal to administer them and the form of action are changed. The court and the judges being the same, and the jury always present, it requires an effort to avoid confounding the methods of proceeding in the two classes of cases. This is especially true in reference to the practice as to what was formerly called issues out of chancery to be tried before a jury in a law court. Feigned issues are abolished, but the same purpose is accomplished in another way. Simple orders for trial are substituted in their place. This court has lately had occasion to consider the subject in several cases, and has endeavored to settle the practice as near as may be in conformity with the practice of the late Court of Equity in this state. When a judge, sitting in what would have been called a suit in equity, orders an issue upon any question of fact, it is an interlocutory order made to enlighten his conscience, reserving the consideration of further questions in the cause until after the trial of the issue. That should be set down on what we may call the law side of the court, not as an ordinary case for a jury, but a submission, [see Rules of Circuit Courts, rule 28,] and the verdict should not be generally for plaintiff or for defendant, but specifically on the matter submitted, somewhat in the nature of a special verdict. The judge before whom the issue is tried does not hear a motion for a new trial, nor is judgment entered on the verdict, but it is reported, to be dealt with in connection with

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the whole case in *which the issue was ordered. The judge who hears it finally, sitting as Chancellor, is not required to regard the finding of the jury as conclusive of the fact submitted any more than he would the report of a referee, but, on the contrary, is bound to consider all the evidence in the whole case, including the finding and the evidence to support it, and pronounce his judgment accordingly. 2 Daniell's Ch. Prac. 1085; Thomasson v. Kennedy, 3 Rich. Eq. 440; Drayton v. Logan, 3 Strob. Eq. 37, note; R. R. Co. v. Toomer, 9 Rich. Eq. 270; Sullivan v. Thomas, 3 S. C. 547; Flinn & Hart v. Brown, 6 S. C. 209; Gadsden v. Whaley, 9 S. C. 147; Sloan v. Westfield, 11 S. C. 447; C., C. & A. R. R. Co. v. Earle, 12 S. C. 53. In the case last cited the court says: "The parties in what is commonly called an equity case, have a right to the opinion of the Circuit judge, notwithstanding his right to refer issues of fact to the jury for the purpose of enlightening his conscience, but the verdict of the jury is not to be accepted as the conclusion which is to control and govern the case, and through the medium of which the judgment is to be pronounced in favor of one side or the other."

Upon the merits we cannot say that the decree of the Circuit judge was wrong. The plaintiff was in no way deceived. He incautiously purchased land without inquiry, against which there was a judgment open in the office. That was constructive notice of its existence as it stood. When, years after, he heard of it he instituted this proceeding to enjoin the judgment, alleging that, although it stood open, it was in fact canceled by a verbal compromise between Clawson, the plaintiff, and Sadler, the defendant in execution. In this issue he held the affirmative and was bound to show that the judgment was satisfied, and that too against the prima facies arising from the existence of the record. What proof did he make? He knew nothing about it himself, and Sadler was estopped from denying the legal existence of the judgment, as he had allowed it to be renewed against him without objection in 1876, long after it is alleged he settled it. Jackson v. Patrick, 10 S. C. 197.

The Circuit judge says: "There is no proof whatever of any compromise by Clawson except the admission in his answer." And the answer which contained the admission of a

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conditional *promise stated "that R. M. Kerr well understood said agreement—taking a receipt for a payment made, in which the terms of the agreement were expressed." That agreement, the only writing as to the terms of the promise, should have been produced or accounted for.

The Circuit decree is affirmed and the appeal dismissed.

McIVER, A. J., concurred.

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14 S. C. 274

(Case No. 936.)

BLACK v. ROSE.

(April Term, 1880.)

[1. *Payment* ⇦12.]

A receipt given by the clerk of the court, in March, 1863, for money (confederate) paid into court in a cause then pending under order passed in October, 1860, should not be set aside, there being no proof of irregularity.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 50; Dec. Dig. ⇦12.]

[2. *Tender* ⇦26.]

Money paid into court, under its order, is payment and not tender. Rule 94, Miller's Compilation, construed.

[Ed. Note.—Cited in Salinas & Son v. Ellis, 26 S. C. 345, 2 S. E. 121; Reynolds v. Price, 88 S. C. 537, 71 S. E. 51.

For other cases, see Tender, Cent. Dig. §§ 88–92, 95; Dec. Dig. ⇦26.]

[3. *Payment* ⇐14.]

The clerk received the payment in confederate currency. *Held*, that such payment could not be sealed. State v. Moseley, 10 S. C. 1; Wiseman & Finley v. Hunter, 14 Rich. Eq. 174, recognized and followed.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 93; Dec. Dig. ⇐14.]

[4. *Tender* ⇐26.]

[Where a tender is followed by bringing the money into court, the defendant cannot be afterwards allowed to withdraw it from court.]

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 89; Dec. Dig. ⇐26.]

Before Wallace, J., York, October, 1879.

This case is fully stated in the Circuit decree and opinion of this court. The Circuit decree is as follows:

This cause was commenced originally in 1860, as an action on a sealed note, in which Samuel A. Black was plaintiff, and William E. Rose and another were defendants. The defendants plead, among other things, failure of consideration in the note to the extent of $1600 of the principal thereof, and on October 13th, 1860, an order was passed by the court allowing the defendant to pay into court the amount admitted by him to be due the plaintiff and the costs accrued. On March 24th, 1863, this defendant paid to the clerk of the court $3495.04 in Confederate

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*money, the balance at that day due on the note, less the $1600; and also paid the costs. The clerk gave the defendant his receipt, stating that the money was paid in pursuance of the order of court. The plaintiff admitted, as of record, that there was a failure of consideration as to $1600 of the note, and asked judgment against this defendant for the amount of the balance which had been paid in Confederate currency, less the value of the Confederate money at the date of payment. The Circuit judge decreed for the plaintiff; on appeal, the Supreme Court set aside the decree, holding, among other things, that the question decided by the Circuit judge, as to the Confederate money not being payment, was foreign to the issues made by the pleadings, and that the receipt of the clerk was conclusive until set aside, and remanded the case. The case now comes before me on a motion to vacate the receipt of the clerk, the defendant not having complied with the order of 1860, in paying the clerk Confederate money in 1863, when the order passed in 1860 contemplated payment in good money. The motion must be refused; under the order of court, the defendant had the right to pay the money and the clerk was the proper party to receive and receipt for it, and this has been done. There is no charge of fraud or mistake—not anything of that character on account of which receipts are sometimes set aside; the only ground of complaint was that the payment was in Confederate currency. Payment in the currency has been frequently recognized by the Supreme Court of this state as proper when made to sheriffs and commissioners and masters, and I see no difference between payments made to those officers and to the clerk that could avail the plaintiff anything.

The plaintiff's attorney declined to accept the Confederate money from the clerk after he had accepted it from defendant; but although the order was standing open for over two years, and the Confederate money was constantly depreciating in value, the plaintiff gave no warning to the clerk not to accept it. He has been pushing this case for many years, and not until this motion, sixteen years after money is paid by the defendant, is there any allegation against the regularity of the receipts from the clerk.

The case of State of South Carolina v.

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Moseley, 10 S. C. 1, is a *case in many circumstances resembling this, and seems to me to be conclusive of it.

For the reasons above stated, and on the authority of the case just cited and others, I hold that the motion must be dismissed, and it is so ordered, with $10 costs for defendant for the motion.

Plaintiff appealed.

Mr. J. H. Rion, for appellant.

Messrs. Hemphill & Hemphill, contra.

November 5th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This was an action on a note for negro slaves, commenced in 1860, and has a long history, which is fully given in the judgment of the Circuit Court, and need not be repeated here, except so far as to make the ruling of this court intelligible. The defendant got an order to pay the money into court upon the usual conditions and in the usual form. The money was paid and the clerk of the court gave his receipt for it, stating—"This payment made in pursuance of the order of court in this case," precisely in accordance with the 94th rule of court, Miller's Compilation. The money was paid in Confederate currency, then (March, 1863), the only currency in use, and the plaintiff refused to accept it. Judge Mackey held that it was allowable to go behind the terms of the receipt and inquire into the value of the money paid, and, in effect, annulled the receipt, except to the extent of the value of the money at the time it was paid. The Supreme Court set aside the decision and ordered a new trial, declaring "that the clerk's certificate must be regarded as part of the record in the case, and, if erroneous, should have been corrected by a direct proceeding, on timely notice, grounded upon its irregularity. It was too late to raise that question on the trial of the cause, nor was that the proper place to consider it. The certificate was

treated by the Circuit judge as if merely prima facie proof of the facts stated in it, whereas it was conclusive, so long as it was permitted to stand."

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*In such a "direct proceeding" to vacate a receipt given by S. E. Moore, officially as clerk, he or his representative should have been made a party; but it does not appear from the record that the objection was made at the trial. The question was made simply by motion to vacate and set aside the receipt. The Circuit judge entertained the motion, but refused to grant it. The plaintiff alleging error in that judgment, appeals to this court.

The exceptions may be condensed into two points of alleged error:

First. That the judge should have held that the delivery of money into court by the defendant, under an order allowing him to do so, was not payment, but a mere tender, and inoperative until accepted by the plaintiff; and, that being established,

Second. That he should have held that the plaintiff had been guilty of no such laches in attacking the receipt as should now preclude him.

The only question before us, in this phase of the case, is as to the correctness of Judge Wallace's rulings in regard to the alleged irregularity in the clerk's certificate of payment. That certificate was given by the proper officer, as the court directed, precisely in the form prescribed by the rule of court, without fraud, accident or mistake, and we agree with the Circuit judge that nothing was proved tending to show irregularity in it, and that it should not be set aside. McDowall & Black v. Le Maitre, 2 McC. 320; Dobbins v. Perry, 1 Rich. 33; Wheeler v. Alexander, 1 Strob. 61.

But, if we understand the bearing of the argument made, it was not directed to the point of setting aside the receipt itself, but to show that it was a mere tender, and in that way set aside its legal effect as a payment. If we are correct, that is renewing the controversy involved in the first appeal. The question as to the legal effect of a payment of money into court, under an order, was substantially decided by this court when it held that the receipt was "conclusive" until set aside. If the law were as now claimed it would have been entirely unnecessary to make the question of the irregularity of the receipt, which, in that case, would not have stood in the way. The payment of money in-

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to *court, under order, is certainly more than a simple tender. A tender is an offer to pay by the debtor before suit, and cannot be made after suit brought. It is purely ex parte. If it is not accepted the debtor must retain his money, and if established on plea, the only effect is to stop interest thenceforward on the amount tendered. But a payment into court is different. It is not ex parte, but done by order of the court, which represents both parties, and whose orders bind the plaintiff as well as the defendant. The money paid in is for the plaintiff, and the possession of it cannot be resumed by the debtor. In the further prosecution of the case that much is stricken from the record, whether the plaintiff takes out the money or not.

The rule of court required that if the plaintiff should take the money out of court, the clerk shall, in the "receipt to be taken for the money, require such plaintiff to say, for information of defendant, whether he accepts the money in full discharge of the action, or takes it with the intention of proceeding further." This does not mean that the effect of the payment was to depend upon his acceptance or non-acceptance of it. The effect was fixed by the payment, but as he had the right to be dissatisfied with the amount and go for a larger sum, this statement was required simply for the information of the defendant whether he accepted the money in full discharge. That is, if he claimed more, the case went on—the controversy being limited to the excess so claimed, but if he claimed no more in amount, that was an end of it. Fishburne v. Sanders, 1 N. & McC. 242; Broughton v. Richardson, 2 Rich. 64; Bank of Columbia v. Southerland, 3 Cowen 336; Spalding v. Vandercook, 2 Wend. 431; Murray v. Bethune, 1 Wend. 191; Boyden v. Moore, 5 Mass. 367. In this last-cited case the rule is stated clearly in these words: "The bringing money into court is a practice adopted to relieve the defendant against an unexpected suit for money which he is willing to pay, but which he has not tendered to the plaintiff before the commencement of the suit. After the defendant had brought in as much money as he thinks proper, and the plaintiff has refused to receive it in satisfaction, the defendant is entitled to have the same considered as a payment made on the day on which it was brought, and he is answerable only for further damages."

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*Accepting this view of the legal effect of a payment into court under order, the plaintiff further contends that whilst the receipt is regular and formal and cannot be set aside for irregularity, yet the clerk received Confederate money, which was not a legal tender; that he had no right to do so and give a receipt as for good money, and on that account the receipt should be set aside, at least in part, so as to make it correspond in amount with the real value of the money at the time it was received. In other words, that the payment should be scaled. Upon this point the case is identical with that of State v. Moseley, 10 S. C. 1. In that case a sheriff, who had an execution to collect, received Confederate money and gave a receipt for it, and the question was whether he had a right to do so. It was held that he had the right. So far as the right to receive Confederate money is concerned, we can see no difference between the sheriff in that case and the clerk

in this. They were both public officers and received the money in discharge of a duty imposed. There, as here, there was no notice not to receive Confederate money, which was the only medium of exchange at the time. It is unnecessary to repeat the argument, which is so well stated in that case as follows: "The true foundation for the doctrine is the implied consent of the creditor. For when bank or other notes constitute the only currency, and is in universal use as such, while courts will still recognize the constitutional right of the creditor, when asserted at the proper time, to demand payment of his debt in that which is established by law as a legal tender, they will, in the absence of any such assertion, conclude that he assented to or authorized payment to be made in that currency, which every one regarded and used as money."

This case is stronger than that of Moseley in one important particular. That was not a proceeding to cancel the receipt and make the debtor pay again, as this is, but to make the sheriff and his sureties liable for a wrongful act on the part of the sheriff in receiving the money and giving receipt for it. In that case it seemed to be taken for granted that the receipt was a discharge. This court has always sustained the payment when the question was made by the obligor who produced a receipt from the proper person, and has in all cases refused to allow payments to be

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sealed *under the act of 1869, (Gen. Stat. 310,) for the reason that they were not executory, but executed. Austin v. Kinsman, 13 Rich. Eq. 265; McPherson v. Lynah, 14 Rich. Eq. 121; Wiseman & Finley v. Hunter, Id. 174; Fluitt v. Nelson, 15 Rich. 11; Mayer v. Mordecai, 1 S. C. 383 [7 Am. Rep. 26]; Johnstone v. Crooks, 3 S. C. 202.

In the case above cited of Wiseman & Finley v. Hunter, Chancellor Dunkin said: "The question is not whether bank bills or Confederate treasury notes, or anything other than gold or silver, is a lawful tender in payment of debts, but whether where a debtor has paid to an officer of the court in these funds a debt which he was required to collect, and taken his receipt in discharge of the same, the court will, at this distance of time, and at the instance of a party in the cause, repudiate the act of its officer and set up the claim against the debtor. It concerns the interest of the public that there should be an end of litigation. Where a transaction has been consummated and rights vested, the repose of society demands that it should not be opened."

This case has been prosecuted for years with extraordinary energy and perseverance, in the view, probably, that it was a hardship that the plaintiff should be bound by the act of the clerk in receiving for him Confederate money, which became worthless. This court cannot prevent—may regret—but must not be controlled by what appear to be hardships. We cannot, however, shut our eyes to the fact in this case, that if the money became worthless, so did the property which was received in exchange for it. Both were lost from the same cause.

We see no error in the judgment of the Circuit judge. The judgment is affirmed, and the appeal dismissed.

McIVER, A. J., concurred.

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14 S. C. *281

*(Case No. 937.)

S. & A. RAILROAD COMPANY v. EZELL. SAME v. CATHCART. SAME v. NASH.

(April Term, 1880.)

[1. *Railroads* ⟸14.]

By the first section of an act of incorporation, a railroad company were declared to "be, and they are hereby created, a body politic and corporate;" and in a subsequent section it was enacted "that when $100,000 shall have been subscribed, and $1 on each share shall have been paid in, the said company may organize and proceed to work." *Held*, that this requirement was sufficiently complied with when $100,000 were subscribed, and a sum in gross paid in equal to $1 upon every share subscribed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 27–30; Dec. Dig. ⟸14.]

[2. *Corporations* ⟸16.]

Held, further, that a failure to comply strictly with these requirements would not have affected the corporate existence, but would have been an irregularity only, which could not defeat the right of the corporation to recover a stock subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 24; Dec. Dig. ⟸16.]

Before Mackey, J., Richland, November, 1879.

The case is fully stated in the opinion of the court.

Messrs. Rion, Lyles & Barron, for appellants.

Mr. W. A. Clark, contra.

November 9th, 1880. The opinion of the court was delivered by

McIVER, A. J. The three cases above stated, presenting the same state of facts, and governed by the same principles of law, were tried together on Circuit and will be considered together here.

They were actions brought by the plaintiff to recover the amounts of the subscriptions alleged to have been made by the defendants to the capital stock of the Spartanburg and Asheville Railroad Company. That company was chartered by an act passed February 20th, 1873, (15 Stat. 346), which, in its first

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*section, declared that certain persons therein named, together with their associates, successors and assigns, "be and they are hereby created a body politic and corporate, by

the name and style of the Spartanburg and Asheville Railroad Company, and by that name may sue and be sued, * * * make contracts," &c. In the eighth section of that act it is, amongst other things, provided "that when one hundred thousand dollars shall have been subscribed, and one dollar on each share shall have been paid in, the said company may organize and proceed to work." On March 25th, 1874, a meeting of the corporators was held, at which it was duly ascertained that there was over $100,000 of bona fide subscriptions to the capital stock of the company, whereupon an aggregate amount equal to $1 per share of the amount subscribed was paid in, though each subscriber did not pay $1 on each share subscribed for by him, the defendants in the above-stated cases, with perhaps others, never having paid anything. The company was then organized and proceeded to work, and had constructed and put into operation a very considerable portion of the road before the commencement of these actions, more than $500,000 having been subscribed to the capital stock and paid in, leaving, at the time of the trial below, of the total amount subscribed only about $20,000 unpaid, of which the subscriptions alleged to have been made by defendants form a part.

The Circuit judge charged the jury, among other things, that in order to enable the plaintiffs to maintain these actions, it "must show that the corporation had strictly complied with all of the conditions prescribed by the charter as precedent to its organization; that is, the plaintiff must show that before the organization of the company one hundred thousand dollars had been bona fide subscribed to its capital stock, and the one dollar per share, prescribed by section 8 of the charter, must have been paid by each subscriber upon each share by him subscribed, to the amount of at least two thousand shares, before the corporation could be legally organized so as to have a right of action against subscribers upon their subscriptions; the payment in gross of the two thousand dollars by several of the subscribers for themselves and others, not being sufficient." To this portion of the charge exception was

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duly taken, and the only question for us *to consider is, whether there was any error in the charge as above recited.

It will be observed that the act chartering this company, unlike many other railroad charters, declares the persons named in the first section, with their associates, successors and assigns, a corporation with the powers usually conferred upon such bodies, among which was the power to contract and be contracted with, to sue and be sued, and hence, when the defendants signed the paper set out in the "case," by which they bound themselves to take a specified number of shares "in the capital stock of the Spartanburg and Asheville Railroad Company, to be paid for when called upon, according to the regulations of said company," it is difficult to see what element of a valid contract was wanting. If the act chartering this company had, like some others, for example the act chartering the Charlotte and South Carolina Railroad Company, simply authorized the formation of "a corporate company, * * * which company, when formed in compliance with the conditions herein prescribed, shall have corporate existence as a body politic," and if one of the conditions prescribed had been here, as it was there, "that on each share of the stock subscribed for the subscriber shall pay to the commissioners who shall take the same, the sum of five dollars, * * * and on non-payment of said installment the subscription shall be void;" and if the charter of this company had provided, as the charter of that one did, "that whenever the sum of three hundred thousand dollars of said capital stock shall be subscribed for in manner aforesaid, the subscribers, their executors, administrators or assigns, shall be and they are hereby declared to be incorporated into a company, by the name and style of the Charlotte and South Carolina Railroad Company," &c., we could very readily understand why it should be held, as it was held in the case of C. & S. C. R. R. Co. v. Blakely, 3 Strob. 245, "that the mere signing of a paper by the defendant agreeing to take a certain number of shares of the stock of the company, without paying five dollars on each share at the time of subscribing, would not enable the company, after it was formed, to recover from the subscriber the amount so subscribed." In that case there was no legal person in existence at the time

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the alleged contract was *made, capable of contracting or being contracted with—no person capable of bringing a suit to enforce a contract—for the act did not constitute any particular persons a corporation, but only provided that those who had subscribed in the manner therein prescribed, should have the right to form a corporation after a certain amount had been subscribed in that manner; which corporation might, after it was thus formed, have the power to contract and be contracted with, to sue and be sued, &c. Here, on the other hand, the act, in its very first section, created the corporation and gave it all the necessary powers to enable it to make contracts and enforce them by suit. In that case, too, the act expressly provided that, upon non-payment of the cash installment required the subscription should be void, while here there is no such provision. But the differences between the two cases are so very well marked as scarcely to justify further comment.

The real question to be considered here is, first, whether the charter required the payment of $1 on each share, by each subscriber, to the amount of at least two thousand

shares, as a condition precedent to the organization of the company; and, second, if so, whether a failure to comply strictly with this provision was not a mere irregularity in its organization, which would not have the effect of defeating the right of the plaintiff company to maintain these actions.

As to the first question, it is very obvious that the charter does not, in express terms, require that $1 per share shall be paid by each subscriber. To give the section that meaning it would be necessary to interpolate into the statute the words italicised. The language of the section is "that whenever one hundred thousand dollars shall have been subscribed, and one dollar on each share shall have been paid in, [by each subscriber,] the said company may organize and proceed to work." It does not declare by whom the $1 per share is to be paid, and we do not feel at liberty to interpolate words into the statute necessary to make such a declaration.

But, even if the statute did contain those words, it is manifest that there was a mere irregularity in the organization of the company which could not possibly have the effect of defeating the plaintiff's right of ac-

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tion upon a valid contract entered into *by the defendant previous to the formal organization of the company.

In the case of Chubb v. Upton, 95 U. S. 667 [24 L. Ed. 523], the Supreme Court of the United States said: "It is settled by the decisions of the courts of the United States and by the decisions of many of the state courts, that one who contracts with an acting corporation cannot defend himself against a claim on such contract in a suit by the corporation by alleging the irregularity of its organization, [citing the cases.] The same principle applies to the case of a subscription to the capital stock in an organization which has attempted irregularly to create itself into a corporation and has acted as such."

In the case of Minneapolis and St. Louis Railway Co. v. Bassett, 20 Minn. 535; S. C., 18 Am. 376, the charter of the company provided that its capital stock should be divided into shares of $100 each, and $5 on each share should be paid at the time of subscribing. The action was brought to recover the amount of ten shares subscribed for by the defendant, upon which he had paid nothing at the time of subscribing, and his defence was rested upon that ground. It was held that he was liable. It is true that this case is not precisely in point, inasmuch as there the defendant subscribed after the incorporation and organization of the company; but it is, nevertheless, useful as affording a review of the authorities, in which it is shown that the cases relied upon to sustain such a defence are cases in which the statute required the payment to be made as a condition of corporate existence, while as we have seen, in the cases now before the court, the corporate existence of the plaintiff is derived directly from the express declaration of the legislative will contained in the first section of the act, and is not dependent upon any conditions whatsoever; and that the provision requiring the payment of $1 per share is, at most, a mere condition affecting, not the corporate existence of the plaintiff, but merely the regularity of its organization.

The judgment of the Circuit Court in each of the above-stated cases is set aside, and in each a new trial is ordered.

McGOWAN, A. J., concurred.

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14 S. C. *286

*(Case No. 938.)

COLEMAN v. CHESTER.

(April Term, 1880.)

[1. *Frauds, Statute of* ⇐74.]

An agreement for the sale of land may not be proved by parol, but an agreement to compensate the owner of land for expenses incurred by him, by reason of the illegal appropriation of his land by a municipal corporation to the uses of widening a street, is not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 124; Dec. Dig. ⇐74.]

[2. *Appeal and Error* ⇐855.]

The judgment of a Circuit Court based upon untenable conclusions, will not be disturbed, if it can be sustained upon any other grounds.

[Ed. Note.—Cited in Callaham v. Robinson, 30 S. C. 255, 9 S. E. 120, 3 L. R. A. 497.

For other cases, see Appeal and Error, Cent. Dig. § 3406; Dec. Dig. ⇐855.]

[3. *Witnesses* ⇐153.]

In an action brought against a town, the plaintiff is not prevented by the proviso to section 415 of the code of procedure from testifying as to transactions between himself and a former intendant of the town, acting for the corporation, but at the time of trial deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 660; Dec. Dig. ⇐153.]

[4. *Municipal Corporations* ⇐744.]

A municipal corporation is not liable to an action for damages for a trespass committed by its officers under the authority of the corporation, unless made so by statute. White v. City Council, 2 Hill, 571, recognized and followed, semble.

[Ed. Note.—Cited in Black v. City of Columbia, 19 S. C. 413, 422, 45 Am. Rep. 785; Young v. City Council of Charleston, 20 S. C. 118, 47 Am. Rep. 827; Gibbes v. Town Council of Beaufort, 20 S. C. 218; Chapman v. City Council of Charleston, 28 S. C. 380, 6 S. E. 158, 13 Am. St. Rep. 681; Matheny v. Aiken, 68 S. C. 174, 182, 183, 47 S. E. 56; Bryant v. City Council of Orangeburg, 70 S. C. 140, 49 S. E. 229; Irvine v. Town of Greenwood, 89 S. C. 514, 72 S. E. 228, 36 L. R. A. (N. S.) 363; Parish v. Town of Yorkville, 96 S. C. 26, 79 S. E. 635.

For other cases, see Municipal Corporations, Cent. Dig. § 1565; Dec. Dig. ⇐744.]

[5. *Municipal Corporations* ⇐860.]

But it may bind itself, by contract, to pay for benefits derived from such acts of trespass,

or to compensate the party injured, if he would refrain from prosecuting a remedy given to him by statute.

[Ed. Note.—Cited in Nurnberger v. Town of Barnwell, 42 S. C. 160, 20 S. E. 14.

For other cases, see Municipal Corporations, Cent. Dig. § 1815; Dec. Dig. ⟸860.]

Before Wallace, J., Chester, October, 1879.

This was an action by J. K. Coleman, against the town of Chester. The complaint was as follows:

1. That the defendant is a body corporate, duly created and organized by and under the laws of said state.

2. That heretofore, to wit, on the eighth day of February, 1873, plaintiff was seized and possessed in fee simple of a certain lot or parcel of land situate in the town of Chester, at the southeast corner of Main and Columbia streets, containing a frontage on said Main street of twenty-three feet, and a depth on Columbia street of two hundred and nineteen feet.

3. That at the date above named, defendant, through its officers and agents, and for the purpose, as it is alleged, of widening said Main street, entered upon and seized and dedicated to the public use the whole of the front of said lot, bounding a distance of twenty-three feet on Main street and to

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the depth of *twelve feet, against the protest and objections of plaintiff, and to his damage $500.

4. That plaintiff, at the time of said seizure, had begun to erect a certain building of brick on his said premises; and in consequence of said seizure of a part thereof was compelled to erect the same on more unfavorable ground, whereby the expense of erecting was greatly increased, and to the amount of $140.

5. That plaintiff, pursuant to the directions and ordinances of said defendant corporation, was also put to the further expense, in consequence of the seizure of his said premises, of making and erecting a new sidewalk or pavement upon the portion of the premises so seized, at a cost of $20.

6. That at the time of said seizure and dedication of plaintiff's said premises, and at divers times afterwards, the defendant, by its corporate authorities, faithfully promised and agreed with plaintiff, in consideration that he would acquiesce in said seizure and dedication to public use of the premises and abandon all further resistance and objection to said seizure and dedication of the same to public use, that defendant would pay to him the full value of said premises so seized, and also the additional expenses incurred by him in the erection of his building and sidewalk; but although plaintiff, relying upon said premises, did acquiesce in the dedication to public use of said premises, the defendant has neglected and refused, and still neglects and refuses, to pay the value of said premises according to its said promises, and plaintiff alleges that said premises so seized and dedicated and his increased expenses of sidewalk and building were reasonably of the value of $660, and that defendant should be required to pay said sum, with interest, by way of damage for its detention.

Wherefore plaintiff demands judgment against said defendant for relief, in that defendant be required to pay to him the value of his said premises and his expenses, pursuant to its promise and undertaking, and costs.

Defendant admitted the first two paragraphs of the complaint, and denied the others.

At the trial it was shown that the acts done towards widening the street, were done under the authority of the town council.

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*Plaintiff being on the stand, proved his damage. He was asked the following questions:

1. Was there any parol agreement or understanding had between yourself and Melton, intendant, respecting compensation for the land taken and occupied by defendant, if you would acquiesce therein?

2. Was there a parol arrangement between you and Melton, intendant, respecting compensation for increased expenses incurred by erecting your building on more unfavorable ground?

Upon objection made, both questions were ruled out, as obnoxious to the statute of frauds, and plaintiff excepted. It was also in evidence that G. W. Melton had said that Coleman and he had settled the matter. G. W. Melton was then the intendant of the town, but died before the trial. The Circuit judge ordered that the complaint be dismissed on the grounds: 1st. That no contract had been proved; and 2d. That the defendant was not liable to an action for damages under the facts proved.

The plaintiff appealed to this court upon the grounds of error in excluding his questions to the plaintiff, and in holding that an action for damages could not be maintained against defendant for the injury done plaintiff.

Mr. W. A. Sanders, for appellant.

Messrs. J. & J. Hemphill, contra.

November 22d, 1880. The opinion of the court was delivered by

McIVER, A. J. In this case the defendant a municipal corporation, supposing itself vested with authority so to do by the act of September 22d, 1868, (14 Stat. 89, re-enacted in Gen. Stat. 352,) proceeded to condemn certain land of the plaintiff for the purpose of widening one of the streets of the town. This proceeding was resisted by the plaintiff until, as he alleges, an agreement was made by George W. Melton, then intendant of the town, to compensate him for the dam-

ages done to his property by this appropriation of a portion of it for the purpose above mentioned. This agreement, however, was

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not in writing, and *when the plaintiff proposed to offer parol testimony tending to prove such agreement, it was ruled out as inadmissible under the statute of frauds. To this ruling exception was duly taken, and the first question presented by this appeal is, whether such ruling was correct.

If the purpose of the testimony offered was to prove an agreement for the sale of lands, "or any interest in or concerning them," then, unquestionably, it was incompetent; but if, on the other hand, the object of the testimony was to prove an agreement to compensate the plaintiff for any damages which he had sustained by reason of the illegal acts of the servants or agents of the defendant, of the benefits of which the defendant continued to avail itself, then it was not amenable to the objection stated. The form in which the first question ruled out was submitted, clearly evinced a purpose to prove an agreement to pay the plaintiff the value of the land taken and occupied by the defendant, in consideration that plaintiff would acquiesce in such taking and occupation, and it was therefore properly ruled out. The second question, however, does not appear to us to have been obnoxious to the objection based upon the statute of frauds. It did not tend to elicit proof of an agreement for the sale of lands "or any interest in or concerning them," but simply proof of an agreement to compensate the plaintiff for certain expenses incurred by him by reason of the illegal acts of the agents or servants of the defendant, of the benefit of which the plaintiff continued to avail itself. The objection to this question was, therefore, improperly sustained, and upon this ground there must be a new trial.

Another objection to this testimony has been urged in the argument here, which, though not specifically mentioned in the court below, will next be considered; for while the rule is that a judgment of the Circuit Court will not be reversed upon exceptions not taken in that court, yet if it can be sustained upon any ground this court will affirm it, even though the ground upon which it has been placed in the court below may not be tenable. It is contended here that to permit the plaintiff in this case to prove a transaction between himself and Melton, as intendant of the town, who was dead at the

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time of the trial, would be in vio*lation of the provisions of Section 415 of the code of procedure. This position is not well taken. The defendant in this case does not stand towards Melton in any of the relations mentioned in that section of the code, and hence the exception made to the general rule of evidence by the proviso to that section, cannot be applied. Guery v. Kinsler, 3 S. C. 423; Jones v. Plunckett, 9 S. C. 392.

The testimony tending to prove the parol agreement with the intendant of the town having been rejected, the plaintiff then contended that he could maintain his action as an action to recover damages for trespass committed by the agents of the defendant, but the Circuit judge held otherwise, and ordered "that the complaint be dismissed on the grounds—First. That no contract had been proved; and, Second. That the defendant was not liable to an action for damages under the facts proved." To all of which exception was duly taken.

The very important and interesting question which has been mainly discussed here—whether a municipal corporation is liable to an action for damages for a trespass committed by its officers or agents under the direction or authority of the corporation, where such right of action is not given by statute—can scarcely be said to properly arise in this case. For we do not think the frame of the complaint would support such an action; and if it would, the plaintiff, by his own showing, has compromised and waived any claim which he possibly might have had to bring such action by the agreement with Melton which he sets out in his complaint, whereby he acquiesced in the seizure and dedication of his premises to the public use. Besides, after the charter of the defendant had been amended so as to authorize it to proceed under the act of September 22d, 1868, it is very clear that the plaintiff would be compelled to adopt the mode of proceeding provided for by that act to obtain compensation, and could not resort to an action to recover damages for trespass. So that whatever may be the rule upon the subject, it is manifest that the plaintiff could not, in this case, maintain an action for damages.

But the question is important and it may be well for us to state our views. While it is quite true that in some of the states a contrary conclusion has been reached, we think

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it settled in *this state by the case of White v. City Council of Charleston, 2 Hill 571, that an action to recover damages for a tort, unless it be provided for by statute, cannot be maintained against a municipal corporation, characterized by Marshall, C. J., in Fowle v. Alexandria, 3 Pet. 409 [7 L. Ed. 719], as "a legislative corporation, established as part of the government of the country." The case of White v. City Council, so far from being shaken, is rather confirmed by the subsequent case of Main v. Railroad Co., 12 Rich. 82 [75 Am. Dec. 725]. In the last-named case it was held that an action of trespass could be maintained against a railroad company, a corporation formed and exercising its functions for the pecuniary benefit of its members, and not a public corporation, instituted for the purposes of government. Whitner, J.,

in delivering the opinion of the court, says: "The profession will readily recognize the distinction taken between corporations of different kinds, and a difference in the proceedings authorized in consequence," citing White v. City Council, supra; Mower v. Leicester, 9 Mass. 247; Fowle v. Alexandria, supra; in all of which it was held that a municipal corporation, forming a part of the government of the country, was not liable to a civil action for a tort. Again, he says: "The present question is not as to a public corporation instituted for the purposes of government, or a quasi corporation created by statute and invested with particular powers without their consent, but as to a corporation exercising its functions for the benefit of its members and holding its franchises upon contract." He then proceeds to declare that corporations of the latter class have, in numerous cases, been held liable to an action for trespass, but there is no intimation of any dissatisfaction with the rule laid down in White v. City Council, as to corporations of the former class. Hence, whatever may be the rule elsewhere, we are bound to declare it as established by White v. City Council, unless we were to overrule that case, which we do not feel justified in doing.

But a municipal corporation may make contracts, and it is bound by them, and if its officers or agents, acting under its directions, commit a trespass, of the benefits of which the corporation continues to avail itself, it may bind itself by contract to pay the damages resulting from such trespass. So,

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too, if the *plaintiff, after the charter of the defendant had been amended so as to authorize it to proceed according to the provisions of the act of September 22d, 1868, to condemn the land of the plaintiff for the purpose of widening the street, had been induced, by an agreement with defendant or through its authorized officer or agent, to forego any proceedings under that act to recover damages for the condemnation of his land until after the time limited by the act for the institution of such proceeding, we do not think such an agreement would be within the statute of frauds, and, therefore, parol evidence of such an agreement would be competent.

The judgment of the Circuit Court is reversed and a new trial is ordered.

McGOWAN, A. J., concurred.

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14 S. C. 292

(Case No. 939.)

JONES v. MASSEY.

(April Term, 1880.)

[1. *Appeal and Error* ⇐1194; *Judgment* ⇐721; *Wills* ⇐725, 732.]

A was charged by a referee's report with the rental value of lands, and he excepted for that "he had been charged with rent of lands," but alleged no error in the amount of rents, or the mode of charging them. This report being confirmed by the Circuit Court, A appealed, alleging as error that his exception had been overruled. The Supreme Court directed that A should be required to account for the rents and profits of the land held by him, other than his own share, and set aside the decree of the Circuit Court, so far as it was inconsistent with their opinion. *Held* that A was not estopped, upon the principle of res adjudicata, from afterwards questioning this same amount of rents and the mode of charging them against him, adopted in the subsequent report of a referee.

[Ed. Note.—Cited in Murray v. Aiken Mining & Porcelain Mfg. Co., 39 S. C. 464, 18 S. E. 5.

For other cases, see Appeal and Error, Cent. Dig. § 4651; Dec. Dig. ⇐1194; Judgment, Cent. Dig. § 1238; Dec. Dig. ⇐721; Wills, Cent. Dig. § 1736; Dec. Dig. ⇐725, 732.]

[2. *Tenancy in Common* ⇐28.]

A distinction recognized between rents and profits and rental value.

[Ed. Note.—Cited in Thomson v. Peake, 38 S. C. 440, 17 S. E. 45, 725.

For other cases, see Tenancy in Common, Cent. Dig. §§ 76–88; Dec. Dig. ⇐28.]

[3. *Tenancy in Common* ⇐28.]

A tenant in common in possession of the land, who has committed no ouster, is liable only for the rents received and the profits made upon so much of the tillable lands as he rented and cultivated in excess of his share.

[Ed. Note.—Cited in Scaife v. Thomson, 15 S. C. 367; Maner v. Wilson, 16 S. C. 480; McCreary v. Burns, 17 S. C. 54; Annely v. De Saussure, 26 S. C. 502, 2 S. E. 490, 4 Am. St. Rep. 725; McGahan v. Crawford, 47 S. C. 582, 25 S. E. 123; Cain v. Cain, 53 S. C. 355, 31 S. E. 278, 69 Am. St. Rep. 863.

For other cases, see Tenancy in Common, Cent. Dig. § 79; Dec. Dig. ⇐28.]

[4. *Wills* ⇐736.]

A being entitled under a will to take all of the testatrix's lands at their appraised value, to be paid for in ten equal annual installments from the date of his election, made his election

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to take by way of exception to the *return of the commissioners in partition. The other legatees went into possession of their shares as allotted to them by this return and the return was confirmed by the Circuit Court, and the right of A to take the lands denied. Upon appeal, the Circuit decree was reversed and the election allowed. *Held* that the election should date from the Circuit decree.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1875–1887; Dec. Dig. ⇐736.]

[5. *Partition* ⇐90.]

Held further, that the bond and mortgage to secure the sums to be paid for the land taken under such election, should not be enforced until the accounts between all the parties were adjusted.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 250; Dec. Dig. ⇐90.]

[6. *Wills* ⇐736.]

Held further, that the rents due to A. by the other parties for the time they were in possession under the return of the commissioners, should be credited on such bond of A.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1875–1887; Dec. Dig. ⇐736.]

[7. *Tenancy in Common* ⇐28.]

One entitled to an undivided share of slaves, having them in his exclusive possession, is liable to account to the other joint owners for

the profits derived by him from the use of the slaves.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 76–88; Dec. Dig. ⟸ 28.]

[8. *Wills* ⟸736.]

One of several residuary legatees having received and used property, a part of the residuum, consumable in its use, is liable to account for the value derived by him from its use, over and above his share.

[Ed. Note.—Cited in Rabb v. Patterson, 42 S. C. 537, 20 S. E. 540, 46 Am. St. Rep. 743.

For other cases, see Wills, Cent. Dig. § 1881; Dec. Dig. ⟸736.]

[9. *Reference* ⟸100.]

A matter not excepted to, embraced in a referee's report, which is confirmed by the Circuit Court, but upon appeal to the Supreme Court, is modified in other particulars, cannot be made a subject of exception in subsequent stages of the case.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157–168; Dec. Dig. ⟸100.]

[10. *Executors and Administrators* ⟸314.]

Under an action for the division and settlement of an estate, one of the parties in interest cannot assert against his codistributees a claim for an illegal levy caused by them to be made upon his property.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274–1297; Dec. Dig. ⟸314.]

[This case is also cited in McCreary v. Burns, 17 S. C. 46, and rule governing accounting between tenants in common followed, and in Fitzpatrick v. Wylie, 76 S. C. 262, 280, 56 S. E. 364, 1039, as to the facts.]

Before Wallace, J., Lancaster, October, 1879.

This case having been heretofore twice before this court, will be found reported in 7 S. C. 134, and 9 S. C. 376. After it was last sent back to the Circuit Court, the orders of reference mentioned in the opinion were made. The referee submitted his report, consisting almost wholly of a statement of accounts; but the items objected to and brought to the attention of the Circuit Court, are indicated by the exceptions taken thereto.

Exceptions of James R. Massey.—1. For that said referee has therein charged Dr. James R. Massey with the abstract annual rental value of the lands described in the pleadings, whereas the said referee should have allowed the said Massey to "account for the rents and profits" of the said lands received by him, other than his own proportionate share thereof, and should have charged him with the said rents and profits as aforesaid, and not with the annual rental value thereof.

2. For that said referee has taken into the

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accounting the *appraised value of that portion of the lands which James R. Massey elected to take under the will of his mother, Mrs. Elizabeth Massey, whereas said appraised value is in no way connected with the accounting for rentals and for personalty herein, and no authority to consider the same in connection therewith, is given by the orders of reference herein; James R. Massey, under the decision of the Supreme Court herein, being entitled to ten years within which to pay to the parties entitled their proportionate share of said appraised value.

3. For that said referee has therein charged Dr. James R. Massey with interest on said appraised value of the lands, whereas Dr. James R. Massey should not have been charged with interest thereon.

4. For that said referee has failed to deduct from the total sum of the annual rentals above stated, the full proportionate share therein of Dr. J. R. Massey, having failed to deduct therefrom the $^{100}/_{1751}$st part thereof, whereas the said James R. Massey, if liable at all for the "rental value" of said lands, is only liable therefor according to the proportions stated in the conclusions of law contained in the report of W. M. Connors, Esq., referee, heretofore made, and is therefore entitled to credit for the $^{100}/_{1751}$st part thereof, as above stated.

5. For that said referee has calculated interest on the sum total of said rental value, whereas he should have charged interest only upon the $^{4453}/_{1400}$sth part thereof; said James R. Massey if liable at all, being only liable for interest upon that portion thereof, in accordance with the conclusions of law in the report of Referee Connors before stated.

6. For that said referee has, in stating the accounts upon the rentals of the land, compounded the interest thereon against Dr. J. R. Massey, by computing the same to September 16th, 1879, then deducting credits, with interest computed to that date, which credits were not sufficient to over-balance the interest then due, and afterwards on the balance thus found, computing interest to September 16th, 1879, whereas he should have computed the interest on the annual rentals from the end of each year to September 16th, 1879, and the interest on the credits to the same date, and have then ascertained the balance at that date.

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*Exceptions by Other Legatees to Report of Referee.

1. Because said referee has disregarded the decree of the Supreme Court and the orders of reference herein; and has opened up matters that were settled by the report of the former referee, and the orders of the Circuit and Supreme Court thereon. In this he has undertaken, without authority, to find that Dr. James R. Massey, in 1860, received personal property belonging to the estate of Elizabeth Massey, to the amount only of $75, and in 1864 to the amount of $100, the two items, with interest, aggregating $374. Whereas, the report of the former referees, W. M. Connors and Thomas H. Clyburne,

show that he did receive personal property belonging to said estate, consisting principally of corn and other supplies, about January 1st, 1861, to the amount of $1156, with which he was charged, and interest thereon from January 1st, 1861, to September 16th, 1876. The former report in this particular was confirmed by the Circuit decree, and the Supreme Court decree in no way disturbed the same; and, certainly, the referee had no authority to ignore this item.

2. Because the said referee has erred in disregarding the former report in the particulars above stated, in disregarding all the testimony taken on this point by Referee W. M. Connors, Esq., and in refusing to charge James R. Massey with three-quarters of the said sum and interest, (he being entitled to one-quarter thereof,) especially as the decree of the Supreme Court does not disturb the same, but left it as adjudicated.

3. Because the orders of reference and the opinion of the Supreme Court directed said referee to charge Dr. James R. Massey with what he derived from the use of the slaves—and although the slaves were all in the use and employ of Dr. James R. Massey from about January 1st, A. D. 1861, to the time of their emancipation, yet the said referee concludes, in the face of a great mass of testimony, to the contrary, that Dr. James R. Massey derived no benefit from the use of the slaves, and charged him with nothing on this score; and in this it is submitted he erred.

4. Because he erred in allowing credit to Dr. James R. Massey for taxes for 1866, to wit, $36, and $17.64 interest thereon, which, he says in his report, was not noticed in the former report.

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*The order of reference did not authorize this; and the referee erred in allowing the same.

5. Because the referee erred in giving Dr. James R. Massey credit for $6750.30, an alleged guardianship account, when F. P. Ingrem had been, since 1861, the regularly appointed guardian of the said James R. Massey, in the room and stead of Elizabeth Massey, and the presumption is that the executor of Elizabeth Massey had already paid over this sum to the said F. P. Ingrem, guardian; especially in this case, when neither F. P. Ingrem nor his legal representative is a party to these proceedings.

6. Because the referee has erred in charging Elizabeth Beckham with $34.77; in charging Sarah Jones with the same sum; in charging J. R. Massey, Jr., and his two sisters, with the same sum; amounts alleged to be in the nature of damages for an alleged illegal levy of some cotton—matters which were improperly brought into the accounting, and which the accounting ordered between the parties did not embrace. These charges are wholly unwarranted by law and the orders of reference.

7. Because the referee has erred in charging in favor of Dr. James R. Massey against the other parties in interest, all the credits allowed to him in the former reports and decree thereon; and then in opening the charges made against him in the said reports and decree, thus acting contrary to equity and good conscience.

8. Because the referee has charged Elizabeth Beckham with improper charges and interest thereon, and all the others with too much interest.

9. Because he has failed to charge Dr. James R. Massey with the use of the negroes and interest thereon, as aforesaid, and also with the proper amount of interest on the other item.

Upon hearing the report of the referee and the exceptions thereto by the various parties, the Circuit Court made the following

Decree.

The report of D. A. Williams, Esq., special referee herein, was filed September 16th, 1879, and exceptions thereto, by the defendant, James R. Massey, were filed September

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19th, 1879, *and by the plaintiffs and the other defendants September 23d, 1879.

The cause came on to be heard before this court at Lancaster, October 3d, 1879, upon these exceptions. The first exception by James R. Massey, the defendant, alleges as error in said report, that he is therein charged with the annual rental value of the lands described in the pleadings, whereas he should have been required to account for the rents and profits of the lands received by him other than his own proportionate share thereof, under the will of Mrs. Elizabeth Massey.

It is not denied that James R. Massey is a tenant in common with the other parties to this action, but it is claimed by them that the question as to whether he should be charged with the annual rental value of the lands or should account for the rents and profits, is res adjudicata, and cannot now be considered by this court. From an examination of the decree of the Circuit and Supreme Court herein, this court has come to a different conclusion. By the report of Referee Connors in this cause, filed October 3d, 1874, Dr. Massey was held liable for the rental value of the lands, but to that report exceptions were filed by him, alleging as error, among others, that he had been charged with "rent of lands belonging to said estate," and had been "adjudged chargeable with large balances of money upon said account."

This exception was overruled by the decree of the Circuit Court, made August 10th, 1876. James R. Massey appealed from said decree, and also from the Circuit order of October 24th, 1876, made in pursuance thereof upon the ground, amongst others, that the Circuit Court "erred in overruling said exceptions."

The question, upon the general exceptions

above quoted, having thus been brought before the Supreme Court, it was held by a decision in this cause, filed March 21st, 1878, that James R. Massey should "account for the rents and profits of the lands other than his own share, down to the time of his election." The order of reference under which this report was made directed the present referee "to revise the reports of the former referee, so as to make the same conform to

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the decision of the Supreme Court," *above mentioned. The referee should have required James R. Massey to account for the rents and profits of the lands received by him, other than his own proportionate share thereof, down to the time of his election to take the same, and he erred in charging him with the annual rental value of said lands. The first exception by the defendant, James R. Massey, is therefore sustained.

The second and third exceptions, by said defendant, are also sustained, on the ground that the referee, in stating the accounts between the parties to this action, should not have taken into the accounts the appraised value of the lands which James R. Massey elected to take under his mother's will. The rights of the parties in this particular, under the decision of the Supreme Court in this cause, will be considered by the court hereafter in this decree.

The third exception is also sustained, upon the further ground that interest can only be charged upon the said appraised value from the date of the Circuit order of February 13th, 1874, overruling the exceptions to the return of commissioners to the writ in partition and confirming said return. This, however, becomes unimportant in view of the above determination as to the propriety of considering the appraised value in stating the accounts.

The fourth, fifth and sixth exceptions by the said defendants are also sustained upon the several grounds in said exceptions mentioned, but these being contingent upon the overruling of the first exception, and that exception having been sustained, are now of no practical importance to the defendant.

The first exception on the part of the plaintiff and the other defendants, (except James R. Massey), charges error in the report that the referee undertook to find the amount of personal property actually received by Dr. James R. Massey, whereas in report of Referee Connors he is charged with the estimated value of certain corn and other plantation supplies to a much larger amount, which report was confirmed by a decree of the Circuit Court. The second exception by the same parties is to the same effect.

It appears that James R. Massey excepted to the report of Referee Connors, on the ground that the referee had erroneously decided that he was "bound to account for the

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value of certain *slaves and other property belonging to the estate of Mrs. Elizabeth Massey, deceased," and this exception came before the Supreme Court on appeal from the Circuit decree overruling it.

The Supreme Court say, in concluding this this decision, "the decree of the Circuit Court and the reports of referees must be set aside, so far as they are inconsistent with the conclusions already stated, and the cause must be remanded for the further proceedings conformable to this decree."

An examination of that decision shows, and this court holds, that the charge against James R. Massey, for corn and other personalty left on the plantation, unless it was used by James R. Massey for his individual benefit, is "inconsistent with the conclusions" stated in said decision. It is therein expressly held that the slaves and other personalty left by Mrs. Elizabeth Massey, "should have been kept together by the executor until partition could have been had," and that "the retaining of slaves upon the land cannot be made ground for holding James R. Massey to a measure of liability different from that fixed by the will."

It follows from these principles, that the mere fact that certain corn and other plantation supplies were left upon the land at the death of Mrs. Elizabeth Massey, is no ground for charging James R. Massey for the value of such supplies.

It is proper that he should be charged with so much thereof as was used for his individual benefit over and above his own proportionate share thereof.

With this explanation of the views of the court upon this question, the first and second exceptions are overruled. The third exception refers to the hire of the slaves. The referee has found that Dr. James R. Massey derived no benefit from the use of the slaves from January 1st, 1861, up to their emancipation. And this exception was filed to the report of the referee because he charged the said James R. Massey with nothing at all on that account. This exception will be sustained so far as to have this matter referred back to the referee for further inquiry, and report as to what the value of the services of the said slaves, for the time designated, would have been worth, under the control of a farmer or planter of average skill and diligence. The liability of Massey, therefore, is to be determined after a full report from the

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referee. *The fourth exception on the part of the same parties, alleges error in a credit allowed in said report, to Dr. James R. Massey, for certain taxes and interests thereon, which was not included in former reports, and (it is claimed) was not authorized by the orders of reference herein. One of these orders expressly directs the referee to allow James R. Massey, upon the accounts, all credits allowed by the report of former referees, as well as "such other credits as may appear to be proper." The credit for taxes appears to be

proper. This exception is therefore overruled. The fifth exception by these parties as to error in the referee in allowing to the defendant, James R. Massey, credit for the guardianship account against the estate of Mrs. Elizabeth Massey, cannot be considered. This credit was allowed in the report of Referee Connors, above mentioned, and no exception thereto was taken. If there was error in so allowing the credit, it should have been noticed by an exception before the confirmation of that report. It is now too late to make the question, and the exception must be overruled. In addition to the reasons just given, it may be added that one of the orders of reference expressly directs this referee to allow to James R. Massey all the credits allowed by the former reports, thus recognizing the fact that no question as to the propriety of these credits could now be made.

The sixth exception charges error in the report in this: That Elizabeth Beckham, Sarah Jones, and James R. Massey, Jr., are each charged with $34.77, as damages caused to defendant, James R. Massey, by an alleged illegal levy made in this case. In this there was error: the referee should not have undertaken to estimate the damages caused by an illegal levy. The sixth exception is therefore sustained. The seventh exception by same parties is a general exception, and has, in effect, already been considered. The seventh exception is overruled. The eighth and ninth exceptions as to error in charges of interest, must be overruled. No such error has been shown to this court. The other question raised by the ninth exception has already been considered in one of the exceptions above. The eighth and ninth exceptions are overruled. It is ordered that it be referred back to D. A. Williams, Esq., special referee, to revise his report in this cause, so as to make the same conform to the conclu-

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sions herein stated. *It is further ordered that said referee do inquire and report how much of the lands of Mrs. Elizabeth Massey's estate the said Dr. James R. Massey worked and cultivated each year from January 1st, 1861, down to the day of his election to take the whole lands: what the same were worth each year, under the control and management of a farmer of good ordinary skill and industry, and what the rents and profits of the same other than his own share, were worth for the time specified.

It is furthermore ordered that the referee do inquire and report the names and number of slaves belonging to the estate of Elizabeth Massey, that were under the control, and in the employ of Dr. James R. Massey, or his guardian, from January 1st, 1861, down to the time of their emancipation, and what the value of their services would have been worth for that period, in the hands and control of a farmer of average skill, industry, and perseverance: what they could have been hired for, and what benefit the said James R. Massey has derived from their use, so that the court that has to determine this question, may be enlightened on the facts bearing upon the points suggested. All the testimony heretofore taken by the former referees, and any further testimony that may be desired, may be used by the referee and the court in reaching a conclusion on all the points. Upon the hearing of this cause, a motion was made on behalf of the defendant, James R. Massey, for an order that so much of the return of the commissioners to the writ in partition, dated December 1st, 1873, as relates to their appraisal of the land therein mentioned and described, be confirmed, and that, upon the execution by James R. Massey, of his bond secured by a mortgage of the eleven hundred and sixty-six acres of land (which he elected to take under Mrs. Elizabeth Massey's will) to the clerk of this court, conditioned for the payment of three-eighths of the appraised value of the whole lands, (exclusive of the one hundred acres and the mills) to wit, for the payment of $2623.50 in ten equal annual installments, with interest from date hereof, to be restored by the sheriff of Lancaster county to the full possession of the whole of said lands. But this court is of the opinion that a proper construction of the decision of the Supreme Court upon this point, as filed March 15th, 1876, fixes the date at which the

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*ten years, credit to James R. Massey should commence, at the date of the Circuit order, confirming the return of the commissioners to the writ in partition, and overruling the exceptions to that return, namely, February 13th, 1874. This appears from that decision where it is said (7 S. C. 141) James R. Massey was clearly entitled to take the lands at their appraised value, and was not bound to make his election until the value of the lands was ascertained by the confirmation of the return of the commissioners.

It was proper that he should be required to give his bond and mortgage, for the payment of the principal, in annual installments, and interest upon it from the date of the judgment.

It is therefore ordered that so much of the return of the commissioners to the writ in partition dated December 1st, 1873, as relates to the appraisal of the land therein mentioned and described be confirmed, and that upon the execution of James R. Massey of his bonds, secured by a mortgage of the eleven hundred and sixty-six acres of land, which he elected to take under the will, to the clerk of this court, conditioned for the payment of three-eighths of the appraised value of the whole lands, exclusive of the mills and the one hundred acres, to wit, for the payment of $2623.50, in ten equal annual installments, with interest from February 13th, 1874, he be restored by the sheriff of Lancaster county to the full possession of the whole of said lands. It appearing to the court that upon the coming in of the report

of referee upon the revised accounts between the parties to this action, some or all of the other parties will probably be indebted to James R. Massey to a greater or less amount, and it also appearing that great loss, injury and wrong might result to the defendant, James R. Massey, by a suit upon the bond herein required, prior to the coming in of said reports, on motion of Ernest Moore, attorney for the defendant, James R. Massey, it is ordered that the clerk of this court, and all the parties to this action, be enjoined from assigning, transferring or suing upon said bond, or foreclosing said mortgage for any installment due thereon until the coming in of the report upon the reference to revise the accounts herein ordered, and until the final and complete adjudication of the issues upon the accounts between the parties to this action. It is further ordered that, upon the coming in of said report, such balance upon the accounts as may be found due by

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any of the *other parties to the defendant, James R. Massey, be credited upon the interest or share of each of said parties, respectively, in said bond and be considered to that extent a payment upon the said bond.

Exceptions to this decree were duly served and filed, and notice of appeal therefrom was duly given, on behalf of the defendant, James R. Massey, and of the plaintiff and the other defendants.

The grounds of appeal are numerous and lengthy; the points decided are sufficiently indicated in the opinion.

[For subsequent opinion, see 15 S. C. 615.]

Mr. Ernest Moore, for J. R. Massey.

Messrs. Allison & Connors, contra.

November 22d, 1880. The opinion of the court was delivered by

McGOWAN, A. J. Elizabeth Massey died in 1858, leaving a large estate, real and personal. She had one son, James R. Massey, two daughters, Elizabeth Beckham and Sarah Jones, and three grandchildren, children of a deceased daughter Jane, viz., Mary E. Massey, Charlotte A. Beckham and James R. Massey, Jr. The deceased left a will, of which Dixon Barnes was executor, and after his death, his executor, Daniel W. Brown, by which she devised and bequeathed to her son, James R. Massey, the mills on the Catawba river, and a hundred acres of land adjoining, one-half of the remainder of her real estate, and also some personal property, horses, stock, library, silver cup, &c. Besides the foregoing exclusively to James R., she directed the residue of her estate to be divided into four equal parts, one-fourth to her said son, James R.; the same to Churchill B. Jones, in trust for his wife, Sarah; the same to Elizabeth Beckham, and the same to be divided among the children of Jane. The testatrix named the negroes that were to be allotted to the different parties in the division; and to her son, James R., she gave the right of election to take all of the real estate at valuation on the partition and division of the same.

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*In 1861 the shares were valued by certain persons, called together for that purpose by Dixon Barnes, the executor, and placed in the possession of the parties to whom they were given. But, for some reason, there was no effort to partition the real estate, which was left in the possession of James R. Massey, who remained at the homestead until 1871, when this action was commenced by C. B. Jones, trustee, against James R. Massey for partition and account of the rents and profits of the lands, &c., including an account of D. W. Brown, then executor, and a settlement of the estate of Elizabeth Massey. No objection was made. Writ of partition was issued to lay off to James R. Massey the mills and a hundred acres, and to divide the remainder of the land among the parties according to the will. The commissioners made return laying off mill and lands for James R., and recommending that the remainder of the land be divided according to the interest of the respective parties. James R. Massey objected to the return and declared his election to take the whole land at valuation. Judge Mackey confirmed the return and ordered it executed to February 23d, 1874. James R. Massey appealed to the Supreme Court, which held that "he was entitled to take the land at appraisement," and that he "should be required to account for the rents and profits of the lands held by him other than his own share down to the time of his election." * * * "The judgment must be set aside and the case remanded to carry out the requirements of the judgment." Jones v. Massey, 7 S. C. 142.

Before the above appeal upon the subject of election the matters of account had been referred, and W. M. Connors, Esq., was appointed special referee, who made a report affirming the consent partition of slaves, and charging James R. Massey with the yearly rental value of all the lands from 1861 to 1873, which, with interest, amounted in the aggregate to $13,748.20; that there were articles of personal property, not willed, to the value of $1256, consisting principally of corn and provisions, and that there was due to James R. Massey from the estate of the testatrix, on account of guardianship, $3114, &c. To this report James R. Massey excepted. In May, 1876, Judge Mackey overruled the exceptions and confirmed the report. From his order James R. Massey again appealed to

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this court, which (March *21st, 1878), rendered a judgment reversing the Circuit order confirming the consent partition of slaves, and directing that James R. Massey "should be charged with whatever value he has derived from the use of the slaves, prior to the emancipation, over and above the proportion

of such value he was entitled to under the will, on the same ground upon which he was required by the judgment of this court to account for the rents and profits of the lands. The decree of the Circuit Court and the reports of the referee must be set aside as far as they are inconsistent with the conclusion already stated, and the same remanded for further proceedings conformable to this decision." Jones v. Massey, 9 S. C. 391.

The case went back a second time. May 20th, 1878, Judge Mackey, at Chambers, granted an order appointing D. A. Williams, referee, and directed him to "revise" the former reports and make a report conformable to the judgment of the Supreme Court. March 7th, 1879, Judge Pressley presiding, at Lancaster, made an order appointing the same referee, and directing the parties in possession of the land to account to James R. Massey. [It does not appear, but we suppose these parties had been put into possession under the writ of partition before that part of it was set aside.] Exceptions were filed to the order of Judge Mackey by James R. Massey, and to that of Judge Pressley by Jones et al. Referee Williams, under both orders, made a report, which, amongst other things, transferred into his own report so much of the report of Connors as charged James R. Massey with the rental of the lands, bringing the interest down to September 16th, 1876, and making the aggregate of $22,742.87. To this report both sides filed exceptions, which were argued before Judge Wallace, from whose decree the appeal comes to this court.

We shall not consider as distinct the exceptions taken to the orders of May, 1878, and March, 1879. So far as they were orders of reference to carry out the second judgment of this court they were merely administrative and not final. The same referee was appointed by both orders. He made his report under both, and in considering the exceptions to that report and the decree based upon it, all exceptions previously taken to the orders may come under review. The

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exceptions to the report and the decree *are numerous—made by both parties—and to prevent confusion we shall not take them up seriatim but according to the subject matter.

The most important question in the case is as to the principle of the accounting of James R. Massey for occupation of the lands between the death of his mother and the time he became sole owner by election. This subject is made somewhat complicated by the claim that it is res adjudicata. Connor's report, made before the second judgment of this court, charged James R. Massey with the rental value of the land and interest for fifteen years, as if he were a stranger, and this on action for use and occupation. Judge Mackey confirmed that report, and it is claimed, although the second appeal was from that decree, and it was set aside, so far as inconsistent with the conclusion therein stated, that the particular part of the report and decree which had reference to the account for rent was not reversed because it was not appealed from and was not inconsistent with the judgment of the Supreme Court. The allegation is that Judge Wallace had no right to consider that part of the report of the referee, Williams, for the reason that Williams merely transferred it and incorporated it into his report from that of Connors, where it had been confirmed by Judge Mackey and not appealed from, and, therefore, was res adjudicata.

We have looked carefully through the record of this case back to the original complaint and answer. We find that James R. Massey did except to the report of Connors as to rents, and did appeal from the order confirming it. To the report he excepted, "that he had been charged with rent of lands belonging to the estate," and to the order confirming the report, upon the ground, among others, "that the court erred in overruling said exception." Jones v. Massey, 9 S. C. 382, 386. That, it is said, was a general appeal as to all rents and not as to the difference between "rents and profits" and "rental value." That is true; but the whole includes all its parts. It is said that point was not argued. It may be that upon that appeal the weight of the argument was directed to the point of accountability for the slaves; but whether the matter of the land rent was argued or not, it was in the record, and this court ruled upon it, repeating almost the

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same *words as the former judgment. [See quotation from that judgment hereinbefore made.] The decree and the reports of the referee were set aside, "so far as they are inconsistent with the conclusion herein stated." Under these circumstances we cannot accept the view that the item for the rental value, in the report of Connors, was finally adjudged by the Circuit decree of 1876, on the ground that it was not appealed from; that Referee Williams had the right to transfer it to his report, and that Judge Wallace had no right to consider it, because it had been adjudged. We agree with him that the matter was not adjudged, and that the charge as to rents was "inconsistent" with the judgment of the Supreme Court and vacated.

If we were not reluctant to shut off inquiry we would hold that the proper principle of the accounting had been adjudged by this court to be for "rents and profits," and not for "rental value." This court, in both of its judgments pronounced by the same judge, so expressed its view in words, and, in the last, particularly declared that the account for the slaves and the land should stand "on the same grounds." But the precise difference between "rents and profits" and "rental

value," had not been argued before this court, and as we are inclined to the opinion that the words "rents and profits" in the judgments, were used in their general sense, we entertain that point now as for the first time before this court.

The question then being open, what principle should govern in stating the account of James R. Massey for use and occupation of the lands up to the time he took them by election? Upon the death of Mrs. Elizabeth Massey the title to these lands devised rested in the respective devisees, subject, of course, to all just claims against the testatrix. They stood to each other as tenants in common in unequal interests. Each had the same right to occupy his proportion of the land. James R. Massey had the largest interest, and, in common with the others, he had the right to be there. One tenant in common cannot maintain a possessory action against his co-tenant except for an actual ouster. If James R. Massey had ousted the other co-tenants, and kept them out by force, which is not alleged, then he would have been liable as a trespasser for the rental

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value beyond his *share. But as it is not alleged that he kept the other tenants out of the possession of their respective parts, they were in default in not occupying or claiming partition, and he is liable for the rents and profits which he received from the lands beyond his own share, just as he was held to account for whatever value he "derived from the use of the slaves over and above the portion of such value he was entitled to under the will." Jones v. Massey, 9 S. C. 376; Volentine v. Johnson, 1 Hill's Eq. 49; Lyles v. Lyles, Id. 86.

We cannot suppose that the application of this principle to the case will work any injustice. From 1861 to 1874 the country was in an unsettled state. For a portion of that period James R. Massey was a minor; for a large portion war was raging, and he was absent in the service of the Confederate States; and after military operations ceased the labor of the country was disorganized, affecting injuriously the income from lands. We note that James R. Massey states in his answer "that so far from having received any profit from said plantation for which he should account, the possession of the same entailed upon him great loss." But be that as it may, the rule as to the accountability between tenants in common is established, and is nowhere better expressed than by an elementary writer of high standing, (Adams), who says: "In addition to the decree for a partition, the court may, also, if either of the co-owners has been in the exclusive reception of the rents, decree an account of his receipts. But the mere fact of his having occupied the property will not, of itself, make him liable for an occupation rent, for the effect of such a rule would be that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff, and prevent him from occupying them, except upon the terms of paying rent." Adams' Eq. 233.

We concur with the Circuit judge as to the principle upon which the accounting should be stated, but it seems to us that his orders of reference embrace more than his ruling required. We cannot see that it is necessary or that it will promote progress in this long litigation to order an inquiry—outside of the rights of the parties—as to "what the same lands were worth each year under the control and management of a farm-

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er of good *ordinary skill and industry." According to the foregoing principles, the relation of the parties does not authorize them to hold James R. Massey responsible for bad husbandry, or to require him to make good any deficiency which may have arisen from his not being "a farmer of good ordinary skill and industry." He was not a lessee for value, but part owner. His possession was not tortious but permissive, and might have been ended at any moment by the parties claiming their own. The accounting should be conducted as follows: Ascertain whether James R. Massey cultivated more of the tillable land than his proportion before election. If not, then there is nothing due by him. If he did, then he should be charged with the rents and profits of that excess; that is to say, if he rented the land he should be charged with the rents received; and if he cultivated them himself, then with the profits actually received from such cultivation, without regard to the skill which he happened to possess as a farmer or his habits as to industry.

As to the time when the bond for the land should bear date and put in motion the credit of ten years, it cannot be as contended when the commissioners in partition made their return, for if there was no other reason that return never recommended election, but ignored it. In this respect the case is not analogous to that of Huson v. Wallace, 1 Rich. Eq. 6, in which the parties were in possession under the return that was afterwards, nunc pro tunc, confirmed. Here the exact reverse is the case—the possession was held in opposition to the right of election. The bond should bear date when the election was consummated. At that moment the relative rights of the parties changed. Massey became the owner of the lands and the account against him as tenant in common must cease. He never indicated his election until after the return of the commissioners had been made, December, 1873. To that return he excepted and declared his election. His exceptions were overruled. The return was confirmed and ordered to be enforced February, 1874. That order was reversed by judgment of this court, (1876),

which allowed the election. It should have received legal sanction in the order of February, 1874, but it was refused, and, pending the appeal, he was denied the rights inci-

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dent to it. When must he be consid*ered to have elected? When the Circuit order was passed which should have decreed it, or when he realized the fruits of it? We concur with the Circuit judge that the election must be considered to have been legally made at the date of the Circuit order. It is true his enjoyment was postponed until after the judgment of the Supreme Court, but that judgment did not create the right, it only declared error in the Circuit order, and it must be referred back and read for that order. The judgment itself indicates this view, for it says that James R. Massey should give his bond and mortgage "for the principal in annual installments, with interest upon it from the date of the judgment." This may operate hardly on Massey, but what has been done cannot be undone; all that can be done is to put the parties, as nearly as possible, in the condition in which a correct judgment would have placed them at that time. The right of Massey attached at the date of the Circuit order, so as to give him from that time an account of rents from those in possession of the lands, and he must be held to the corresponding obligation of arranging the purchase money by giving the bond and mortgage at that date. What is the proper date of that order? The first order of Judge Mackey was rescinded and replaced by another. In the first report of the case, (7 S. C. 139), the date is given as February 23d, 1874, but in the decree of Judge Wallace it is referred to as February 13th. We conclude that this is a mistake, and that the proper date is February 23d, 1874, and that fixes the time for the date of the bond and mortgage from which the credit of ten years began to run.

We see no objection to the temporary injunction against "foreclosing said mortgage for any installment due thereon until the coming in of the report and the adjudication upon the accounts between the parties." It is manifest that some of the parties will be indebted to James R. Massey in some amounts growing out of this litigation. They have cross equities, which, as far as they go, should be set off one against the other. This cannot be done with certainty unless the parties are kept in statu quo until their rights are determined. There seems to be propriety in it, for the reason that James R. Massey is required to give bond for the purchase money of lands two years before his

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right was *declared to the lands so purchased, and the possession of which was held by those who are entitled to receive the purchase money secured by the bond. The rents for these lands during the very years in which the interest was running and the installments falling due, most certainly should be credited on the bond.

In regard to the slaves, this court, after argument, directed in what manner the account should be stated. Under that direction the referee reported "that under the decision of the Supreme Court in this cause, James R. Massey should account for whatever value he derived from the use of the slaves and not for their hiring value, and, accordingly, reports from the testimony that James R. Massey derived no benefit from the use of the slaves over and above their expenses." The Circuit judge referred it back to report "what the value of their services would have been in the hands and control of a person of average skill, industry and perseverance. What they would have hired for," &c. In the view which we expressed as to the rents and profits of the lands, we think this reference was unnecessary and would only increase the expenses and cause further delay in the case. The principle of the account for the possession of the slaves was settled by this court in its second judgment, and we can do no more than re-affirm it in the words there stated. "It is proper that he [James R. Massey] should be charged with whatever value he has derived from the use of the slaves prior to emancipation, over and above the proportion of such value he was entitled to under the will, on the same ground upon which he was required by the judgment of this court to account for the rents and profits of the lands." The evidence is not before us upon which the referee based his report, and we can pronounce no judgment thereon.

We concur with the Circuit judge in reference to the account for corn, plantation supplies, &c., alleged to have been on the place at the death of Mrs. Massey. That property, not specifically disposed of, like the slaves, fell under the residue clause of the will. The report of Referee Connors upon the subject of this property, was excepted to in the words "slaves and other property." The matter was before the Supreme Court in the exception for error "in overruling said

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exceptions." The same prin*ciple of accountability, which was expressly declared as to the slaves, should be applied to this property, which, in its nature, was consumable in the use.

We also concur with the judge in refusing to disturb the report of the referee in regard to the guardianship claim against the estate of Mrs. Massey. That was a distinct claim by James R. Massey, having no connection with the points argued, and the objection now made for the first time comes too late. And we concur in refusing to allow the charge against Elizabeth Beckham, Sarah Jones and James R. Massey, Jr., for damages caused, as alleged, by an illegal levy upon

the property of James R. Massey. This claim was properly disallowed.

Subject to the modifications herein made, the decree is affirmed and the appeals dismissed.

McIVER, A. J., concurred.

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14 S. C. 312

(Case No. 940.)

BLACK v. CHILDS.

(April Term, 1880.)

[1. *Vendor and Purchaser* ⟸220.]

To sustain a plea of purchase bona fide without notice, three things are necessary: (1) that he has paid in full the purchase money; (2) that he has the legal title, or the best right to it; (3) that he purchased bona fide without notice.

[Ed. Note.—Cited in Sweatman v. Edmunds, 28 S. C. 62, 5 S. E. 165; Robert v. Ellis, 59 S. C. 147, 37 S. E. 250.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 461–465, 720; Dec. Dig. ⟸220.]

[2. *Judicial Sales* ⟸17.]

Section 8 of the act of 1791 (7 Stat. 263,) forbidding certain officers from being interested in the purchase of property sold by them officially, was superseded and repealed as to commissioners in equity by section 6 of the master's act of 1840. 11 Stat. 108, 120.

[Ed. Note.—Cited in Johnson v. Southern Ry., 69 S. C. 326, 48 S. E. 260.

For other cases, see Judicial Sales, Cent. Dig. § 40; Dec. Dig. ⟸17.]

[3. *Judicial Sales* ⟸17.]

It seems to be the settled conclusion from the authorities, that where a trustee to sell purchases at his own sale, the sale is not void, but will be set aside upon the application of any one interested, whether the sale was fair, and a full price obtained, or not.

[Ed. Note.—Cited in Finch v. Finch, 28 S. C. 168, 5 S. E. 348, 13 Am. St. Rep. 665.

For other cases, see Judicial Sales, Cent. Dig. § 40; Dec. Dig. ⟸17.]

[4. *Notice* ⟸13.]

Denial of notice "directly or indirectly," is denial of notice had by an agent.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 37; Dec. Dig. ⟸13.]

[5. *Appeal and Error* ⟸194.]

The objection that a defence of purchaser for valuable consideration without notice is not sufficiently pleaded, should be taken by motion to make the answer more definite, or by demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241–1246; Dec. Dig. ⟸194.]

[6. *Vendor and Purchaser* ⟸229.]

Where circumstances are sufficient to put a

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party upon inquiry, he is *chargeable with constructive notice of every fact which such inquiry, properly conducted, will certainly disclose.

[Ed. Note.—Cited in Carrigan v. Byrd, 23 S. C. 95; Hampton & B. R. & Lumber Co. v. Bank of Charleston, 48 S. C. 135, 26 S. E. 238; Brayton v. Beall, 73 S. C. 311, 53 S. E. 641.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477–494; Dec. Dig. ⟸229.]

[7. *Trusts* ⟸357.]

Where P. a commissioner in equity, at his own sale procured his friend F. to purchase the property sold, and F. was announced as the bidder, took titles in his own name, and executed to the commissioner the required bond and mortgage, and P. took control of the property, a subsequent purchaser for value from F., under negotiations had with P., (who claimed to act for F., and who as commissioner, received payment in full of such bond and mortgage before maturity) is not chargeable with notice of P.'s interest, or of the private arrangement between P. and F., at the commissioner's sale.

[Ed. Note.—Cited in Jones v. Hudson, 23 S. C. 501; Kinard v. Glenn, 29 S. C. 595, 8 S. E. 203; Aultman v. Utsey, 34 S. C. 568, 13 S. E. 848; Merck v. Merck, 83 S. C. 339, 65 S. E. 347.

For other cases, see Trusts, Cent. Dig. § 544; Dec. Dig. ⟸357.]

[This case is also cited in Garlington v. Copeland, 32 S. C. 68, 10 S. E. 616, without specific application.]

Before Thomson, J., Richland, April, 1879.

This was an action commenced in 1869. The facts are fully stated in the opinion of this court. The Circuit decree, after stating the facts, concluded as follows:

What title passed by such sale? The answer is given by the act of assembly, "That * * * no master or commissioner in equity * * * shall be concerned or interested, directly or indirectly, in the purchase or acquisition of any property sold by them respectively by virtue of or in obedience to any process, execution or order of court or law; and if any such officer shall presume to be concerned or interested in any such purchase or acquisition, * * * the purchase made shall be utterly void and of no effect."

Against J. H. Pearson it is clear the plaintiffs could demand and have resale of the premises.

Here it may be urged that, though the sale be wholly void as to Pearson, yet it may be valid as to his vendees or alienees, that is, to L. D. Childs and associates. In other words, is the sale so wholly void, the defect so total, that no title will vest in Pearson or Fair, although the purchaser can plead that he purchased without notice and for a valuable consideration?

An obligation or other instrument of writing declared void by statute is as if it never had existence. What is void cannot be confirmed. The statute against gaming declares all securities given for a gaming consideration void. Our courts have held such notes, though negotiable, void in the hands of an innocent holder. This construction was given

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upon the force of the words *used in the statute. So our court has held a purchase at a sheriff's sale by a deputy sheriff, through or by a third party, would, under the act recited, fail to convey the estate of the heirs-at-law, who, it is said, were as much owners as before the sale.

L. D. Childs, however, alleges that J. H.

Pearson was, as to himself and associates, unknown in the transaction. That their purchase was from S. Fair, who had complied with the terms of the sale. That they were ignorant of any understanding between J. H. Pearson and S. Fair. That their purchase rests upon papers which did not indicate ownership in Pearson or suggest inquiry; in short, that, in the fullest sense, they are purchasers for valuable consideration without notice.

Admitting this to be true as to Childs and associates, what shall be said of A. G. Baskin, the agent?

L. D. Childs states that he employed A. G. Baskin as his attorney to examine the title to the property; that he placed the whole matter in his hands. That he (Childs) had confidence in his judgment, and so expressed himself. Notice in such case to an agent is notice to the principal, and notice to a solicitor is actual notice to the client.

What notice, then, had A. G. Baskin of the transaction? As a matter of course, A. G. Baskin must have known the contents of the record, must have known the order of the court directing the sale and its terms, the credit given to the purchaser, and that the installments fell due successively on the first days of January, A. D. 1864, 1865 and 1866; that a bond and mortgage were given conforming to these terms of sale; the direction that the money was to be retained until the further order of the court; the possession of the lot by Pearson and his conduct like that of an owner, which, of itself, made inquiry necessary, and the transaction which anticipated the payment and surrendered the mortgage to perfect the title to Childs. These were circumstances and acts sufficient to give notice to a prudent man, suggesting inquiry and disclosing peril to a purchaser. In a sale for partition by order of court, in a certain sense the court is the vendor, but not without reference to the will of the heirs-at-law. The court collects this will and embodies it in an order. Thus declared, it expresses the will of the parties in interest, and

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which *the court itself will not change or alter without their consent or notice to them.

No such power is vested in the commissioner. A vendee of a title resting upon a commissioner's sale, who knows that in obtaining it the order of sale has been destroyed, purchases without the consent of the heirs-at-law. He alters the terms of sale and does not purchase as the heirs-at-law proposed.

The following are the conclusions of law of the court:

1. That the sale by the commissioner, Pearson, of lot "C" and the purchase thereof by S. Fair, are void transactions under the statute, and that no interest passed to L. D. Childs and his associates, under the conveyance by S. Fair.

2. That notice was given to L. D. Childs through his agent, A. G. Baskin, of facts and circumstances affecting the title before the purchase was completed, and that L. D. Childs and his associates are not bona fide purchasers without notice.

It is therefore ordered, adjudged and decreed:

1. That the sale of lot "C" by J. H. Pearson is invalid, and the deed of conveyance thereof to S. Fair transfers no interest; and that the deed of S. Fair to L. D. Childs and others is invalid and conveys no interest, and it is ordered that the said deeds be delivered up to the master to be canceled.

2. That it be referred to the master to inquire and report the time L. D. Childs and associates have been in possession of lot "C," and the value of the rents and profits or of the use and occupation, reserving to the defendants the question of liability therefor.

3. That the master call in by the usual practice the creditors of the estate of A. Brodie to present and prove their demands by a given day, and report the same to the court.

4. That it be referred to the master to report upon testimony who are the heirs-at-law and distributees of A. Brodie, deceased, who are entitled to an interest in his estate under the statute of distributions, and for this purpose may use testimony already taken in this case.

5. That parties have leave to apply for an order of sale of lot "C," described in the pleadings.

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*Defendants L. D. Childs, William Johnston and W. H. Willard, the purchasers, appealed to this court.

Messrs. Pope & Haskell, for appellants.

Mr. J. P. Carroll, contra.

A trustee to sell is by law disabled from purchasing the trust property. Sugd. on V. & P. 161–2; Hill on Trustees 159. Under act of 1791, § 8, (7 Stat. 263,) a commissioner could not purchase at his own sales; such purchase was a nullity, and prohibited under penalty. This section was not repealed by act of 1840. 11 Stat. 132, § 31. The penalty attached makes the purchase absolutely void. Story on Agency, § 240; 1 Story's Eq. Jur., § 306; Potter's Dwarris 250–1. Defendants do not deny notice to their agent, Baskin. Le Neve v. Le Neve, 2 Lead. Cas. in Eq. 27; 2 Sugd. on V. & P. 1041. The facts led up to notice. Besides, Pearson was in possession. 19 Ves. 254; Adams' Eq. 158; 4 Rich. Eq. 114; Spears' Eq. 27. The facts show that Pearson was not acting as agent for Fair, but for himself. The money was not due, and the record of the case showed it; therefore the bond is still subsisting. 1 Sugd. on V. & P. 48; Story on Agency, § 98.

November 22d, 1880. The opinion of the court was delivered by

McGOWAN, A. J. Alexander Brodie died intestate in 1861, seized of real estate. Charles H. Black administered upon his estate. In 1862 proceedings were instituted in the then court of equity, in a case entitled Charles H. Black v. James Black and others to partition or sell the land of which the intestate died seized. The record in the case in some way got out of its proper place, and as we now have it is not complete. There is, however, an order of sale of Chancellor Inglis, bearing date June 21st, 1862, which directed the commissioner to sell the lands in January then next or some succeeding sales day, "upon the following terms to wit: so much cash as will pay the costs of these proceedings and the sale, and the balance

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upon a credit of one, two and *three years, with interest from the day of sale, payable annually, secured by bond and personal security and a mortgage of the premises. After paying the costs that the commissioner retain the residue subject to the future order of the court."

John H. Pearson was at that time commissioner for Richland county, and on February 2d, 1863, he offered for sale the different parcels of land, and among them a lot marked "C," described as containing two acres and a fraction, which was bid off by Simeon Fair for $5075. The sale was in accordance with the order; was open, fair and for full value. The purchaser complied with the terms of sale, received titles from the commissioner, and executed to him bond and mortgage to secure the purchase money. From what remains of the record, it does not appear that this sale was confirmed by the court or that there ever was an order to pay out the proceeds of sale. Soon after the sale John H. Pearson went into possession of the lot and retained it until, in the same year, he contracted to sell it to Childs & Co., for $13,000 cash. The negotiation was conducted entirely by Childs and Pearson, and the latter told the former that the title was in Simeon Fair. Childs employed A. G. Baskin, Esq., to examine the titles, and he and Pearson being in the commissioner's office, called Childs in and informed him that "papers were all ready." They offered to show him a bundle of papers to satisfy him that it was "all straight and right," but he declined, saying that if his attorney was satisfied, he was. Baskin handed the title of Fair to Childs, and he paid the purchase money in cash, and went into possession, and still retains it. Pearson died in 1864, and James R. Scott is the representative of his estate.

Some time after the war (1869) some of the plaintiffs, claiming to be heirs of Alexander Brodie, deceased, filed a bill against the defendants, Simeon Fair and the representative of Pearson, to set aside the sale; upon what ground, does not appear (the original record is not before us); and to that bill Simeon Fair, on August 16th, 1869, answered: "That said lot was bid off by him at the instance and for the benefit of John H. Pearson, and although he took title and complied with the terms of sale, it was for the benefit of John H. Pearson; that afterwards on be-

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ing informed *by the said Pearson that he had bargained the same to Childs & Co., this defendant made titles to them, they agreeing to pay the bond for the purchase money." After this disclosure (1872) the plaintiffs filed this amended complaint to have the sale of lot "C" rescinded, vacated and annulled, and that the purchasers account for rents and profits since they went into possession. Baskin, Fair and Childs are all now dead. The defence is, that the defendants are innocent purchasers, without notice of any defect in the title. The Circuit judge decided that the sale was absolutely void, and also that Childs had notice, if not in person, through his attorney, A. G. Baskin, of facts and circumstances affecting the title before the purchase was completed. Childs and his co-purchasers except to this decree, and appeal to this court.

It is too well settled to need citation of authority that a purchaser, bona fide, without notice of any defect in his title may stand upon the plea of purchaser. Equity does not disarm a purchaser, but assists him. But to sustain the plea three things are necessary:

1. That he has paid in full the purchase money.

2. That he has the legal title or the best right to it.

3. That he purchased bona fide without notice.

In this case, there is no doubt that the purchasers paid the purchase money. Have they the legal title? The defence is purely equitable and cannot avail against the legal title, which might be established at law. The defendants have a perfect chain of paper title; but it is said that the sale by Pearson for his own benefit was absolutely void under section 8 of the act of 1791, (7 Stat. 263,) and that therefore they have no title upon which to rest their plea. That act declares that "no commissioner in equity [also other officers] shall be concerned or interested, directly or indirectly, in the purchase or acquisition of any property sold by him by virtue of, or in obedience to any process, execution, order of court or law; and if such officer shall presume to be concerned or interested in any such purchase or acquisition at any sale by him made, he shall, on conviction thereof, be deprived of his office, and the purchase so made shall be utterly void and of no effect."

In 1840, the legislature passed what is

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known as the commis*sioner's act, the title of which is "to ascertain and define the powers, duties and liabilities of masters, commissioners and registers in equity, and to prescribe for the organization and regulation of

their respective offices." This act purports to be a codification of all the laws upon the subject and does include other old provisions, but entirely omits the section above referred to in the act of 1791. The only provision which it contains upon the subject of sales by the commissioner is in section 6, "that masters and commissioners in equity shall make all sales ordered by the said court and execute conveyances thereto." 11 Stat. 108, 120.

It is contended that the act of 1840 was a collection in convenient form of the whole law upon the subject, and that by excluding the provision of 1791, it was thereby repealed so far as it related to commissioners in equity. It may throw some light upon this subject to make a brief reference to the history of the act of 1840. The records show that in 1837 the legislature passed "an act concerning district officers and their offices," (6 Stat. 577,) which required the attorney-general and Circuit solicitor to examine and report as to the condition of the district offices, clerk, sheriff, commissioner in equity, &c., &c. These officers made a report to the session of 1838, whereupon the legislature passed a joint resolution appointing the attorney-general and the Circuit solicitors "special commissioners to sit during the recess, and at the next session to report a bill or bills containing in a condensed form the various duties and liabilities as required of, and imposed upon, the several officers whose offices are enumerated, together with such amendments, additions or alterations, as, after a full and careful examination of statute law, rules and practice of the courts and judicial decisions, the attorney-general and Circuit solicitors shall deem necessary or expedient relative to said officers." Resolutions 1838, 128. The result of the labors of these able commissioners was reported in separate bills in relation to the different offices—sheriff, commissioner, &c. All of these bills passed the legislature in 1839 except the commissioner's act, which passed the next year (1840). The same persons learned in the law who were charged with the preparation of the commissioner's act, also prepared that of the sheriff. In the latter (the sheriff's act) the penal pro-

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vision of 1791 was in*serted, but it was omitted in the commissioner's act. There were reasons for that provision in regard to the sheriff, which did not exist as to the commissioner, and we have no doubt that under the authority to make alterations, it was intentionally omitted in the act of 1840 for the purpose of effecting its repeal. It is not so clear that the exclusion of the provision of 1791 from the act and the insertion therein of only a simple power of sale, were the only appropriate means of accomplishing the purpose of repeal. But, considering the nature and object of the act of 1840, the intelligence of the commissioners who framed it, and the great improbability that they would insert so important a provision in one bill, and merely by accident omit it in another, we feel constrained to hold that the act of 1840 superseded and repealed so much of the act of 1791 as related to the duties and liabilities of commissioners in equity.

This view is incidentally supported by the decision of this court in the case of McCelvey v. Thomson, 7 S. C. 185. That was an action to set aside a sale of a commissioner upon the allegation that he was interested in the sale. The first purchaser had sold the land to innocent parties, who were also included in the proceedings. The principle upon which the relief was granted is not apparent, for there was no fraud, and the interest of the commissioner in the property sold was acquired after the sale; but, being granted, it is manifest that the court did not consider the sale as utterly void under the act of 1791, for they held the first purchaser and the commissioner to account only as trustees for the profits, and allowed the defence of innocent purchasers on the part of those who purchased without notice. Justice Wright in delivering the opinion of the court said: "The sale to Reed and Brown must stand. In addition to the reasons already given, they were bona fide purchasers for valuable consideration and not affected with notice of any equity on the part of McCelvey sufficient to overreach legal title." This is a distinct declaration that McCelvey had only an equity and that the legal title was in the purchasers, which could not possibly be upon the assumption that the sale by the commissioner was utterly void.

Assuming, then, that the provision in the act of 1791, in regard to sales made by commissioners in equity, cannot control this

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*case, as it did not control the above-stated case, yet the fact still remains that Pearson, the commissioner, by a private arrangement made in advance with a friend, purchased the lot in question. The commissioner was, in one sense, a trustee for the parties in interest; he was a trustee to sell, and indirectly purchased at his own sale. That sale must be tested by the equitable principles applicable in such cases. We shall not enter into the question, which has been much discussed in our courts, as to the exact status of such a sale, but accept what seems to be the settled conclusion from all the authorities, that whilst such a sale is not utterly void, it will be set aside on the application of any one interested, and that without reference to the question whether the sale was fairly conducted or whether a full and fair price was paid. Davoue v. Fanning, 2 Johns. Ch. 252; Ex parte Wiggins, 1 Hill's Eq. 353; Farr v. Sims' Rich. Eq. Cas. 138 [24 Am. Dec. 396]; Huger v. Huger, 9 Rich. Eq. 225, and cases there cited.

The only exception to this rule is made in behalf of the bona fide purchaser for full value without notice; and the next question

is, whether the defendants, when they purchased from Pearson in possession and received title from Fair, who was the apparent owner, had notice of the private arrangement under which the purchase was made. So far as the pleadings are concerned, we think the defence is stated with sufficient fullness. The denial of notice, "directly or indirectly," includes a denial of notice by the agent. But if it had been otherwise, it is now too late to make the objection. It should have been made by notice to make the answer more definite, or by demurrer. Pom., § 596.

There are two kinds of notice—actual and constructive. Childs alone conducted the negotiation for the purchase of the lot, and it is clear that he had no actual notice. He was not at the sale. There is no proof that any one informed him of the agreement, and he swears that he had no such notice. The inquiry is, then, narrowed down to the question whether Childs, in person or through his attorney, had constructive notice. If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon

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the principle that the party is bound *to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose. "There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter." Birdsall v. Russell, 29 N. Y. 220; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Le Neve v. Le Neve, White & Tudor, Part I., § 11, par. 161, notes.

It does not appear that Childs had any reason to doubt the title so as to be put upon the inquiry against the hidden equity. He had some notice about a disputed lien, but that was a different matter. We are unable to see that either Childs or his attorney had knowledge of such facts as should fix upon Childs constructive notice of the private agreement at the time of the sale, which was the isolated fact that caused the defect in the title. Baskin was employed to examine the title. He was in the commissioner's office with Pearson, and they had the books and papers before them, and Childs must be regarded as having had notice of all that they disclosed or upon examination would have disclosed to Baskin. We know of no facts thus within his reach other than these, viz.: That the lot was sold by Pearson, as commissioner, under an order of court, upon a credit of one, two and three years; that Fair purchased it and complied with the terms of sale; took title and executed bond and mortgage; that Pearson was in possession and controlling the lot in the name of his brother-in-law, who had title; that upon the receipt of the money and before due, he, as commissioner and payee, marked the bond and mortgage paid, and handed to Childs the deed of Fair. It may have been improper in Pearson to cancel the bond and mortgage before due. It concerned the discharge of his duty as commissioner, and might make him and his sureties liable on his official bond, or by possibility the act might be a nullity, leaving the mortgage a subsisting lien; but still that did not reach to the infirmity in the title which had vested. The only fact which could create that infirmity was the private arrangement at the sale, of which none of these circumstances, nor

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all of *them together, furnished knowledge. That fact was, in its nature, secret—out of the usual course of things—and not reasonably nor naturally inferable from what appeared. There is no proof that Pearson disclosed his secret, either to Baskin or Childs. There was no necessity for him to do so, and it does not appear that defendants had notice of it until Fair's answer to the original bill was filed. Looking back after that admission, it may be thought that there was enough to excite some general suspicions in a distrustful mind; but before the fact was disclosed by Fair, the circumstances were not, in our judgment, sufficient to lead up to this particular fact. It is said in the case of Birdsall v. Russell, before cited, that "the mere knowledge that the numbers on the bonds had been changed, gave the purchaser no clue, which, if followed up, would necessarily or even probably lead to knowledge."

It is said that Pearson was in possession, and that fact fixed Childs with all the equities of Pearson. That is true, but what equities had Pearson? The possession naturally implied only that Fair, the legal owner, allowed him to occupy it either as a tenant or as his friend and kinsman.

The plea of the defendants, Childs, Johnston and Willard, that they are bona fide purchasers for valuable consideration without notice, is sustained, and in that respect the Circuit decree is reversed. But as the plaintiffs may desire to set up the claim that the act of the commissioner in satisfying the mortgage before the debt was due, was a nullity, and that, therefore, they have a right now to demand a foreclosure of the mortgage, which was not considered by the court below, and could not, therefore, be considered here, and which the frame of the complaint, as it now stands, would not permit, the case is remanded to the Circuit Court, and the plaintiff may, if so advised, apply to that court for such amendment as may be necessary to effect that purpose. If within a reasonable time after notice of this judgment, no such appli-

cation is made, then the Circuit Court is instructed to dismiss the complaint as to the defendants, Childs, Johnston and Willard.

McIVER, A. J., concurred.

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14 S. C. *324

*(Case No. 941.)

STEELE v. C., C. & A. RAILROAD COMPANY.

(April Term, 1880.)

[1. *Motions* ⇐43.]

The order of a Circuit judge granting leave to a party to make a motion before another judge, is without force.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 55; Dec. Dig. ⇐43.]

[2. *New Trial* ⇐11.]

A motion on the minutes for a new trial, upon the ground of excessive damages, made without argument, was refused by the trial judge, and an appeal therefrom dismissed by the Supreme Court for want of jurisdiction. *Held*, that a succeeding Circuit judge had no power to grant an application for a new trial upon a case settled, but based upon the same grounds as before.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 14–16; Dec. Dig. ⇐11.]

[3. *Judges* ⇐24; *Motions* ⇐42.]

The decision of one judge is not subject to be reviewed by another: and a motion once heard and decided, will only be reviewed upon a new state of facts arising after the decision.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 93; Dec. Dig. ⇐24; Motions, Cent. Dig. § 53; Dec. Dig. ⇐42.]

[4. *New Trial* ⇐165.]

Neither the judgment nor the order refusing a new trial on the minutes, could be opened as matter of favor under Section 197 of the code of procedure, because of a misinterpretation of law by counsel.

[Ed. Note.—Cited in Clark Bros. v. Wimberly, 24 S. C. 141; Kaminitsky v. Northeastern R. Co., 25 S. C. 68; Hubbard v. Camperdown Mills, 26 S. C. 589, 2 S. E. 576; Ex parte Jones, 47 S. C. 396, 25 S. E. 285; Peeples v. Ulmer, 64 S. C. 501, 42 S. E. 429; Dixon v. Floyd, 73 S. C. 207, 53 S. E. 167.

For other cases, see New Trial, Cent. Dig. §§ 334, 335; Dec. Dig. ⇐165.]

[5. *Appeal and Error* ⇐1195; *Courts* ⇐104.]

An expression of opinion ore tenus by one of the justices of the Supreme Court, after judgment pronounced, cannot affect the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4664; Dec. Dig. ⇐1195; Courts, Cent. Dig. § 353; Dec. Dig. ⇐104.]

[6. *Appeal and Error* ⇐1015.]

[Cited in State v. Nance, 25 S. C. 174, to the point that the refusal by circuit court of a new trial on the facts is not reviewable by Supreme Court.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876; Dec. Dig. ⇐1015.]

Before Wallace, J., York, November, 1879.

This case is fully stated in the opinion of the court.

Mr. J. H. Rion, for appellant.

A motion may always be renewed upon sufficient grounds. 1 Till. & Shear. Pr. 432; 4 Abb. Pr. 404; 4 Wait's Pr. 612; 26 How. Pr. 396; Voorh. Code, 634 b; 75 N. Y. 599. The code, Section 197, authorizes the relief asked here. Counsel here, as other distinguished counsel in Brickman's case and others, thought Judge Aldrich's order appealable. And the direct provisions of the statute misled. The motion now is not too late. Wait's An. Code 333. Motion renewed was under circumstances different from when motion was made; but if facts were not different, court had power to hear. 33 Barb. 654; 74 N. Y. 379. Even the Supreme Court allows a rehearing. Judges Aldrich and Mackey do not object; and another judge may hear. 1 S. C. 141; 3 Wait's Pr. 423. See, too, 3 Wait's Pr. 442, s.

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*Mr. W. B. Wilson, contra.

November 22d, 1880. The opinion of the court was delivered by

McGOWAN, A. J. In July, 1878, John G. Steele, the plaintiff, brought an action against the Charlotte, Columbia and Augusta Railroad Company for damages on account of personal injuries received by him when a passenger on the railroad of the said company, in an accident at the bridge over the South Fork of Fishing creek, in York county, November 23d, 1877. The case was tried before Judge Aldrich, September, 1878, and, after much testimony, the jury rendered a verdict for the plaintiff for $10,000. A motion was made on the minutes of the judge for a new trial on the grounds—

"1. Because the verdict was contrary to the legal preponderance of the testimony.

"2. Because the damages are excessive."

Judge Aldrich refused to grant the motion. An appeal was taken from the order refusing the motion and the Supreme Court dismissed the appeal, not upon the merits, but upon the ground that the decision of the Circuit judge upon the facts was final and could not be reviewed by this court. Steele v. Charlotte, Columbia and Augusta R. R. Co., 11 S. C. 590.

May 3d, 1879, the attorney of the defendant corporation, after notice and on copies of the brief, the order of the Supreme Court and the affidavits, made a motion before Judge Mackey, at chambers, "for a new trial, and also for an order staying all proceedings upon the judgment of the plaintiff until the determination of this motion. The following are the affidavits referred to:

"State of South Carolina, county of Fairfield.—Personally appeared James H. Rion, and makes oath that he, as attorney for the Charlotte, Columbia and Augusta Railroad Company, defendant in the case of John G.

Steele v. Charlotte, Columbia and Augusta Railroad Company, made the motion for a new trial in said case upon the judge's minutes, before his Honor, Judge A. P. Aldrich, the presiding judge, and that at the time of making the motion deponent was not aware

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of the decision of *the Supreme Court in the case of Brickman v. South Carolina Railroad Company, [8 S. C. 173] and hence did not support his motion by an argument, he, at that time, supposing that the refusal of the presiding judge to grant the motion would be reviewable in the Supreme Court. That deponent is informed and believes that his Honor, the presiding judge, was also of the opinion that his refusal to grant the motion was reviewable in the Supreme Court. That deponents' inquiries and information produce the firm belief on his part that the Circuit judges and the bar of the state were not aware that the Supreme Court of the state would not review such refusal, before the publication of Volume VIII., South Carolina Reports, which were issued since said motion was made. James H. Rion.

"Sworn to before me, this 14th day of April, 1879. Henry N. Obear, N. P."

"State of South Carolina, county of Fairfield.—Personally appears James H. Rion and makes oath that on the 23d day of April, 1879, the Supreme Court of said state rendered a decision in the case of John G. Steele v. Charlotte, Columbia and Augusta Railroad Company, in which they did not pass upon the merits, and dismissed the appeal without prejudice to any right of the defendants; and at the time of rendering said decision the said court ore tenus stated that there was nothing to prevent the defendants from applying to the Circuit judge for a re-hearing of this motion for a new trial.

"James H. Rion,
"Attorney for defendants."

"Sworn to before me, this 23d day of April, 1879. Henry N. Obear, N. P."

Judge Mackey, after the affidavits were read and argument heard, refused the motion for a new trial, but July 26th, 1879, granted an order "that all proceedings under the judgment herein, be and the same are hereby stayed and enjoined, pending the determination of a motion for a new trial, to be made on behalf of the defendants herein at the next ensuing term of the Court of Common Pleas of the county of York."

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*From this order the plaintiff appealed upon the following grounds:

"1. Because it is respectfully submitted that his Honor had no jurisdiction in the premises, and that said order and decree are without the authority of law.

"2. That his Honor erred in holding that a motion for a new trial could be made at the next ensuing term of the Court of Common Pleas for York county.

"3. That in the proceedings had before his Honor no such application as above was made and no notice thereof given to the plaintiff or his attorneys.

"4. That said injunction was not in accordance with law, no levy having been made or affidavit that the same was threatened, and no bond required of defendant in said order.

"5. That said cause was res adjudicata, having been heard and decided by the Supreme Court, and that the motion for leave to renew motion for new trial before the Circuit judge who heard the cause had also been refused by said Supreme Court.

"6. That the motion for a new trial before Judge Aldrich was made upon the case as heard, and on the sole grounds that the verdict was contrary to the evidence, and excessive, and no exception was taken to his rulings upon the law pending said trial, and that defendants cannot now renew their motion for a new trial before any Circuit judge or Court of Common Pleas."

Whilst this appeal was pending in the Supreme Court, the defendants, upon the papers before referred to and the decree of Judge Mackey, made a third motion for a new trial before Judge Wallace, sitting in term time for York county, who heard the motion, and November 7th, 1879, ordered that "said motion is hereby refused upon the ground that I have no power to grant it. That proceedings upon the plaintiff's judgment be stayed until the determination by the Supreme Court of the appeal from this order, which, it is agreed by the counsel, shall be heard by said court at the November Term, 1879, in connection with the appeal now pending in the above case, and which is now on the calendar of said court."

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*The defendants excepted to this order and appeal to this court for that, "His Honor held that he had no power to grant the motion for a new trial then made."

Judge Mackey's order granted leave to the defendants to renew their motion for a new trial before the judge who might hold the court for the next ensuing term for York county, and in the meantime restrained the enforcement of the judgment. The plaintiff appealed from this order, but afterwards consented that his appeal might be considered in connection with defendants' appeal from Judge Wallace's order. We shall not now consider whether Judge Mackey, at chambers, had the right to make the order appealed from. So much of that order as granted leave to make the motion before another judge was without force, as the judge before whom the motion was to be made, could, if necessary, as well grant leave as any other judge; and so much of that order as restrained the plaintiff from proceeding on his judgment until the motion could be made, was adopted by Judge Wallace and extended until the appeals could be heard, and

is no longer important. We shall, therefore, confine ourselves to the last appeal, the consideration of which, so far as practical issues are concerned, will dispose of the whole matter.

Was it error of law for Judge Wallace to refuse to grant a new trial, on the ground that he had no power to grant it, Judge Aldrich having refused it? The original motion for a new trial was exclusively upon the facts of the case. It is quite certain that Judge Aldrich, who heard the case, had the right to hear and determine that motion, and, if he had refused to do so, upon the ground that he had no power, it would have been error in law and appealable to this court. "Circuit Courts shall have the power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law in the United States." Gen. Stat. 497. The phrase "Circuit Courts shall" clearly means not in union, but each separately. The right to grant implies the right to refuse, and Judge Aldrich did refuse the motion for a new trial. Was that order made by the authority provided by law to decide applications in cases of this character and

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final in its nature, or was it *reviewable for error by any authority known to the laws of the state? The terms of the code cited, indicate that the Circuit judge is the appellate authority provided in that class of cases, as it directs upon what principles new trials shall be granted. The law makes the Circuit judges acting separately, the Court of Appeals, to hear and determine motions for new trials upon the facts in jury cases. The Circuit judge hears the case and is supposed to be familiar with the facts, but whether this is the wisest provision that could be made is a matter for the legislature and not for us to discuss. It is certain that the decision of the Circuit judge refusing the new trial on the facts, could not be reviewed by this court, which, in the class of cases to which this belongs, is only a "court for the correction of errors at law." There was no error of law charged in the case and, therefore, it is clear that this court, as it has decided, could not review the order of Judge Aldrich. Is there any other authority competent to consider and review it on the ground of error of judgment? We think not. The Court of Common Pleas is a unity, although its jurisdiction is administered by a number of judges who are, in some sense, the exponents of the court. When one of these judges makes a decision upon the merits of a matter within his jurisdiction, that is not merely the personal opinion of the judge, but a judgment of the Court of Common Pleas, which exhausts the power of the court upon that subject and must stand until reversed or set aside in the manner prescribed by law. There is no appeal from one Circuit judge to another. All are of equal dignity and have the same right to pronounce the judgments of the court. One Circuit judge upon the same state of facts, has no power to change, alter or reverse a decision of a brother judge of the same Circuit. Otherwise, there would be no end to litigation. No one could tell where it would stop. Nothing could be considered as finally adjudged, and all rights of person and property would be set afloat. This rule results from the nature of the case and well-established principles. Its propriety is so obvious that it has not been thought necessary to enforce it by constitutional prohibition or express enactment, but for the sake of symmetry and convenience in practice it has been embodied in our 61st rule of the Circuit Courts, which de-

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clares that "if any application for an *order be made to any judge, and such order be refused, in whole or in part, or be granted conditionally, or on terms, no subsequent application upon the same state of facts, shall be made to any other judge; and if upon such subsequent application, any order be made, it shall be revoked," &c. This is precisely the same as the 31st rule of the New York courts, and Mr. Wait, in his practice, tells us that in that state "the courts enforce the rule rigidly." It seems that there are doubts whether the refusal of a motion even on the merits, is, as in the decision of a case, absolutely res adjudicata. The judge may sometimes reconsider his own orders, but all the authorities agree as to the general doctrine, "that the decision of one judge is not subject to be reviewed by another." 1 Greenleaf on Ev. 543; Smith v. Spalding, 30 How. Pr. 340; Dollfus v. Frosch, 5 Hill (N. Y.) 495; Cazneau v. Bryant, 4 Abb. 103; 3 Waite's Pr. 423; 4 Waite 611; Till. & Shear. 430.

But conceding this, it is said that there are circumstances under which the Court of Common Pleas will allow its own decisions to be assailed and set aside in its own courts. That is true, but we think it is never allowed indirectly by an appeal from one judge to another, or by renewing a motion before one judge which has been refused by another on the same state of facts. The court will not change its own orders (except they are merely administrative) without a direct proceeding to set aside one order and substitute another for good cause; and the fact that one of the judges may differ in judgment upon the subject, from the judge who made the order complained of, is not of itself regarded as sufficient cause.

A motion once heard and decided fully will only be reviewed upon a new state of facts arising after the decision. The new state of facts must be such as to make a new case, as misconduct in the judge granting the or-

der, newly-discovered evidence, or that the ground of the order has been removed, as in the case of Gilchrist v. Comfort, 26 How. 394, where an order refusing a new trial was based upon an adjudication, which was afterwards reversed. We cannot see that the facts of this case were changed in any important particular between the first application and the last. When the motion was

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made before Judge Wallace, the *facts, which the affidavits did not touch, were the same as when Judge Aldrich refused the original motion. The truth is, the motion before Judge Wallace was not to vacate for cause the order of Judge Aldrich, nor an application for a rehearing, but a renewed motion seeking a different judgment in the matter of the new trial, simply ignoring the order of Judge Aldrich. It was in substance really, an appeal from the judgment of one judge to that of another.

But it is ingeniously argued that the order of Judge Aldrich may be regarded as in the class which are sometimes "opened as matter of favor." Mr. Whittaker says these arise more particularly under the power of relief conferred by the code, (Gen. Stat. 612, § 197) as follows: "The court may, * * * upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect," &c. The relief allowed by this provision does not apply to this case. That section of the code was intended only for the relief of parties who, by reason of some mistake, inadvertence, &c., may have lost the opportunity to be present at the trial or to be represented there, as is suggested by the words "taken against him." In commenting on this provision, Freeman says that "if the parties were represented at the trial, they can only obtain relief by an application made in conformity to the rules of procedure provided by law in reference to new trials. But if they were not at the trial or not represented there on account of some mistake or excusable neglect, then their remedy is not by application for a new trial, but by an application addressed to the discretion of the court and made under the statute authorizing relief to be granted from judgments rendered against a party through "his mistake, inadvertence or excusable neglect." Freeman on Judgments, § 105; McKinley v. Tuttle, 34 Cal. 239; Williams ex parte, In re Campbell v. County of Charleston, 7 S. C. 71; Gibbes v. Elliott, 8 S. C. 60. In this case the defendants were ably represented at the trial and made vigorous defence. It is difficult to see what "relief" could be granted against an order "taken against him," when the complaint was for non-action in refusing to grant the order for a new trial.

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*If this "relief provision" could be made to embrace an order refusing a new trial, a case for relief was not made out. No relief can be granted against the judgment, for so far as that is concerned there is no allegation of any mistake, inadvertence, surprise or excusable negligence. As to the order refusing the new trial, it is stated in one of the affidavits that the defendants' attorney omitted to argue the motion, induced by "not being aware of the decision of the Supreme Court in the case of Brickman v. South Carolina Railroad Company, and supposing that the refusal of the presiding judge to grant the motion would be reviewable." That was not enough to make out a case for relief "against the order" for several reasons. It was a mistake in law. In all cases the surprise complained of must be in some matter of fact and not of law. 3 Waite's Pr. 403. The mistake was in matter extrinsic and had no connection with the case, except as it influenced the conduct of the attorney. The new matter must be such as could not by reasonable diligence have been known. As we understand it, the case of Brickman, then not published, declared no new principle as to the hearing of appeals. The same doctrine had been held in the cases of State v. Bailey, 1 S. C. 1; Floyd v. Abney, Id. 114; Abrahams & Son v. Kelly & Barrett, 2 S. C. 235; Byrd v. Small, 2 S. C. 388; Massey v. Adams, 3 S. C. 254.

Besides, it does not appear that the order of Judge Aldrich would probably have been different if the distinguished attorney of the defendants had argued the motion with all his accustomed ability. Judge Aldrich was fresh from hearing the whole case, and may not have desired further argument. It is not unusual for the most zealous and able lawyers to submit such motions without argument to the judge who heard the case. The judge does not say that his judgment was in any way affected by the want of argument on the facts, and we think it improbable that his opinion would have been changed by any argument that could have been made. We cannot suppose that his judgment was affected by any opinion he might have as to the appealable nature of his order, or that he failed to consider the subject gravely, and made merely a pro forma order in the expectation that the Supreme Court would cor-

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rect it. The high character of the *judge forbids any such supposition. Whittaker, in his Practice, states the rule as follows: "In motions for new trials on the ground of surprise or newly-discovered evidence, the strongest possible case must be made out. * * * Enough ought to be shown to raise at least a fair and bona fide inference that had the surprise not occurred, or had the newly-discovered evidence been introduced, the result might and probably would have

been different." 2 Whittaker's Pr. (4th Ed.) 465.

The expression of opinion ore tenus on the part of one of the members of this court at the time the order was announced dismissing the appeal, can have no bearing upon the law of the case. The court had just decided that they had no jurisdiction therein, and what was then said could not possibly be considered in the light of an "interpretation as to the effect of the opinion." It was simply the statement of an impression, prompted probably by regret at the necessary result of the case and sympathy for the losing party. In no possible view could it amount to more than an individual opinion upon a matter which had not been argued, and which, from its character, was not and could not be before the court for adjudication.

This was an action sounding in damages and peculiarly for the jury. We may think the verdict was too large, but we have no standard by which to measure it with exactness. Courts are more reluctant to grant new trials for excessive damages in actions for personal injury than in any other class of cases. The judge who heard the testimony, and who, by the law, was the proper officer to decide the question, refused to grant a motion for a new trial. An appeal was taken to the Supreme Court and there dismissed for want of jurisdiction. At a subsequent term of the Circuit Court the motion was renewed before another judge, who refused it on the ground that under the circumstances he had no power to grant it. We cannot say that this was error. The appeals should be dismissed, and it is so ordered.

McIVER, A. J., concurred.

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14 S. C. *334

*(Case No. 944.)

HARRISON v. BAILEY.

(November Term, 1880.)

[1. *Trusts* ⇐17, 18.]

A verbal contract with a judgment debtor to purchase his land at the execution sale, and then to transfer one-half of it to the debtor, is within the terms of the statute of frauds, and may not be established by parol evidence.

[Ed. Note.—Cited in Lamar v. Wright, 31 S. C. 75, 9 S. E. 736.

For other cases, see Trusts, Cent. Dig. § 22; Dec. Dig. ⇐17, 18.]

[2. *Contracts* ⇐47.]

An agreement made by a stranger with a judgment debtor to purchase the judgment, and allow the debtor one-half of the profits to be made by a sale of his land under the judgment, is without consideration, and therefore not binding.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 256; Dec. Dig. ⇐47.]

[3. *Equity* ⇐25.]

A court of equity will not lend its aid to enforce an agreement, whose object appears to have been to defeat the claims of the creditors of the plaintiff.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 77–85; Dec. Dig. ⇐25.]

Before Mackey, J., Greenville, April, 1878.

Action by William A. Harrison against John Bailey, commenced in 1877. The complaint was as follows:

The plaintiff, by Earle & Wells, his attorneys, complaining of the defendant, for cause of action shows as follows, to wit:

The plaintiff was largely indebted, and having a large family was sorely pressed to support them, and his homestead having been set off to him under an execution in favor of G. F. Townes for about $2100, he was residing at Reidville, in Spartanburg county, where the defendant came to him and pretended greatly to sympathize with him and with his family, and being his brother-in-law, proposed to befriend him and enable him again to start in the world, and said that he personally had some special means of acquiring the judgment of Townes, with whom he had intimate relations, and of having it transferred to him at chambers, and it was agreed by and between them that the defendant should acquire said judgment and bring the land into sale and buy it, unless it should sell too largely in excess of the whole amount of the judgment, and the defendant, Bailey, was to buy the said judgment and incur all expenses himself, and then transfer one-half of the land to the plaintiff in such manner as plaintiff should direct, in order to secure to his family the

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uninterrupted *enjoyment thereof, but if it should sell largely in excess of the judgment, then the costs of the judgment and the necessary expenses were to be deducted, and the plaintiff was to receive the balance of the money.

2. Plaintiff subsequently learned that this visit and conversation was on the Saturday previous to the sale on Monday of the Townes judgment by his assignee, as a portion of his assets in bankruptcy.

That the defendant, Bailey, suppressed the truth as to the judgment being for sale at auction, and misled and deceived the plaintiff by pretending that he possessed special means of obtaining the judgment and of having it transferred to himself.

3. That shortly after this defendant came again to plaintiff's house and informed plaintiff that he had secured the judgment, but evading the cost of it, gave plaintiff to understand that it was between $700 and $800, and it was agreed that the land should at once be brought into sale and that plaintiff should go up and attend the same. A few days after this, however, the defendant wrote that he "must on no account come to Greenville on the day of sale, that these were days of

injunctions, and that the matter must be done secretly and cautiously;" and plaintiff, reposing implicit confidence in the defendant's disposition to aid him in his embarrassment, and being impressed by his assumed kindly disposition to serve him, did not go to the sale on the first Monday in April, 1874, and it was not until afterwards that plaintiff learned that defendant had craftily and subtilely deceived him by the disguise of his pretended sympathy and friendship, and in utter violation of his agreement had allowed the land to be sold for some $200 or $300 less than the judgment and received the money himself.

4. Defendant, Bailey, paid plaintiff $800, which plaintiff thought it better to accept, as the land was irretrievably gone, and said Bailey promised to arrange the remainder to plaintiff's satisfaction, but plaintiff has sought, on two occasions, to meet the defendant, who has adroitly evaded meeting him, and he has been unable to obtain the balance due him.

5. And this plaintiff alleges and charges that the defendant has adroitly deceived and

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defrauded him, and by this means has *succeeded in preventing his purchasing said judgment, and has obtained it, according to his own statement, with all expenses thereof paid, for $250, and having done so has basely disregarded his contract to buy the land, pay the costs of the judgment and all expenses, and divide the same as herein set forth; that having obtained an unconscionable advantage of the plaintiff by abusing his confidence, has obtained the proceeds of said judgment and refused to pay over the same.

Wherefore plaintiff prays judgment—

1. That said defendant, in this purchase of said judgment, may be deemed to be the trustee of this plaintiff, and to have purchased the same for him and on his behalf.

2. That an accounting may be had, and that, after allowing defendant all just credits for amounts actually paid out, and for the amount paid plaintiff, the defendant be decreed to pay him the remainder of the money received on said judgment, together with interest from sales-day in April, A. D. 1874.

3. For such other and further relief as the court shall deem meet and to equity pertains.

4. For his costs herein.

The answer denied the statements of the complaint, set up a different agreement, of which there had been full performance, and plead the statute of frauds.

Upon the pleadings, the Circuit judge dismissed the complaint as not stating facts sufficient to constitute a cause of action, and as the contract alleged was obnoxious to the statute of frauds, it being a parol agreement for the purchase of land, and without consideration.

Plaintiff appealed.

Mr. W. E. Earle, for appellant.

Mr. J. S. Cothran, contra.

November 29th, 1880. The opinion of the court was delivered by

McIVER, A. J. In this case the Circuit judge dismissed the complaint upon two grounds: First. Because it did not state

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*facts sufficient to constitute a cause of action. Second. Because the contract sued upon was obnoxious to the statute of frauds. The case must therefore be considered as though all the allegations contained in the complaint, which are properly pleaded, were true. So considering it, we agree entirely with the Circuit judge. If the cause of action be regarded as a contract by which the defendant undertook to purchase the land of the present plaintiff under the execution in favor of Townes, "and then transfer one-half of the land to the plaintiff in such manner as plaintiff should direct, in order to secure to his family the uninterrupted enjoyment thereof," as some of the allegations in the complaint would seem to imply, then, clearly, it was a contract for an interest in lands which is within the terms of the statute of frauds, and parol evidence, upon which alone it is alleged to rest, would not be sufficient to establish it. McDonald v. May, 1 Rich. Eq. 91.

If, on the other hand, the cause of action alleged be regarded as an agreement on the part of the present defendant to buy the judgment in favor of Townes against the present plaintiff, and to allow him one-half of any profit that might be made by the transaction, then, clearly, there was no consideration alleged for such an agreement, and hence it does not constitute a cause of action. The present plaintiff was under an obligation to pay the whole amount of the judgment, and his property, as the event proved was sufficient for that purpose, and although something is said in the complaint about a homestead having been set off to him under the Townes judgment, there is no allegation that such homestead was set off to him in the land which was subsequently sold, or that it was a part of the agreement that the present plaintiff should abandon or waive his claim of homestead, if indeed, he could do so, whereby the land out of which it was carved might be sold by the present defendant for its full value, and that in consideration thereof the defendant had agreed to divide with the plaintiff any profit made by the transaction.

There is another view of this matter which would be fatal to the claim of the plaintiff. There is no principle of equity better settled than that he who seeks equity must himself do equity—that one who comes into the court

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of equity must come with *clean hands. In this case it is impossible to avoid the impression that the whole object of the alleged ar-

rangement between the plaintiff and the defendant was to defeat the claims of the creditors of the plaintiff, and to such purpose no court should lend its aid.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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14 S. C. 338

(Case No. 946.)

DILL v. MOON.

(November Term, 1880.)

[1. *Appeal and Error* ⇨91.]

A refusal by the Circuit judge to grant a stay of judgment for the possession of land, pending an action for improvements under the betterment act of 1870, (Gen. Stat. 559,) is a denial of a substantial right, involving the merits, and is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 612–641; Dec. Dig. ⇨ 91.]

[2. *Appeal and Error* ⇨91.]

There being nothing in the record to show that the improvements were not made in good faith—*Held*, that the stay should have been ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 638; Dec. Dig. ⇨91.]

[3. *Improvements* ⇨4.]

[The court will presume, in the absence of contrary proof, that the title to land under which improvements were made was colorable, and that the improvements were made in good faith.]

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 13; Dec. Dig. ⇨4.]

Before Kershaw, J., Greenville, July, 1878.

This case is fully stated in the opinion of the court.

Mr. G. G. Wells, for appellant.

Messrs. Garlington & Moore, contra.

November 30th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. John P. Moon brought an action against John P. Dill to recover possession of five acres of land in Greenville county. Dill denied plaintiff's right, setting up title in himself. Each claimed under different grantors, but nothing further appears as to the manner in which Dill came into possession. The case was heard July 18th, 1878,

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and the *jury found for the plaintiff, Moon, the land in dispute and $1 damages. On July 19th, at 9:45 o'clock a. m., Dill filed in the clerk's office the complaint required by the statute to recover the value of alleged improvements on the land. July 22d the Circuit Court refused a motion for an order "that all proceedings in the case of John P. Moon against John P. Dill be suspended until the trial of this case." From this refusal Dill appeals to this court upon the following ground:

"Because the plaintiff was entitled to the stay prayed for as of right, and it is respectfully submitted that his Honor, the presiding judge, was without discretion and erred in refusing the order prayed for."

It does not appear upon what ground the Circuit judge refused the motion, but it is insisted here that his order was "intermediate," which did not involve the merits of the action, nor affect any substantial right in said action, but related only to a matter of procedure, and is not appealable. It is true that an order involving merely the exercise of discretion on the part of the court is not appealable, as error of law cannot be alleged against such an order. But it appears to us that this order denied a substantial right. The words of the amendment to the code of 1873 are "involving the merits," and it has been held that an order refusing a motion to transfer a case to the county where the defendants resided, after the law upon that subject had been changed, was a denial of a substantial right secured by statute, and appealable. Blakely & Copeland v. Frazier et al., 11 S. C. 123.

What is said in that case is applicable to this: "The word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case. * * * It may be concluded that whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies to this court."

Did the refusal of the order deny to Dill, who had lost the land in the case of Moon against him, anything which he could claim of right in reference to his case? That must depend upon the question whether the facts of his case brought it within the provisions of the act of 1879, (Gen. Stat. 559,) in regard

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to im*provements or betterments. If the case comes within that act, it was error of law to refuse the order. The first section of the act provides: "That after final judgment in an action to recover lands and tenements in favor of the plaintiff, if the defendant has purchased the lands and tenements recovered in such action, or taken a lease thereof, or those under whom he holds has purchased a title to such lands and tenements, or taken a lease thereof, supposing at the time of such purchase such title to be good in fee, or such lease to convey and secure the title and interest therein expressed, such defendant shall be entitled to recover of the plaintiff in such action the full value of all improvements made upon such land by such defendant or those under whom he claims, in the manner hereinafter provided." * * *

"Section 4. The court, on the entry of such

action, shall stay all proceedings upon the judgment obtained in the prior action until a final judgment shall be rendered in this action," &c.

Within the time and in the manner prescribed, Dill claimed the right given by the first section of the act, and made a motion to stay all proceedings in the case of John P. Moon against him until the trial of the case, which was refused. Clearly, Dill had the right under the statute to have the case suspended, if he held, as a purchaser, a title which he had reason to believe was good. It is not alleged that he entered on the land by virtue of a contract with the legal owner, Moon, who had performed such contract on his part. Nor does it appear that he was a mere trespasser.

"Dill denied plaintiff's title, setting up title in himself." That was not precisely in the words of the act that he "had purchased the lands, supposing at the time of such purchase such title to be good in fee," but it does appear that each claimed under a different grantor, which, considering the purpose of the act, was equivalent to a claim as purchaser. It is not to be assumed that the title under which the improvements were made was fraudulent or pretensive. It must be considered to be bona fide until the contrary is made to appear, and there is nothing tending to negative the claim that he held under a title which he supposed to be good. Fraud is not lightly presumed. In the absence of proof to the contrary, the court

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assumes that the *improvements were made in good faith. If they were not, the jury can so find. The defendant in the action for the land should have an opportunity to have that question decided, and, in the meantime, by the express terms of the act, the judgment should be suspended. The motion should have been granted, and the order refusing it is reversed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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14 S. C. 341

(Case No. 947.)

SHARPE v. LEE.

(November Term, 1880.)

[*Bills and Notes* ⇨125.]

A note payable one day after date, "with interest from date at the rate of twelve per cent. per annum, interest to be paid annually," draws twelve per cent. interest after maturity.

[Ed. Note.—Cited in Mobley v. Davega, 16 S. C. 75, 42 Am. Rep. 632; Maner v. Wilson, 16 S. C. 476; Watkins v. Lang, 17 S. C. 17; Westfield v. Westfield, 19 S. C. 90; Wilson v. Kelly, Id. 168; Thatcher & Co. v. Massey, 20 S. C. 547; Piester v. Piester, 22 S. C. 140, 53 Am. Rep. 711; Smith v. Smith, 33 S. C. 215, 216, 11 S. E. 761; Baum v. Raley, 53 S. C. 40, 30 S. E. 713.

For other cases, see Bills and Notes, Cent. Dig. § 281; Dec. Dig. ⇨125.]

Before Mackey, J., Anderson, September, 1880.

The case is fully stated in the opinion.

Messrs. Brown & Tribble, for appellants.

Mr. W. H. Lyles, contra, contended that there was no difference between a note payable one year after date and one payable one day after date: if so, at what period would the line be drawn? That the words, "interest to be paid annually," apply to the manner of payment, and not to the rate, as in 2 S. C. 253.

December 6th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This was an action on a sealed note in the following words:

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*"Anderson C. H., S. C.

"$1616.51.

"One day after date we, or either of us, promise to pay W. S. Sharpe, trustee of Jane N. Neville, one thousand six hundred and sixteen 51-100 dollars, for value received, with interest from date at the rate of twelve per cent. per annum. Interest to be paid annually, as witness our hands and seals.

"May 1st, 1875.

(Signed) "Thos. B. Lee. [L. S.]
"Miriam E. Lee. [L. S.]
"E. Preston Earle." [L. S.]

On April 3d, 1880, the sum of $2255 was paid, which left due the sum of $447.63, if interest is counted at "twelve per cent. per annum and payable annually," but if it is counted at seven per cent. per annum, after it became due, the note was paid in full. The defendant made that question by way of demurrer "that the complaint did not state facts sufficient to constitute a cause of action." Judge Mackey sustained the demurrer and dismissed the complaint. The defendant appeals to this court on several grounds, which all state nearly the same proposition, in different forms, as that contained in the following:

"1. Because the sealed note was a due paper to bear interest at twelve per cent. annually."

The note was given on May 1st, 1875, prior to the re-enactment of the usury law of 1877, (16 Stat. 325,) when it was not unlawful for the parties to agree in writing, signed by the party to be charged therewith, for any specific rate of interest. Gen. Stat. 318. The question, then, is purely one of construction. What was the contract of the parties as expressed by the instrument itself? Was it to bear interest at twelve or seven per cent., or at twelve per cent. until due and seven per cent. after due? It is not necessary to

review the many cases in our books upon the subject. They have been collected and arranged under proper heads in the appendix to Johnstone's Equity Digest, p. 165. The general rule may be stated in the words of the court in the case of Langston v. S. C. Railroad Company, 2 S. C. 248: "If the

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debt bears a fixed rate of interest *on its face higher or lower than that provided by law, the interest fixed by law attaches on it for the detention of the principal sum when the parties do not contract that it shall be the rate after the debt becomes due." In construing a paper every word, if possible, should have its full effect. Here the note is made payable "one day after date, with interest from date at the rate of twelve per cent. per annum, interest to be paid annually." There can be no doubt of the intention—that the parties contracted that the interest at twelve per cent. should run for a longer time than one day, as indicated by the declaration that it should be "paid annually," otherwise the word "annually" would not have been used. As Judge Wardlaw says in the case of O'Neall v. Sims, 1 Strob. 115: "It amounted to a mutual stipulation for an indefinite extension of credit, and annual payment of interest during the extension. * * * The same reason would apply to a case of the principal payable one day after date with annual payment of the interest." On a bond due at twelve months, with annual interest from its date, the interest accrues annually as well after as before the debt falls due. Singleton v. Lewis, 2 Hill 408; O'Neall v. Bookman, 9 Rich. 80; Wright v. Eaves, 10 Rich. Eq. 582. The words "payable annually" do not occur in the case of Briggs v. Winsmith, 10 S. C. 133 [30 Am. Rep. 46].

It is not the province of the court to make contracts for parties, but to construe them in order to give effect to the intention. We have no doubt of the intention here.

The order dismissing the complaint should be reversed, and it is so ordered.

SIMPSON, C. J., and McIVER, A. J., concurred.

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14 S. C. *344

*(Case No. 948.)

STATE v. JONES.

(November Term, 1880.)

[*Forcible Entry and Detainer* ⇐49.]

An indictment will lie at common law for forcible entry and detainer.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 190; Dec. Dig. ⇐49.]

Before Mackey, J., Abbeville, October, 1880.

This was an indictment for forcible entry and detainer at common law against W. T. Jones and J. W. Ware. Defendants moved to quash the indictment on the ground that there is no such offence in this state; and after a verdict of guilty, they moved in arrest of judgment upon the same ground. Both motions were overruled and the defendants were sentenced. They appealed, alleging error in the Circuit judge in refusing their motions.

Mr. E. B. Gary, for appellants.

Mr. Solicitor Cothran, contra.

December 7th, 1880. The opinion of the court was delivered by

McIVER, A. J. In this case the defendants were convicted of forcible entry and detainer under an indictment at common law, and the only question raised by this appeal is, whether such an indictment can be maintained. In a leading case upon the subject of forcible entry and detainer, (State v. Speirin, 1 Brev. 123,) the court uses this language: "An indictment at common law lies for a forcible entry, because it tends to disturb the peace, and in such an indictment it is not necessary to allege that the party trespassed upon had any estate in the land, but only that he was in quiet possession thereof." Citing 3 Burr. 1698, 1731; 8 T. R. 357. It is true that the language just quoted is a mere dictum, inasmuch as the indictment in that case was under the statute, and not at common law, yet, as we shall

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presently see, *this dictum has the support of high authority; for while the cases cited from Burrows' Reports do not distinctly decide the point in question, though in one of them, (Rex v. Bake, 3 Burr. 1732,) Mr. Justice Wilmot does say: "No doubt an indictment will lie at common law for a forcible entry, though they are generally brought on the acts of parliament. On the acts of parliament it is necessary to state the nature of the estate, because there must be restitution, but they may be brought at common law," yet in the case of The King v. Wilson, 8 T. R. 357, the question was distinctly made, and it was held that an indictment at common law for this offence could be maintained. In that case Lord Kenyon, C. J., says: "There is no doubt but that the offence of forcible entry is indictable at common law, though the statutes give other remedies to the parties grieved—restitution and damages." Indeed, an examination of the various cases referred to in the above-cited cases will show that there never was any doubt entertained that an indictment at common law for this offence will lie; but that the only question was as to the allegations necessary to be made in such an indictment. In the case now before the court no exception seems to have been taken to the form of the indictment, as no copy of the indictment

has been incorporated in the case, and, as we understand it, the naked question presented is, whether an indictment for forcible entry at common law in any form will lie. In 1 Russ. on Crimes 304, it is said: "It is clear that in many cases an indictment will lie at common law for forcible entry if it contain not merely the common technical words 'with force and arms,' but also such a statement as shows that the facts charged amount to more than a bare trespass," as for example, where the entry is charged to have been made "unlawfully and with a strong hand," as was done in the case of The King v. Wilson, supra.

From this brief review of the authorities it is clear that even after the passage of the various statutes giving additional remedies in cases of forcible entry and detainer, an indictment at common law for this offense would lie, provided it contained the necessary allegations.

Under this view the question raised in the argument here as to whether the repeal of

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the various statutes in regard to this *offence, which are referred to in the case of State v. Speirin, supra, by ch. CXLVI., Gen. Stat. 778, restores the remedy by indictment previously existing at common law, does not properly arise and need not, therefore, be considered, inasmuch as the offence, as we have seen, continued to be indictable at common law, even while those statutes were undoubtedly in full force.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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14 S. C. 346

(Case No. 949.)

STATE v. McKETTRICK.

(November Term, 1880.)

[1. *Indictment and Information* ⟸32.]

The punishment for both grades of assault and battery being now prescribed by statute, all indictments for this offence must conclude contra formam statuti.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 127; Dec. Dig. ⟸32.]

[2. *Criminal Law* ⟸93.]

Trial justices have exclusive jurisdiction of assaults and batteries which are not of a high and aggravated nature.

[Ed. Note.—Cited in State v. Cooler, 30 S. C. 109, 8 S. E. 692, 3 L. R. A. 181.

For other cases, see Criminal Law, Cent. Dig. §§ 129, 137–166; Dec. Dig. ⟸93.]

[3. *Criminal Law* ⟸93.]

Courts of General Sessions have exclusive jurisdiction of assaults and batteries of a high and aggravated nature; but to give jurisdiction the aggravation must be set forth in the indictment more specifically than in the technical terms usual at common law.

[Ed. Note.—Cited in State v. Sims, 16 S. C. 486, 491, 492; State v. Beadon, 17 S. C. 55; State v. Smalls, Id. 64, 65; State v. Robinson, 31 S. C. 456, 10 S. E. 101; State v. Grant, 34 S. C. 109, 12 S. E. 1070.

For other cases, see Criminal Law, Cent. Dig. §§ 129, 137–166; Dec. Dig. ⟸93.]

[4. *Criminal Law* ⟸240.]

If a trial justice determines that a case of assault and battery brought before him is beyond his jurisdiction, and binds the defendant over to the Court of General Sessions, such determination of the grade of the offence is not conclusive upon the higher court.

[Ed. Note.—Cited in State v. Burch, 43 S. C. 4, 20 S. E. 758; State v. Glover, 90 S. C. 167, 72 S. E. 1087.

For other cases, see Criminal Law, Cent. Dig. § 500; Dec. Dig. ⟸240.]

[5. *Criminal Law* ⟸93.]

[Cited in State v. Sims, 16 S. C. 491; State v. Padgett, 18 S. C. 320; State v. Penny, 19 S. C. 223; State v. Pickett, 47 S. C. 105, 25 S. E. 46, to the point that under Const. art. 4, § 18, giving the court of general sessions exclusive jurisdiction over all criminal cases not otherwise provided for by law, and article 1, § 19, providing that all offenses less than felony in which punishment does not exceed a fine of $100 or imprisonment for 30 days, shall be tried summarily before a justice of the peace or other officer authorized by law, the court of general sessions has no jurisdiction over an ordinary assault and battery.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 161; Dec. Dig. ⟸93.]

[This case is also cited in State v. Evans, 18 S. C. 138; State v. Jeter, 47 S. C. 5, 24 S. E. 889; State v. Jeffcoat, 54 S. C. 199, 32 S. E. 298, as to the requisites of an indictment.]

Before Pressley, J., Abbeville, September, 1879.

Upon the call of this case at April Term, 1880, of the Supreme Court, it was found that the defendant's sentence had not been pronounced. The hearing of the case was suspended, this court holding that the appeal should be from the sentence. See 13 S. C. 439. At the next succeeding term of the Circuit Court for Abbeville, the sealed sentence was opened and pronounced, and defendant appealed.

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*The case is fully stated in the opinion.

Mr. W. C. Benet, for appellant.

Simple assault and battery was made a statutory offence by the act of 1870, (Gen. Stat. 195,) to which the common law must give place. 1 Bl. Com. 89; 14 Rich. 174; 2 Brev. 300. Otherwise, there would be two different punishments for the same offence. Where a statute changes the nature and degree, or the punishment of an offence, the indictment should conclude contra formam. 10 S. C. 193; Whart. Prec. 25; Archb. Cr. Pr. & Pl. 290.

Of simple assault and battery courts of trial justices have exclusive jurisdiction under the constitution, (art. I., § 19, and art. IV., § 18,) they being the "other officer au-

thorized by law." 2 S. C. 404. This is fully shown by the reasoning of the court in State v. Harper, 6 S. C. 464; see, too, 2 S. C. 1, and Dud. 167. The ground upon which this court, in State v. Williams, 13 S. C. 585, overruled State v. Harper, supra, as to petit larceny, sustains this position. In Williams' case it was held that petit larceny was not without the jurisdiction of the Court of General Sessions, because the punishment provided by statute was in excess of that within the competency of trial justices. But in cases of simple assault and battery the special punishment provided is not in excess of the competency of trial justices. Gen. Stat., ch. XXV., §§ 9, 10. Trial justices have exclusive jurisdiction. Apply the severe tests laid down in 14 Rich. 37 and Id. 283, and we have an exclusive jurisdiction declared in the words of article I., section 19: "All offences less than felony, &c., shall be tried summarily by a justice of the peace or other officer authorized by law, on information under oath, without indictment or intervention of a grand jury." These are clearly exclusive of the Court of General Sessions. See Gen. Stat. 708, § 2. The incongruity—and a striking one it is—which this court met in interpreting the law and the constitution with reference to petit larceny in State v. Williams, does not appear with reference to common assault and battery.

As a case of aggravated assault, which is within the jurisdiction of the Circuit Court,

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the indictment is fatally defective in *not setting out in terms the aggravation. Indictments must be certain to every intent, (1 Chit. Cr. Law 171–2,) both in matter charged and in manner of charging it. Id. 169, 171; Bac. Ab., tit. "Indictment," G 1; 1 Rich. 184. Not one aggravating fact is set forth. The charge is general and by way of recital. But an aggravated assault is not a simple assault. Gen. Stat. 195; 2 Bish. on C. L., §§ 42–3; Archb. Cr. Pr. & Pl. 926–7; 3 Chit. on Cr. Law 821, et seq.; 1 Bish. on Cr. Proc., §§ 77–88.

Mr. Solicitor Cothran, contra.

When a statute prescribing punishment is simply cumulative, the contra formam statuti may be disregarded. Trial justices clearly have a discretion to say whether a case of assault is within their jurisdiction. In this case the trial justice said he had no jurisdiction, and the sentence of the higher court proves that it was so. His discretion cannot be controlled.

The "other enormities" charged in the indictment sufficiently includes acts of aggravation; dragging by the hair, &c., as in this case.

Assault and battery is a common law offence. The statutes so recognize it, and simply prescribe the punishment.

December 7th, 1880. The opinion of the court was delivered by

SIMPSON, C. J. In this case, the appellant was put upon trial at the September Term, 1879, of the Court of General Sessions for Abbeville county, under charge of assault and battery.

The indictment was as follows:

"The State of South Carolina, county of Abbeville, to wit:

"At a Court of Sessions, begun to be holden in and for the county of Abbeville, in the State of South Carolina, at Abbeville courthouse, in the county and state aforesaid, on the first Monday of September, in the year of our Lord one thousand eight hundred and seventy-nine, the jurors of and for the county aforesaid, in the state aforesaid, upon their oaths, present that George McD. McKettrick, on the fourth day of June, in the year of our Lord one thousand eight hundred

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and seventy-nine, *with force and arms, at Abbeville court-house, in the county and state aforesaid, in and upon one Amanda McKettrick, in the peace of God and of said state, then and there being, did make an assault, and the said Amanda McKettrick, then and there, did beat, wound and ill-treat, and other wrongs and enormities to the said Amanda McKettrick then and there did, against the peace and dignity of the same state aforesaid.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that the said George McD. McKettrick, on the fifth day of June, in the year of our Lord one thousand eight hundred and seventy-nine, with force and arms, at Abbeville courthouse, in the county and state aforesaid, in and upon Amanda McKettrick, in the peace of God and of this state, then and there being, did make an assault, and the said Amanda McKettrick then and there did beat, wound and ill-treat, and other wrongs and enormities to the said Amanda McKettrick then and there did, against the peace and dignity of the same state aforesaid.

"J. S. Cothran, Solicitor.

"True bill—Wm. Z. McGhee, Foreman."

Upon this indictment the defendant was found guilty, with recommendation by the jury "to the mercy of the court." Thereupon, a motion was made in his behalf in arrest of judgment, upon grounds substantially which appear in the grounds of appeal herein.

This motion in arrest of judgment was refused by the Circuit judge, and the defendant has appealed to this court upon the following grounds:

1. Because simple assault and battery, i. e., assault and battery without aggravation, being a statutory offense under the general statutes of South Carolina, it is plain on the face of the indictment that both counts thereof are fatally defective in that they fail to allege that the offense charged was

committed contrary to "the form of the statute in such case made and provided."

2. Because the Court of General Sessions

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has not jurisdiction *in cases of assault and battery, except in such as are of a high and aggravated nature, requiring greater punishment than that prescribed by the statutes made and provided in cases of simple assault and battery; and because the general statutes of South Carolina vest courts of trial justices with exclusive jurisdiction in cases of common or simple assault and battery.

3. Because if the offence charged were one of assault and battery of a high and aggravated nature, in which the Court of General Sessions would have jurisdiction, the said indictment is fatally defective in that it does not set out the aggravation.

The grounds of appeal raise the questions—

1. As to the conclusion of the indictment.

2. As to the jurisdiction of the Court of General Sessions in cases of assault and battery.

3. As to the allegations necessary in an indictment for assault and battery.

The constitution, Article IV, section 31, requires that "all indictments shall conclude against the peace and dignity of the state."

And it is well-settled law, that in all statutory offences the indictment should conclude "against the form of the act," &c. This was held in the recent case of State v. Strickland, 10 S. C. 191; and is found in all the books on criminal practice and pleadings, and a failure in this respect renders the indictment fatally defective. State v. Strickland, supra. Is the offence charged in this indictment a statutory or a common law offence?

All assaults and batteries previous to the act of 1870, (Gen. Stat. 195), were punishable at common law, and hence up to the passage of that act, they were all common law offences. The act of 1870, however, conferred upon trial justices jurisdiction in cases of assault and battery where the offence "is not of a high and aggravated nature," and fixed the punishment for such assaults and batteries by fine not exceeding $100 or imprisonment not exceeding thirty days, and since the passage of this act, this class of assaults and batteries has been punishable under its provisions, the common law punishment having been repealed thereby. State v. Ripley, 2 Brev, 300; State v. Gray, 14 Rich. 174. "The common law is superseded by a statute, in so far as it is repugnant to the latter." 1 Bl. Com. 89.

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*The effect of the act of 1870, was to divide assaults and batteries into two classes: First. Those "of a high and aggravated nature;" and, Second. Those below that grade, jurisdiction as to the latter being conferred by the act upon trial justices, with authority to inflict punishment by fine not exceeding $100 or imprisonment not exceeding thirty days. The first class was left to the common law until 1878, when the general assembly passed "An act entitled 'An act to amend the law respecting the punishment for crime.'" 16 Stat. 453. This act altered and changed the common law punishments, in which imprisonment had been provided as a punishment in whole or in part, and subjected offenders in such cases to imprisonment in the penitentiary with or without hard labor, or in the county jail, with or without hard labor, at the discretion of the Circuit judge. This included assaults and batteries of the second class, and under the operation of the principle referred to above, this class by that act and immediately upon its passage, became a statutory offence, so that now all assaults and batteries are punishable by statute, and consequently all are statutory offences. Such being the fact, whether the offence charged in this indictment be assault and battery of a high and aggravated nature or one below that grade, the law absolutely requires that the indictment upon which a party is put upon his trial in such cases must conclude "against the form of the act," &c., &c. State v. Strickland, supra. The indictment in this case in neither of its counts thus concludes. It follows, therefore, that in this respect it is fatally defective.

Next: As to the jurisdiction of the Court of General Sessions in cases of assault and battery. Article IV., section 18, of the constitution provides "that the Court of General Sessions shall have exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law."

Article I., section 19, of the same instrument provides "that all offences less than felony and in which the punishment does not exceed a fine of $100 or imprisonment for thirty days, shall be tried summarily before a justice of the peace or other officer authorized by law," &c.

The Justice of the Peace Court has never been established, but a Trial Justice Court has been, by act of 1870, and its jurisdic-

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*tion therein defined almost in the same language as that of article I., section 19, above, of the constitution, conferring jurisdiction upon justices of the peace or other officer authorized by law. In the case of State v. Fillebrown, 2 S. C. 404, it was held that the general assembly might confer on an inferior tribunal, created by itself, the same powers which the constitution intended for justices of the peace. The Trial Justice Court is, therefore, a constitutional court, or rather its creation was authorized by the constitution, and it is entitled to exercise the powers which the act creating it has conferred upon it. This act, as we have seen, has

given this court jurisdiction in cases of assault and battery of a grade below that of a high and aggravated nature, and where the punishment does not exceed a fine of $100 or by imprisonment of thirty days; and it has conferred this jurisdiction in language which indicates that it was the intention of the general assembly that it should be exclusive. The jurisdiction is conferred upon the trial justice, as the other officer than the justice of the peace, referred to in article I., section 19.

There can be no doubt that had the Justice of the Peace Court been established and the powers embraced in section 19 had devolved upon that court, as would have been the case by virtue of the section itself, that that court would have had exclusive jurisdiction in all offences less than felony where the punishment did not exceed $100 fine or imprisonment for thirty days.

This conclusion is reached by the very strong language of the section itself, and is sustained by the principle upon which the State v. Williams, 13 S. C. 546, overruled the case of the State v. Harper, 6 S. C. 464.

In the case of the State v. Harper the court had decided that trial justices had exclusive jurisdiction in cases of petit larceny. This decision was overruled in the case of State v. Williams on the ground that the punishment in petit larceny had not been limited to $100 fine and thirty days, imprisonment, which was required to make exclusive jurisdiction attach to Trial Justice Courts under Article I., Section 19, of the constitution.

The punishment of assault and battery, however, below the grade "of a high and aggravated nature," is thus limited. This fact distinguishes assaults and batteries of that

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class from petit *larceny, and is the fact, on account of which the trial justice is entitled to exclusive jurisdiction in such cases.

It follows, from the construction thus given to Section 19, Article I., and to Section 18, Article IV., of the constitution, construed in the light of the case of State v. Williams and the act of 1870 in reference to trial justices, that trial justices have exclusive jurisdiction in cases of assault and battery not of a "high and aggravated nature," and that the Court of General Sessions has exclusive jurisdiction in cases of "a high and aggravated nature."

Now there is nothing on the face of this indictment which marks it as a case of a high and aggravated nature, and in the absence of some distinguishing feature of that kind the Court of General Sessions was without jurisdiction in the case.

We come now to the third ground of appeal, which involves an examination into the necessary allegations in an indictment for assault and battery in the Court of General Sessions. An indictment is the complaint of the state against the accused. Upon this the accused is put upon his trial. It should charge some offence cognizable by the court, and this offence, whatever it may be, should be clearly and distinctly set forth. The crime charged should be described with certainty, for "no latitude of intention will be allowed to include anything more than is expressed." Chit. on Cr. L. 171.

"Every crime must appear on the face of the record with scrupulous certainty." Id. 172. And in this respect it is needless to say that greater strictness is required in criminal than in civil proceedings. This is due to that tenderness which, as Lord [illegible] observes, should always prevail in criminal cases; and this is necessary, to the end that the accused may be fully informed of the offence which he is called to answer, and that the record may protect him in future. An indictment which fails to conform to these requisites is fatally defective. Now we have seen that assaults and batteries have been divided by the act of 1870 into two classes: First, "those of a high and aggravated nature," and, Second, those below that grade: the first class being exclusively cognizable by a trial justice, and the second exclusively cognizable in the Court of General Sessions.

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Where *a party then is charged with assault and battery before the Court of General Sessions, the indictment should show on its face that the assault and battery charged is of a high and aggravated nature. This is necessary to give the court jurisdiction and to put the accused to answer in that court.

Does the indictment, in this case, contain a charge of assault and battery of that kind on its face? The indictment is in the ordinary form. There is nothing in the description of the offence which would distinguish it from an ordinary simple assault and battery. It is not alleged, even in general terms, that it was high and aggravated, nor are there any special circumstances of aggravation stated; "beat, wound and ill treat," are the words used descriptive of the offence.

These are sufficient to show that an assault and battery is charged, but they do not indicate its character; whether the beating, wounding and ill treatment was mild—comparatively mild—or high and aggravated, does not appear. This is left to conjecture, and yet this is the essence of the offence in the Court of General Sessions. In the absence in the indictment of something showing the character and grade of the offence, how can it be said, even after conviction, that the accused has been convicted of an assault and battery of a high and aggravated nature, and how could the court graduate the punishment? The description in this indictment would be proper in a charge of the lowest grade, but where a high and aggravated offence is intended, something more is necessary. Serious bodily harm, intent to

kill, intent to commit a felony, the use of a stick or deadly weapon, or something showing aggravation, should appear.

Did the jury in this case know that they were passing upon the question whether the offence was high and aggravated? This they should have known, because the punishment of that offence is very different from the offence below that grade, being the difference between the penitentiary for years perhaps, and a small punishment by fine and not more than thirty days in the county jail.

It is true that the act of 1870, defining the jurisdiction of trial justices in criminal cases in reference to assaults and batteries, leaves it to the discretion of the trial justice

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in the first *instance when a party is brought before him to determine whether he will take jurisdiction or bind the accused over; but the act certainly never intended that his judgment in this matter should be final, and that he should have the power to fix, indisputably, the character of the offence when it came before the higher court.

The offence in the higher court consists of two ingredients: First. That it should be an assault and battery. Second. That it should be of a high and aggravated nature. If the trial justice's judgment, as to the last ingredient when he sends the case up, is conclusive, then this strange result would follow: That of the two ingredients which make up the offence before the Court of Sessions, the trial justice has already tried one without jury and without opportunity to the accused to defend, and the jury in the Court of Sessions is to try the other, and which, perhaps, is the least important—two tribunals adjudicating different ingredients of the same offence. Such could not have been the intent of the act of 1870.

The indictment in this case, in the judgment of the court, is fatally defective on its face, in the fact that it does not charge an assault and battery of a high and aggravated nature, either in general terms or in words descriptive of such an offence. The assault and battery charged, being upon the wife of the accused, he is certainly entitled to no sympathy if guilty, but he is entitled to be tried and punished, if guilty, according to law.

The order of the Circuit judge made on the motion in arrest of judgment is reversed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. 355

(Case No. 950.)

VAUGHAN v. FOWLER.

(November Term, 1880.)

[1. *Alteration of Instruments* ⇐8, 20.]

Putting a seal on a note after its execution, without the maker's knowledge or consent, is a material alteration and vitiates the contract.

[Ed. Note.—Cited in Kennedy v. Moore, 17 S. C. 466; Plyler v. Elliott, 19 S. C. 263; Heath v. Blake, 28 S. C. 416, 5 S. E. 842; Sloan v. Latimer, 41 S. C. 219, 19 S. E. 491, 691; Powell v. Pearlstine, 43 S. C. 409, 21 S. E. 328; Gunter v. Addy, 58 S. C. 183, 36 S. E. 553; Central National Bank of Kansas City v. Efird, 91 S. C. 138, 74 S. E. 136.

For other cases, see Alteration of Instruments, Cent. Dig. §§ 44, 182; Dec. Dig. ⇐8, 20.]

[2. *Alteration of Instruments* ⇐27.]

[Cited in Kennedy v. Moore, 17 S. C. 466; Gunter v. Addy, 58 S. C. 183, 36 S. E. 553, to the point that it is incumbent upon the party producing the instrument to explain its appearance.]

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 230–247; Dec. Dig. ⇐27.]

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*Before Wallace, J., Greenville, July, 1880.

Action by W. P. Vaughan, payee, against Elizabeth Fowler. The case is fully stated in the opinion of this court.

Messrs. Garlington & Moore, for appellant.

Whether the seal was put to the note before or after its execution, the alteration of the note thereby made was not of a character to invalidate the note. To render it void there must be a material alteration. 2 Pars. on Cont. (3d ed.) 226–7. An immaterial alteration will not avoid. 2 Chit. on Cont. 1168, note f. The seal here may be treated as surplusage, as it adds no strength to the contract, and impairs no right of defence.

Mr. W. L. Wait, contra.

December 8th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This was an action on a note for $100, dated July 19th, 1872, signed by Fowler & Walker, and Elizabeth Fowler, the defendant, with a seal after her name. Fowler & Walker were a firm, and as such executed the note at the time of its date, when Fowler was alive. He afterwards died, and the defendant, as his widow, signed the note. It does not appear in the case at what time she signed it. It is stated in the argument of counsel that it was "in the spring of 1876," but that fact not appearing in the case, it cannot be considered. The evidence was conflicting as to the circumstances under which she signed, and as to the seal being on the note at the time she signed it. The defence was the statute of limitations, want of consideration and the alteration of the paper by adding the seal after its execution by some other than the defendant, and without her knowledge or consent. The jury found for the defendant. The plaintiff moved for a new trial, and that being refused, appeals to this court upon the following grounds:

"1. Because his Honor erred in charging the jury that the plaintiff was not entitled to recover on the instrument in writing sued on, if it was shown by the proof that the

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seal which ap*peared to said instrument was not affixed at the time the defendant signed the same."

"2. His Honor should have charged the jury that the alteration of the instrument by affixing the seal thereto could not invalidate said instrument, unless said seal was essential in law to such recovery."

"3. Because the alteration of the instrument sued on by affixing the seal thereto although it may have been done after its execution, was not a material alteration in law, and worked no detriment or injury to the defendant, because the plaintiff was entitled to recover on said instrument against the defendant without its being sealed."

These exceptions relate entirely to the charge of the Circuit judge upon the subject of the addition of the seal, which was in these words: "That the seal, if put on the note after the execution and without the knowledge or consent of the defendant, was such a material alteration as would vitiate the contract, and the plaintiff could not recover."

It is insisted that this was error. That the alteration of the instrument by affixing the seal thereto was not a material alteration in law to invalidate it, unless the seal was essential to the recovery, and that it was not so essential for the reason that the note was recoverable without the seal.

It is well settled that "any alteration of a written security in a material part renders it altogether void." Stagg v. Pepoon, 1 N. & McC. 102; Mills v. Starr, 2 Bail. 359; Smith v. Cheney, 1 Hill. 148. Was the addition of the seal a material alteration? We have not been cited to any case in our own reports deciding the precise point, but upon principle it seems to us that there can be no doubt that it is a material alteration. "A change in the character or effect of the instrument, whether in respect to its obligation or to its weight in evidence, is a material alteration. Thus, the addition of a seal to the signature of the maker of a note converts it into a bond against which no plea of want of consideration can be made, and this invests his contract with attributes which he declined to impart to it. Consequently, the note is avoided." 2 Dani. on Neg. Instruments (2d ed.) § 1391; United States v. Linn, 1 How. 104 [11 L. Ed. 64].

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*It does not appear who made the alteration, but when on the production of an instrument it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. 1 Greenl. on Ev., § 569.

We see no error in the charge of the judge. The judgment is affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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14 S. C. 358

(Case No. 951.)

SULLIVAN v. SPEIGHTS.

(November Term, 1880.)

[1. *Appeal and Error* ⇐1219.]

This court cannot entertain a motion for a rehearing of a case decided by it, after the remittitur has been properly sent to the court below.

[Ed. Note.—Cited in Carpenter v. Lewis, 65 S. C. 403, 43 S. E. 881; Jones v. Charleston & W. C. Ry. Co., 65 S. C. 418, 43 S. E. 884; Halsall v. Atlantic Coast Line R. Co., 100 S. C. 489, 85 S. E. 434.

For other cases, see Appeal and Error, Cent. Dig. § 4720; Dec. Dig. ⇐1219.]

[2. *Courts* ⇐101.]

There being a vacancy in the Supreme Court, the two remaining justices constitute the court, under the terms of Article IV., Section 2, of the constitution, and are competent to discharge all of its functions.

[Ed. Note.—Cited in Williams v. Benet, 35 S. C. 150, 14 S. E. 311, 14 L. R. A. 825; Aultman v. Utsey, 35 S. C. 597, 14 S. E. 351.

For other cases, see Courts, Cent. Dig. § 347; Dec. Dig. ⇐101.]

This was a motion for a rehearing of the points decided in Sullivan v. Speights, 12 S. C. 561. The case is fully stated in the opinion.

Mr. J. C. C. Featherston, for the motion.

December 9th, 1880. The opinion of the court was delivered by

SIMPSON, C. J. At the November Term of this court, 1879, the appeal of Hewlett Sullivan, appellant, v. A. M. Speights, W. T. Shumate et al., respondents, after full hearing by the court, was dismissed, upon the ground that the exceptions of the appellant had not been served on the presiding judge within the time limited by the statute on that subject. The remittitur in the case was sent to the court below on January 6th, 1880, in accordance with the rules of this court, and filed by the clerk of the court below on the 10th of the same month. On April 16th

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*thereafter the appellant gave notice that he "would move the Supreme Court for a new hearing" of said case on the grounds—

1. That the court which dismissed the appeal was not a constitutional court, there being but two judges in the Supreme Court at the time.

2. That the Circuit judge regarded the service of the exceptions as sufficient and went on and settled the facts, and that the respondents should not have been allowed to object for him.

3. That the appellant has discovered that he had written acceptance of notice and grounds of appeal within the ten days by the clerk of the Circuit Court, and that this was sufficient notice to the judge of the Circuit Court.

In accordance with this notice the petition has been presented here and is now for consideration.

This court, under the constitution, is a court for the correction of errors of law in cases at law, with appellate jurisdiction in cases of chancery. It has also original jurisdiction in certain cases, and it is authorized to hear motions with reference to cases already on its docket, brought there according to the rules prescribed in appeal cases. If the motion can be heard then, it must come before the court through one of these channels; it cannot be heard as an independent motion.

It does not claim to come by appeal to have an error either of law or fact below corrected, nor is it made in a motion within the original jurisdiction of the court.

Is it a motion with reference to a case on the docket of this court?

According to the facts stated, the case to which it refers was heard and determined at the November Term, 1879, about one year since. Under the rules of this court, when a case is heard here and determined, the remittitur to the court below is not sent down immediately, but it is retained in every case for ten days, unless the court directs otherwise. And on application, showing sufficient cause, either of the justices, at chambers, may direct by order that it be further retained until the third day of the next session. The object of this is to reserve jurisdiction over the case, so that, should ei-

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ther of the parties desire to make any *motion in reference thereto they might have the opportunity to do so and the court the power to hear it. After the remittitur, however, is sent down, the case passes beyond the reach of this court and its jurisdiction is lost, and no motion can be heard by this court on the matter thereafter.

Now it appears that the remittitur in this case, as has been already stated, after being retained for ten days under the rules by the clerk of this court, was sent down on January 6th, 1880, and was then filed in the office of the clerk of the court below on the 10th of the same month.

Such being the fact, if there was nothing else in this petition but the two last grounds upon which it is based, it would be dismissed at once as beyond our reach. The petition, however, states that the court, when it heard and determined the motion to dismiss the appeal in the case of Sullivan, appellant, v. Speights, W. T. Shumate et al., respondents, was composed of but two justices—Associate Justice Heskell having resigned and no one having been elected to fill the vacancy. And it is contended that this was not a constitutional court, and therefore its judgment dismissing the appeal was void. If this proposition of the petitioner can be sustained, then the case of Sullivan v. Speights, W. T. Shumate et al., is still, or ought to be, on the docket of this court, and this petition would be proper.

The question, then, in the case is, was the court which dismissed the appeal a constitutional court?

Article IV., Section 2, of the constitution provides that the Supreme Court shall consist of a chief justice and two associate justices, two of whom shall constitute a quorum.

Now, it is manifest, from the provision in this section in reference to a quorum, that the framers of the constitution contemplated the possibility of but two of the justices of the court being present at some time or other, and this provision was adopted to meet that contingency. The fact of but two of the justices being able to be present may result from but two causes: First, a vacancy by death, resignation or otherwise of one; and, Second, by the absence of one. Can the section referred to, by any rule of construction,

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be confined and limited in its applica*tion to but one of these contingencies? If so, to which one? It is evident that the framers of the constitution intended that in some contingency the presence of two of the justices was sufficient for a quorum. This they have expressly declared: and inasmuch as there are but two causes, vacancy and absence, which could produce a state of facts where but two of the justices could be present, is there any reason for the conclusion that they intended to provide for the one and not the other? The question involved is one of intention on their part. And is it not much more reasonable to suppose that they intended to provide for both contingencies rather than to leave one unprovided for?

The evil which was to be met by this provision of the constitution was the delay which the framers knew might sometimes take place in the business of the court, if the entire court had always to be present to discharge its functions; and to prevent this delay the constitution invested two of the justices, when present, with all of the powers of the court, declaring, in express terms, that they should constitute a quorum. It is hardly necessary to go into an investigation of the powers of a quorum; this is well understood and needs no elaboration.

Now, it is one of the rules of construction, in endeavoring to reach the true intent and meaning of a remedial act, so to construe it as to suppress, as far as possible, the evil and to enlarge the remedy. This applies to the constitution as well as to acts of legislation. Applying this rule to the section of the constitution under consideration, can

it be confined to but one of the two causes resulting in the presence of but two justices at any session of this court? This would be narrow, contracted and unreasonable, and would violate the rule itself.

Article II., Section 4, of the constitution provides that the house of representatives shall consist of one hundred and twenty-four members, and that a majority shall constitute a quorum. Has it ever been suggested that if one or more of the whole number of that body should die or resign, that this would divest the majority of the powers of a quorum? And yet if the principle contended for here be sound, such would be the result in reference to the house of representatives and all other bodies where a quorum is provided for in a number less than the whole.

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*The opinion of the court is, that the constitution, in the section referred to, has invested any two of the justices with full power to discharge all of the functions of this court.

The motion is, therefore, dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

14 S. C. 362

(Case No. 952.)

SULLIVAN v. JONES.

(November Term, 1880.)

[1. *Appeal and Error* ⟸215.]

Grounds of appeal which complain of omissions by the Circuit judge to charge upon points not brought to his attention during the trial, are not properly before this court for consideration.

[Ed. Note.—Cited in Sawyer, Wallace & Co. v. Macaulay, 18 S. C. 546; Acker v. County of Anderson, 20 S. C. 499.

For other cases, see Appeal and Error, Cent. Dig. §§ 1309–1314; Dec. Dig. ⟸215.]

[2. *Estoppel* ⟸78.]

One claiming property in millstones under the terms of the agreement made with the owner of the mill when the stones were put there, is not estopped from asserting his claim by reason of a lease made with a subsequent owner of the mill and lands adjacent, binding him to pay as rent, one-fourth of the crops made on the farm, and one-third of the toll taken at the mill, the owner to pay half of the expenses of the mill, and possession to be surrendered at the end of the year—the testimony showing that both before and after this lease, the millstones were treated as distinct from mill-house and water-power.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204–210; Dec. Dig. ⟸78.]

[3. *Fixtures* ⟸9.]

Millstones put by a stranger into a mill-house, under agreement with the owner of the mill that they may be removed at pleasure, do not become a part of the freehold.

[Ed. Note.—Cited in De Laine v. Alderman, 31 S. C. 275, 9 S. E. 950.

For other cases, see Fixtures, Dec. Dig. ⟸9.]

[4. *Fixtures* ⟸27.]

And such agreement may be proved in an action brought by a subsequent owner of the mill against the owner of the millstones, affecting the ownership of such stones.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 5; Dec. Dig. ⟸27.]

Before Pressley, J., Greenville, November, 1879.

Action by Hewlet Sullivan to recover $150 from John R. Jones, for an alleged trespass in taking and carrying away certain millstones, of the value of $100. Defendant took the millstones from plaintiff's mill, without injury to the freehold. The case is stated in the opinion.

The plaintiff appealed upon the following grounds:

1. Because his Honor erred in refusing to

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hold that the rental *obligation of John R. Jones, defendant, to Hewlet Sullivan, plaintiff, for the mill, said obligation dated May 4th, 1875, estopped the defendant from setting up any claim to mill, millstones, or any appurtenances thereto.

2. Because his Honor erred in not holding that as the millstones were part of the freehold, that defendant had no right to remove the same, to the injury of the plaintiff.

3. Because his Honor erred in permitting defendant to prove an agreement with Messrs. Hughes that he was to have an interest in said mill and appurtenances, when the property was sold as the property of William McNeely and bought by the plaintiff as judgment creditor of William McNeely.

There were four other grounds alleging error in not charging certain propositions of law.

Mr. J. C. C. Featherston, for appellant.

Mr. George Westmoreland, contra.

December 13th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover damages for a trespass alleged to have been committed by the defendant in taking and carrying away certain millstones from a mill-house on the land of the plaintiff. The defence was that the millstones were the property of the defendant and were taken by him under an agreement made with a former owner of the land at the time the millstones were placed in the mill-house.

The testimony tended to show that the land upon which the mill-house was located originally belonged to one William McNeely, who conveyed it to G. T. Hughes by deed dated May 26th, 1866, which deed was not recorded. G. T. Hughes, on January 22d, 1867, conveyed to T. J. and G. T. L. Hughes by a deed of that date, which was duly recorded. Soon after the purchase by these last-named purchasers they entered into an agreement with the defendant and his brother, James

H. Jones, whereby the Messrs. Jones were "to furnish the millstones and fixtures thereto and put the mill in running order; that the

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Messrs. Hughes were *to furnish the mill-house and water-power," and the proceeds of the mill were to be equally divided. It was also agreed that "the millstones and fixtures were to be and to remain the separate property of the Jones', and if at any time the business of grinding should become unprofitable, or should the parties disagree, the Jones' were at liberty to enter and remove said stones and fixtures. Under this agreement said stones and fixtures were put in said mill-house by the Jones'." The plaintiff having subsequently obtained a judgment against McNeely, the land was sold by the sheriff under it, and bought by the plaintiff in January, 1874. At this sale public notice was given that the millstones and fixtures on said land were the property of the Jones', and that whoever bought the land would buy subject to their claim; but so far as appears from the "case" no controversy was raised as to the title to the land. When the defendant was offered as a witness to prove the agreement above referred to between himself and brother and the Messrs. Hughes, the plaintiff objected to his testifying upon that point, "on the ground that his rental agreement with the plaintiff, in which he agreed to pay Sullivan rent for the use of the mill, estopped him."

The agreement referred to as an estoppel, is in the following words:

"Greenville, S. C., May 4th, 1875.

"In consideration that I am to have the use and possession of a certain tract of land, called the mill tract, lying in Greenville county, South Carolina, belonging to Hewlet Sullivan, for the purpose of making a crop thereon the present year, I do hereby bind myself to cultivate said place in a husband-like manner, and when the crop is made and gathered, I agree to give said Sullivan the one-fourth part of all the crops made on said place. I further agree to give said Sullivan the one-third part of the toll taken in at the mill on said place. If there is any expense attached to running said mill said Sullivan is to pay one-half the expense. I further agree to return the possession of said place to said Sullivan at the end of the present year.

"Witness my hand and seal.

"Attest: W. L. Wait.

"J. R. Jones. [L. S.]"

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*The Circuit judge, after hearing the agreement read over, overruled the objection, and the plaintiff excepted. There was also testimony to the effect that one White, who rented the mill in 1878, paid the Jones' for the use of the stones and fixtures, and the plaintiff for the use of the house and water-power.

The Circuit judge charged the jury that if they came to the conclusion that there was such an agreement, as the one above stated, between the Messrs. Jones and the Messrs. Hughes, "that the millstones and fixtures never became a part of the freehold, and hence could not pass with the land at the sale, and that it was not necessary for notice to have been given at the sale, that the intention of the parties at the time the millstones and fixtures were put there must govern."

The jury having found a verdict for the defendant, the plaintiff gave notice of appeal, upon various grounds, which are set out in the "case." All of these grounds, except the first, second and third, complain of omissions on the part of the Circuit judge to charge the jury upon points, which, so far as the "case" discloses, were not brought to his attention during the trial, either by a request to charge or otherwise, and, therefore, are not properly before us for consideration. We presume, however, that the appellant does not regard them as material, as they were not insisted upon in the argument here, and, therefore, no practical evil will result from the failure to present those points in such a way as that they could be properly considered by this court.

The first ground of appeal presents the point which seems to be mainly relied upon by the appellant, and that is that the "rental agreement," above set forth, estops the defendant from setting up any claim to the millstones. Without entering into a discussion of the principles upon which the doctrine of estoppel rests, it seems to us sufficient to say that the agreement relied upon wholly fails to show any recognition whatever, on the part of the defendant, of the right of the plaintiff to the millstones; and certainly something of this kind would be necessary to create an estoppel. The millstones are not mentioned in the agreement, and the testimony, as we have seen, shows that both before and after the date of the agreement,

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the millstones were *treated as separate and distinct from the mill-house and water-power. The former owners of the mill, by their agreement with the Jones', expressly recognized the title of the defendant and his brother to the millstones, and after the agreement was made, there is strong ground for the inference that the plaintiff himself had likewise recognized the right of the defendant and his brother to the millstones by allowing White, who rented the mill in 1878, to pay the Jones' for the use of the millstones, while he only paid the plaintiff for the use of the mill-house and water-power.

The principle object of the agreement seems to have been to secure the rent of the tract of land as a farm, and what is said in it about the mill, so far from tending to show that the defendant recognized the right

of the plaintiff to the millstones, would rather seem to indicate the contrary. For while the defendant agreed to give the plaintiff only one-third of the toll taken at the mill, the plaintiff was to pay one-half of any expense that might be incurred in running the mill—rather a singular arrangement, if the mill, with all its appurtenances, including the millstones, belonged to the plaintiff. We agree, therefore, with the Circuit judge that there was nothing in that agreement which estopped the defendant from setting up a claim to the millstones.

The second ground of appeal was not urged in the argument here, but was, as we understood, abandoned, and very properly abandoned, as it is very clear that it could not be sustained.

The third ground of appeal alleges error on the part of the Circuit judge in permitting the defendant to prove the agreement above referred to with the Messrs. Hughes, when the property was sold as the property of McNeely, under a judgment against him, and bought by the plaintiff. We do not find that any such objection was made to the testimony when it was offered, and, therefore, according to a well-settled rule, it cannot be interposed here. We may remark, however, that we are unable to perceive how such an objection could be sustained even if made at the proper time. The Hughes' were unquestionably the owners of the land at the time the agreement in question was made, and if it was afterwards sold under a judgment against McNeely, their vendor, that certain-

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ly would not *prevent proof of the agreement under which the millstones were put in the mill by the Jones'. The judgment could not bind the millstones which were put in the mill after McNeely had parted with his title, unless they had become a part of the freehold, which, as we have seen, was not the case.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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14 S. C. 367

(Case No. 955.)

MACOY v. CURTIS.

(November Term, 1880.)

[1. *Officers* ⇐19.]

Quere: If an office is forfeited by reason of failure of the officer elected to qualify within the time prescribed by law, could such forfeiture be avoided by an act of the legislature, passed after the time limited?

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 22, 23; Dec. Dig. ⇐19.]

[2. *Clerks of Courts* ⇐7.]

A clerk of court, elected his own successor at the general election, November 7th, 1876, gave bond, December 18th, which was approved January 1st, 1877, but he did not receive his commission until May 3d, upon which he endorsed the usual oaths June 20th, 1877. Another person was elected clerk at the general election, November 2d, 1880, and qualified and was commissioned in December following. *Held*, that the term of the first clerk was four years from the general election in November 1876, and until his successor, then elected, was qualified.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 21; Dec. Dig. ⇐7.]

[3. *Officers* ⇐52.]

The commission, which is only evidence of the election, may affect the time of actual enjoyment, but it cannot affect the constitutional term of office, which is for four years from the election.

[Ed. Note.—Cited in Smith v. McConnell, 44 S. C. 493, 22 S. E. 721; Verner v. Seibels, 60 S. C. Append. 576, 39 S. E. 274.

For other cases, see Officers, Cent. Dig. § 72; Dec. Dig. ⇐52.]

[This case is also cited in Carolina Groc. Co. v. Burnet, 61 S. C. 206, 39 S. E. 381, 58 L. R. A. 687, as to jurisdiction of the Supreme Court in matters submitted on an agreed statement of facts, and in McDowell v. Burnett, 92 S. C. 472, 75 S. E. 873, to the fact that the tenure must depend on the act creating the office or upon the Constitution.]

Original application to the Supreme Court. The facts are stated in the opinion.

Mr. R. A. Lynch, for plaintiff.

Mr. J. F. Hart, same side.

1. The constitution requires (Art. II., §

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30,) that before enter*ing upon the duties of their respective offices, all officers of the state shall take the oath therein prescribed.

It is evident that plaintiff had not qualified until this oath was taken.

2. The constitution further requires (Art. III., §§ 17, 19,) that the governor shall commission all officers; and that all grants and commissions shall be in the name and under the seal of the state.

The commission being a constitutional requirement, would seem of necessity to constitute the essential qualification necessary to inception in office.

The case at bar is to be distinguished from a line of cases of which State v. Toomer, 7 Rich. 225, is perhaps the leading exponent, and which held in effect that the commission was merely evidence of the election, and that the term of the office after commission sued out, related back to the election. Those cases were decided under certain acts creating the office, which limited the term of the incumbent to an exact number of years, without containing the further provision found in Article IV., Section 27, "and until his successor is elected and qualified." They were decided a convenienti: no other result could have been reached, for a hiatus in the office would constantly have occurred whenever accident or laches prevented the successor from being qualified to enter upon

the duties of the office the instant it became vacant by the expiration of the term of his predecessor.

But in this case there could be no relation back, for the office was never vacant. The same office cannot be held by two persons at one and the same time. There could be no holding by relation back, under the new title, for the tenure had never been divested under the old title until full qualification under the new title had been accomplished.

Were the old decisions forced into application to the new case, the sureties of predecessor and successor would each be liable for the acts of their respective principals during the annexed period; or the different sureties where successor and predecessor were united in the same person, would be held liable during such period.

We must recognize that the organic law

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from which the title *arises in this case, is essentially different from that creating the office of commissioner and Ordinary in former days. Here a vacancy can never occur in the office of clerk, by bare expiration, where there is no qualified successor at hand ready to assume it. The original term lawfully continues in all its original force and vigor until the officer under his new tenure is substituted by qualification following election. 4 S. C. 178; 9 S. C. 6; 25 Ohio St. 588; 19 How. 73; 17 Cal. 11; 1 Nev. 133; 9 Penna. St. 513.

The constitution, in reference to the office of governor, provides that he shall hold the office for two years and until his successor is "elected and qualified"—the same words as respects the office of clerk.

Mr. Justice Willard, interpreting this clause, says: "Two things are essential to perfect a present right of possession—election and installation. Election determines the right to succeed the existing incumbent at the time and in the manner prescribed by law, and installation establishes a present right to exercise the functions of the office." 8 S. C. 483; Id. 514.

If the election, without the further act of qualifying, conferred the office, how could the governor elected in 1874 resign the office thirty days after his successor had been elected in 1876? The office would not be his to resign. The election, and not the oath, would have made the successor the governor.

The entire scope of the opinions in the two foregoing important cases, concedes that but for the renunciation of the title acquired in 1874, by an attempted installation under a new title, Chamberlain might have successfully retained the office as governor de jure long after his defeat in the election of 1876, and until the governor elect had qualified under all the forms of law to receive the office.

The oath in Article II., Section 30, was all that was required to qualify the governor, as he gave no bond, &c. But in the case of the clerk, he must first, execute his bond, and have it approved; second, subscribe to the oath in Article II., Section 30; third, receive his commission under the seal of the state, and signed by the governor; fourth, and before entering upon the duties of his office, take and subscribe to a further oath,

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to be endorsed on his *commission, not to share the profits of his office, &c.; and lastly, to sign the roll of county officers. See Gen. Stat. 174.

3. But it will be said that as predecessor and successor were united in the same person after the election of 1876, it was plaintiff's duty to immediately qualify; that he could not prolong his coming term by neglecting to qualify, so as to cut off the existing term; and that principles of public policy are at variance with such a right; and that he cannot take advantage of his own laches.

The statutory provisions in force, and affecting this branch of the case, and the political status of the executive offices of the state government, through whom the acts of qualification were to be perfected, completely answer this argument. Gen. Stat. 125; 15 Stat. 322.

By reason of the revolution through which the state government passed between November, 1876, and May, 1877, many of the officers elect, had not been able to receive commissions and to "qualify according to law," by taking the oaths required to be endorsed on the commission; consequently, by act of May 23d, 1877, all officers elect in 1876 who had not already qualified, were allowed thirty days from that date "to qualify and enter upon the duties of their respective offices."

The plaintiff here, received his commission May 3d, 1877. He qualified under it June 20th, 1877, within the time allowed by this act.

But aside from this, there are other facts attending this branch of the case, entitled to consideration.

It was the duty of the secretary of state to notify plaintiff of his election in 1876; and after notification he had thirty days in which to qualify. There is no evidence that he was ever notified. If not, the fault is not his.

His bond was executed December 18th, 1876, but not approved until January 1st, 1877. It will hardly be asserted that he could have controlled an earlier approval.

Before either of these acts was accomplished, the state was undergoing a revolution. When plaintiff's bond was executed and approved, Chamberlain and his secretary of state held the executive offices of the state and its great seal, without which no commission could issue, and the rightful governor

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and secretary *were excluded from their offices in the state-house and the election returns and certificates therein, by an armed force. Circumstances entirely beyond his

control prevented an earlier qualification. If he was guilty of any laches, it was only that he did not apply for a mandamus against the governor and R. M. Sims, as secretary of state, (the title of the latter to the office being still in dispute,) to issue his commission under seal.

Messrs. J. J. Hemphill, and T. C. Gaston, contra.

January 10th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This is a case in the original jurisdiction of this court, submitted upon an agreed statement of facts, under the provisions of Section 389 of the code of procedure. At the general election, November 2d, 1880, George W. Curtis was elected clerk of the Court of Common Pleas and General Sessions for Chester county, gave bond November 27th, and was commissioned clerk December, 1880, for four years. On December 4th, 1880, he took the special statutory oaths in such cases provided, and on the same day signed the roll of county officers and demanded possession of said office. His predecessor in the office, C. C. Macoy, refused to deliver possession, upon the allegation that his term of office had not expired. Whereupon the said Curtis took possession of the office, and this is an action in the nature of a quo warranto, instituted by the said C. C. Macoy to recover possession of the said office of clerk.

His claim is as follows: At the general election, held October 16th, 1872, the plaintiff, C. C. Macoy, was elected clerk of the court for Chester county, and on November 22d, 1872, gave bond, qualified and received his commission. At the general election, November 7th, 1876, he was again elected his own successor. His second bond bears date December 18th, 1876, and was approved by the board of county commissioners January 1st, 1877: but on account of confusion in the government of the state, which existed at that time, his commission was not issued until May 3d, 1877. The usual oaths endorsed on the commission bear date as late as June 20th, 1877. Under these circumstances the question propounded for decision by the

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court, is this: * "Has the term of office of C. C. Macoy, as clerk of the Court of Common Pleas and General Sessions for Chester county, expired? If that question is decided in the negative, it is agreed that judgment be given for C. C. Macoy for the possession of said office: and if in the affirmative, that judgment be given for George W. Curtis for the possession of said office."

The constitution of the state (Art. IV., § 27,) provides that "there shall be elected in each county, by the electors thereof, one clerk for the Court of Common Pleas, who shall hold his office for the term of four years, and until his successor shall be elected and qualified."

Article XIV., Section 10, further provides "that the election of all state officers shall take place at the same time as is provided for that of members of the general assembly, and the election for those officers whose term of service is for four years shall be held at the time of each alternate general election."

The act of March, 1874, provides "that the next general election shall be held pursuant to the provisions of the amendment to Article II., Section 2, of the constitution of the State of South Carolina, on the Tuesday following the first Monday in November, 1874, and forever thereafter, on the first Tuesday following the first Monday in November in every second year," &c.

The construction placed upon these provisions by those who framed the constitution and enacted the laws to carry it into effect was, that the term of county officers—including that of the clerk of the court, like that of state officers—was a fixed and unshifting period. This is shown by the act of 1870, (Gen. Stat. 38); act of 1877, (16 Stat. 230); and act of 1878: "To provide for the filling of vacancies of county offices, and to regulate the holding of elections therefor." 16 Stat. 507. These acts, giving the governor the right to fill a vacancy for an unexpired term of a former incumbent, and in providing that the person so appointed and elected, "shall hold his office until the next general election and until his successor shall qualify," &c., are manifestly based upon the view that the term of county offices was from one general election to another, with the possibility of unexpired terms. Under this construction, making the general elections the commencement of the terms of all offices, state and

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*county, the question in this case could never have arisen. But the case of Wright v. Charles, 4 S. C. 178, judicially interpreting the constitution, declared a different construction and authoritatively determined that there can be no unexpired term in the office of clerk, but that each incumbent is entitled to hold the office for four years, whether elected at a general election or at a special election at some intermediate time. From this decision it follows that the term being four years, and not necessarily commencing at a general election, the end must depend upon the time it legally commenced to run.

The plaintiff, C. C. Macoy, claims possession of the office in controversy upon the allegation that being clerk in 1876, at the general election of that year he was elected his own successor, but prevented by well known circumstances, he did not receive his commission under that election until May 3d, 1877. He held and enjoyed the office from the general election in 1876 until May, 1877, but as up to that time he had no commission under the new election, he claims that he

was holding under the supplemental authority of his term of 1872, which gave him the right to hold "until his successor should be elected and qualified," and that, being his own successor, he cannot be considered to have been "elected and qualified" before he received his commission in May, 1877; and starting at that point, four years carries his term to May, 1881. The defendant, George W. Curtis, who was elected at the general election in 1880, and who is qualified and commissioned and in possession of the office, denies the claim, insisting that the right of the plaintiff to hold the office ceased as soon as he, his successor, was elected and qualified, and that he should not be disturbed in the possession of the office.

In the first place the defendant insists that the plaintiff never, in fact, was entitled to a term under the election of 1876; that he did not legally qualify under that election—the consequence being a forfeiture of the office—under the act of 1873, and that during all the time after 1876 he was holding the office under the supplemental authority of the term of 1872, and of course the moment his successor was elected and qualified he was entitled to the office. The act of 1873 (15 Stat. 322), declares "that it shall be the duty of

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every state and county officer *elected by the people to qualify within thirty days after receiving official notification thereof, and upon the filing of such bond and qualifying according to law, he shall enter upon the duties of said office. * * * If any officer elected by the people shall fail to qualify and enter upon the duties of his office, as required by the provisions of this act, he shall forfeit the office to which he shall have been elected, and the governor is hereby authorized to order an election to be holden within ninety days to fill the vacancy." 15 Stat. 322.

If the plaintiff did not, as he insists, qualify and enter upon the duties of his office until May 3d, 1877, his office was then forfeited, unless that forfeiture was cured by the act of May 23d, 1877, which provides "that all county officers elected at the last general election who have not qualified, be and they are hereby allowed thirty days from and after the passage of this act to qualify and enter upon the duties of their respective offices," &c. 16 Stat. 224.

It may be as alleged, that the onus is upon the plaintiff, and he must recover, if at all, upon the strength of his title which he has himself put in issue in a judicial proceeding; yet the court will always hesitate to declare a forfeiture, except in a proceeding instituted expressly for that purpose, and especially in a case where the alleged forfeiture was the result of extraordinary events and involving no personal blame. From the view which the court takes, it will not be necessary to consider what effect the act of 1877, called the validating act, which was passed after the expiration of the thirty days allowed before forfeiture, could have in dispensing the alleged forfeiture declared by the act of 1873. According to our view, the plaintiff was not one of those who needed further time to qualify, and as he was not liable to forfeiture, the last act was not applicable to him.

Assuming, then, that the plaintiff did have a term under the election of 1876, the defendant further insists that the term had expired before the defendant was elected and qualified. The precise question involved is as to the time when the last term of the plaintiff commenced to run: the election, the qualification or the date of the commission.

The following sections of the constitution and provisions of law are referred to:

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*Article II., Section 30, of the constitution requires "that before entering upon the duties of their respective offices all officers of the state shall take the oath therein prescribed."

Article III., Section 17, requires that the "governor shall commission all officers, and that all grants and commissions shall be in the name and under the seal of the state."

"Every clerk, before entering upon the duties of his office, in addition to the oath required by the constitution for persons chosen or appointed to any office of profit or trust, shall take the oath, [not to share profits], which said oaths shall be endorsed on the commission. * * * That the clerks, before receiving their commissions, shall enter into bond, to be approved by the county commissioners." Gen. Stat. 174.

"No executive, judicial or other officer elected to any office shall be entitled to receive any pay * * * until he shall have been duly commissioned and qualified." Gen. Stat. 125.

The facts are, that the plaintiff being clerk, was re-elected at the general election in November, 1876. He executed bond December 18th, which was approved January 1st, 1877, and, as his attorney says, "presumably forwarded with the constitutional oath." There was no difficulty in his way as to the oath, and in the absence of statement to the contrary, we assume that he took the oath when he forwarded the bond. Then he was in possession of the office, and had done everything the law had required of him, except receive his commission with endorsements, which, at the time, had not been issued. On January 1st, 1877, after he had been elected, had given bond, taken the constitutional oath, and was in possession of the office, was not the plaintiff, in fact and in law, clerk of the court under the election of 1876, even without his new commission?

To have the full possession and emoluments of his office several things were made pre-requisites—election, bond, qualification

and commission. Is it reasonable that the performance of all of these, except the last, should have no effect whatever in clothing him with the office, and that even his right to it and its tenures should be made to depend upon the single fact of his receiving a commission which, but the incident of what had gone before and not the act of the electors, but his own, might be prevented by accident or omitted by design? So far as elec-

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tion, *bond and constitutional oath were concerned, he was then elected and qualified. Nothing remained to be done but to receive his commission. That was more than four years ago, and if he was then clerk, elected and qualified, his term has expired and he is not now entitled to the office.

But if the plaintiff was not then clerk de jure under the election of 1876, for lack of his commission, he certainly was clerk after he received his commission, which, when issued without regard to its date, had reference back to the election. We do not understand that the provision in the constitution makes short terms and long terms—some four years and some more than four years, depending upon the time the incumbent may happen to hold over, but the terms of four years only, succeeding each other according to the calendar, the words, "and until his successor shall be elected and qualified," being added merely to prevent a chasm in the discharge of the duties of the office, and amount to no more than an authorized occupation of so much of the succeeding term. Such, of necessity, is the construction in its application to all that class of offices, the term of which runs from one general election to another, as, for example, that of governor. Such is the meaning of the whole provision taken together, and its enforcement is necessary to preserve order and symmetry. In our government certainly the election is the origin and foundation of the right to all elective offices. This would seem to be the correct view from principle, and we also regard it well settled by authority of this state, that neither the existence of an office nor the term of time for which it exists, depends upon the commission, which is only evidence of the appointment or election. State v. Billy, 2 N. & McC. 356; State v. Jeter, 1 McC. 233; State v. Lyles, Id. 239; Kottman v. Ayer, 3 Strob. 92; State v. Toomer, 7 Rich. 227; Ex parte Smith, 8 S. C. 515.

It is said in the case of Jeter that the "tenure by which an office is held does not depend upon the commission which the governor may think proper to give; it is only evidence of the appointment. The tenure must depend upon the act creating the office or upon the constitution."

In the case of Lyles, the court decides that

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"the commission *does not confer the office, it is only evidence of it, and cannot change the term by which the constitution declares it shall be held. As soon as an Ordinary is elected he is an officer under the constitution, and entitled to all the rights and immunities conferred by that instrument."

In the case of Ex parte Smith, Judge McIver says: "It is very obvious in a government like ours, where the people are the source of all powers, that the title to all elective offices depends upon and is derived from the election, the choice of the people, as manifested at the ballot-box."

The case of State v. Toomer was strikingly analogous, and, in some respects, stronger than this. Henry R. Laurens was master in equity for Charleston county, and was reelected in December, 1844. He executed his bond December 3d, which was approved December 24th, 1844, but his commission did not issue until May 7th, 1845, and it was without seal and had endorsed on it only the constitutional oath. The term of office was "for four years and until his successor was elected and qualified." The act of 1840 required a master in equity within three weeks after his election to tender his bond, duly executed, and immediately after it has been approved shall sue out his commission; and upon his neglect or failure to do so within the said time, his office shall be deemed absolutely vacant, &c. Notwithstanding these stringent provisions and the failure of Mr. Laurens to sue out his commission within the time, his sureties were held liable for a default under the bond of 1844, the court declaring that the statutory provisions prescribing the manner of executing the bond, suing out commission or taking the oath of office, were merely directory. Judge Munro, as the organ of a unanimous court, says: "The only efficacy imparted to the official title of an officer elect by a strict compliance with the directions of the law, such as giving bond, suing out his commission, taking the oath of office, &c., within the prescribed times, is to protect the title against forfeiture. If the state sees proper to excuse his delinquency by granting him a commission, the defects in his title are cured, and if he be already in office his title 'de facto' is immediately converted into a title 'de jure,' having relation back to the time of his election."

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*It has been held in New Hampshire: "On general principles, the choice of a person to fill an office constitutes the essence of his appointment. * * * After the choice, if there be a commission or an oath of office, or any ceremony or inauguration, these are forms only, which may or may not be necessary to the validity of any acts under the appointment, according as usage or positive statutes may or may not render them indispensable." Johnston v. Wilson, 2 N. H. 202.

It is true that the constitution makes it the duty of the governor to issue a commis-

sion, which seems to be necessary to put the officer into full practical possession of his office. One elected clerk is not to enter upon the duties of his office or receive its emoluments until he is commissioned. It has been held that before there can be such vacancy, by the death of a person elected to office, as to require it to be filled by executive appointment, the person elected must have been qualified and entered upon the duties thereof. Commonwealth v. Hanley, Brightly's Lead. Cas. on Elections 675. But whilst the commission may be a formal pre-requisite to enable one out of possession to obtain it, we do not see how that necessarily affects the term—the time the office has to run. Actual enjoyment may not be identical with the term, which is a creature of the law and cannot be set afloat and made to vary, shift, or change, according to the caprice, interest or laches of any one who may happen to be incumbent. As illustrated by this case: Should the beginning of the second term be pushed up because there was no commission to May, 1877, the result would be that the election for clerk of the court for the county of Chester would be thrown out of regular connection with all other elections in the state, and possibly a special act of the legislature every four years would be necessary.

If the suing out the commission is, in one sense, a condition precedent to full enjoyment, it certainly does not create the office—for by the terms of the very law which creates the obstacle as to enjoyment the existence of the office is assumed. The abstract right is recognized as a matter prior to and independent of the commission. "No officer elected to any office shall receive pay until he shall have been commissioned and quali-

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fied." The *industry and research of the counsel for the plaintiff found a case in which it is contended that a different doctrine was held. Brodie v. Campbell, 17 Cal. 21. In that case Judge Norton, of the twelfth judicial district of California, held his office for six years under an appointment of the governor, "and until the election and qualification of his successor." He was elected September 6th, 1854, and January 2d, 1855, took the oath of office and was commissioned. At a general election, September 7th, 1859, Brodie was elected his successor, but the governor refused to commission him as prematurely elected. At a general election, November 6th, 1860, Campbell was elected and commissioned. The controversy was between Brodie and Campbell, who was the judge, and that was made to depend upon the question whether 1859 or 1860 was the proper time to elect a successor to Judge Norton. If Norton's term ran from his election, 1859 was the proper time and Brodie was judge. If it ran from the time he qualified and was commissioned, 1860 was the proper time and Campbell was judge. The court held that Norton's full term ran from January 2d, 1855, when he was qualified and commissioned and gave judgment for Campbell. This case does touch the principle involved here, but it is, in several respects, quite different from the case at bar. There the judge elect was not required to give bond and had not taken the constitutional oath. He had done nothing whatever towards perfecting his title before January 2d, 1855, when he took the constitutional oath and was commissioned. It is stated that there was no unusual delay, January being the time fixed by the legislation of the state for the commencement of the terms of district judges. Strong as the facts were, Judges Baldwin and Cope, whilst they concurred with Chief Justice Field, who delivered the judgment of the court, filed a separate opinion, which states: "We do not mean to say that a person appointed to a vacancy may delay to qualify as long as he chooses and then fix his regular term from the act of qualification, for that would be to perpetuate the office in himself; nor even that the governor could defer signing the commission for as long a time as he chose, for that

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would give him the power to *prolong the term of his appointee indefinitely; but that the rule in this case is that the new term commences with the qualification; the modification of the proposition being that this qualification must not be unreasonably deferred." But if the case were in all respects analogous to this, the judgment could only influence us so far as the argument and the dignity of the court which pronounced it are entitled to our consideration and respect. Our own cases are binding upon us as authority and we conceive are in accord with reason and the analogies of the law of our republican institutions and system of popular elections.

The question propounded in the case, whether the term of office of C. C. Macoy, as clerk of the court for Chester county, has expired, is answered in the affirmative, and it is therefore ordered that judgment be rendered in favor of George W. Curtis, the defendant.

SIMPSON, C. J., and McIVER, A. J., concurred.

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14 S. C. 380

(Case No. 956.)

STATE v. BROWN.

(November Term, 1880.)

[1. *Highways* ⟸112.]

County commissioners may require road hands to open a new road, and a refusal to obey

without proper excuse, is a misdemeanor, cognizable by a trial justice's court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 346, 347, 351–355; Dec. Dig. ⟸ 112.]

[2. *Highways* ⟸151.]

A road worker cannot excuse his default by the objection that the road ordered to be opened will injuriously affect the constitutional rights of the owners of the land through which it passes, the land-owners themselves making no complaint.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 415; Dec. Dig. ⟸151.]

[3. *Indictment and Information* ⟸3.]

No formal indictment is required in a trial justice's court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9–23; Dec. Dig. ⟸3.]

[4. *Criminal Law* ⟸260.]

Where an appeal is taken from the sentence of a trial justice to the Court of General Sessions, the case should not be heard de novo.

[Ed. Note.—Cited in State v. Williams, 40 S. C. 379, 19 S. E. 5.

For other cases, see Criminal Law, Cent. Dig. § 584; Dec. Dig. ⟸260.]

Before Aldrich, J., Hampton, March, 1880.

The case is fully stated in the opinion of the court.

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*Mr. W. S. Tillinghast, for appellant.

Mr. Solicitor Gantt, contra.

January 10th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. The defendant was tried in a court of trial justice for failing to work in opening a new road in Hampton county, found guilty and sentenced to pay a fine of $5 or be committed for twenty days. He appealed to the Court of General Sessions, and a trial was there had de novo before a jury. No indictment was found, but the case was tried on the warrant of arrest, which, with the verdict and sentence, came up from the trial justice's court, and did not allege that the offence was committed "contra formam statuti;" but, after stating the charge plainly, commanded the constable, as follows: "These are therefore to command you to apprehend the said Charles Brown and bring him before me to be dealt with according to law." Citizens were summoned from an area of ten miles around to open the new road, of whom the defendant was one. A motion was made to quash the proceeding, which the Circuit judge refused, and submitted the case to a jury upon the facts, who found the defendant guilty, and the judgment was "sentence of trial justice is confirmed with additional costs of appeal."

The defendant appeals, and renews his motion in this court upon the following exceptions:

"1. That the warrant or information was entirely insufficient in law, in that there was no allegation in the same that the charge was committed against any law, or contrary to the form of any statute.

"2. That the county commissioners, or any one of them, are not authorized to appoint a warner, or by themselves to summon citizens of the county living within the area of ten miles to open new highways, and if they had, the act of 1874, Section 4, under which defendant was tried, applied solely to failure or refusal to work existing highways, and not to the construction or opening of new ones."

We will first consider the last exception,

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which makes the *point that the conviction was erroneous for the reason that the county commissioners had no right to warn out persons liable to do road duty to open a new road, but only to repair old ones.

By the act of 1874 "to amend Chapter XLV., of Title XI., Part I., of the general statutes relating to the repair of highways and bridges," it is provided "if any person of the legal age refuse to work upon the highways and roads (having no justifiable excuse) according to the direction of the overseer, he shall be deemed guilty of a misdemeanor, and upon conviction thereof in a trial justice's court, shall be fined in a sum not less than $5 nor more than $10, or be imprisoned in the county jail, for a period of not less than five nor more than twenty days." 15 Stat. 784.

The question is whether the defendant was properly convicted under this act for refusing, when warned by authority of the county commissioners, to work in opening a new road. If not, it is difficult to understand how new roads could be opened.

Article IV., Section 19, of the Constitution declares that "the qualified electors of each county shall elect three persons for the term of two years, who shall constitute a board of county commissioners, which shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties," &c.

In 1868, an act was passed declaring that "the boards of county commissioners have power, and they are hereby authorized to appoint special commissioners to lay out public highways in those cases where they shall be satisfied that the road applied for is important: provided, however, that the said commissioners shall have no power to open any new road until they shall have given three months previous notice by advertisement in the settlement through which the intended road is to be opened. * * * The roads so to be laid out by such special commissioners, or the same as settled on appeal, shall be recorded, opened and worked as public highways of the towns, cities or

counties in which they are respectively situated, in the same manner as other highways of the town, city or county are required by law to be recorded, opened and worked." Gen. Stat. 265.

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*The same provisions, substantially, are re-enacted in the act of 1875, "to reduce all acts and parts of acts in relation to county commissioners, their powers and duties, into one act and to amend the same." 15 Stat. 990. From these provisions there can be no doubt that the county commissioners have the right, upon giving notice as required, to have new roads laid out and opened and worked "as other highways of the town, city or county," and to require all persons liable to said duty to work in opening the same.

The argument drawn from Section 23, Article I., of the constitution, that "private property shall not be taken or applied for public use without the consent of the owner or just compensation being made therefor" is not well founded. It does not appear that any private property has been taken without the consent of the owner. There is no allegation that the county commissioners did not give notice in the settlement through which the road is to pass as the law requires. No land-owner is before the court objecting to the opening of the road. Until the contrary is made to appear, we assume that the county commissioners have complied with the law in all respects; and under these circumstances a road worker will not be heard to make objection, in order to escape the discharge of a public duty, that the constitutional rights of other citizens through whose lands the proposed road runs, are injuriously affected by the opening of the road.

The trial justice had the same right to try a defaulter for refusing to work in opening a new road as for refusing to work in repairing an old road. So far as the court of trial justice is concerned we can see no fatal defect in the conviction either as to irregularity in the proceedings or as to the terms of the warrant, which directs the constable to arrest the defendant and "carry him before the trial justice, to be dealt with as required by law." In a trial justice's court no formal indictment "contra formam statuti" is necessary. All proceedings before trial justices in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offence charged—the information may be amended at any time before trial. All proceedings before trial justices shall be summary, &c.

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Gen. Stat. *196. The conviction of the defendant in the court of the trial justice must stand.

But it is urged in the first exception that the warrant or information was entirely insufficient in law, in that there was no allegation in same that the charge was committed against any law or contrary to the form of any statute. We have seen that this exception is not well taken so far as the court of trial justice is concerned, but it may be different as to the trial of the appeal in the Court of Sessions. It appears that the Circuit judge did not decide the case himself, nor have an indictment found by the grand jury, but simply referred it to the jury on the papers as they came from the trial justice. It is not clear what should be the character and form of the proceeding in the Circuit Court upon an appeal from a conviction in a trial justice's court. The act of 1870 provides that "every person convicted before a trial justice of any offence whatever, and sentenced, may appeal from the sentence to the next term of the Court of General Sessions for the county. The appellant shall be committed to abide the sentence of the said court * * * until the final decree, sentence or order of the court therein, and to abide such final sentence, order or decree," &c. Gen. Stat. 748. The words "final decree, sentence or order" indicate that the appeal should be heard by the Circuit judge sitting in an appellate character. It was clearly error to try the case de novo. Without a formal indictment "no person shall be held to answer in any court for an alleged crime or offence, unless upon an indictment by a grand jury, except in the following: First. Where a prosecution by information is expressly authorized by statute. Second. In proceedings before a police court or trial justice; and, third, in proceedings before court martial." Gen. Stat. 708.

Since this case was heard the legislature has passed an act in conformity with these views, providing in Section 6, "that the said appeal shall be heard by the Court of General Sessions on the grounds of exceptions made, and upon the papers hereinbefore required, and without the examination of witnesses in said court. And the said court may either confirm the sentence appealed from, reverse or modify the same, or grant a new trial, as to the said court may seem meet and conformable to law.

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*The judgment of the Circuit Court is set aside, and the case remanded, that the appeal from the trial justice may be heard according to law.

SIMPSON, C. J., and McIVER, A. J., concurred.

14 S. C. 385

(Case No. 957.)

GIBBES v. G. & C. RAILROAD COMPANY. STATE, ex relatione ATTORNEY-GENERAL, v. SAME. Ex parte CLYDE et al. Ex parte COURTENAY.

(November Term, 1880.)

[1. *Courts* ⇐82.]

In the administration of its own rules, this court, as far as practicable, will not permit mere forms to override substance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 295; Dec. Dig. ⇐82.]

[2. *Exceptions, Bill of* ⇐39.]

The first section of the act of 1878 (16 Stat. 698), regulating appeals to the Supreme Court, applies to all cases where the order, decree or judgment appealed from was made during the term at which the case was tried.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 51, 52, 54–56, 60; Dec. Dig. ⇐39.]

[3. *Appeal and Error* ⇐425, 564.]

To be entitled to an appeal from a decree rendered during the term at which the case was tried, the appellant, within ten days after the rising of the court, must furnish the presiding judge, and serve the respondent's attorney with notice of his intention to appeal, and within thirty days thereafter must serve his case upon the respondent. Rogers v. Nash, 12 S. C. 560, affirmed.

[Ed. Note.—Cited in Re Fifty-Four First Mortgage Bonds, 15 S. C. 304.

For other cases, see Appeal and Error, Cent. Dig. §§ 2155–2161, 2501–2506, 2555–2559; Dec. Dig. ⇐425, 564.]

[4. *Appeal and Error* ⇐429.]

After the time had expired for furnishing the presiding judge with notice of intention to appeal, the respondent, in ignorance of appellant's failure so to furnish his notice, signed an agreement as to the papers which should constitute the appeal record, and the time within which it should be prepared. *Held*, that there was no waiver of the failure to furnish the presiding judge with such notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2172; Dec. Dig. ⇐429.]

[5. *Appeal and Error* ⇐329.]

A cestui que trust has the right to appear in this court and avail himself of the appeal of his trustee. This case distinguished from Shaw v. Railroad Company, 10 Otto 611 [25 L. Ed. 757] and Annely v. De Saussure, 12 S. C. 512.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1836; Dec. Dig. ⇐329.]

[6. *Appeal and Error* ⇐329.]

But such cestui que trust must secure to the trustee all expenses necessary to the prosecution of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1836; Dec. Dig. ⇐329.]

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*Motions to dismiss appeals. The cases are fully stated in the opinion.

Messrs. C. H. Simonton and James Conner, for Clyde et al.

Messrs. Samuel Lord, Jr., and J. P. K. Bryan, for Courtenay.

Messrs. Pope & Haskell, for Clark, trustee.

Messrs. D. T. Corbin, A. G. Magrath and Julian Mitchell, for Fisher, receiver.

January 10th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. Proceedings were originally instituted in the above-entitled cases in the Court of Common Pleas for Richland county, on behalf of creditors, to sell the property of the Greenville and Columbia Railroad Company. To this end an order was made by Judge T. J. Mackey on November 29th, 1879. Under this order Mr. Barnwell, the master, exposed the road to sale, at public auction, in the city of Columbia, on April 15th, 1880. At this sale several bidders appeared, among them W. P. Clyde, T. M. Logan, Joseph Bryan and W. A. Courtenay, as a committee of second mortgage bondholders. At a certain stage of the bidding, when Mr. Courtenay, as the agent of this committee, had bid the sum of $2,303,600, the hammer of the auctioneer fell. The cash payment of $20,000, required by the order of sale, was handed over to the master, and the names of the committee entered upon the auctioneer's book. After this was done, but before the master and his auctioneer had left the block, it was brought to the attention of the master that another party had bid a higher sum than that at which the property had just been knocked down to the committee, and this before the hammer fell. Upon investigation of the facts, and upon the advice of his counsel, the master concluded to re-open the biddings, which was immediately done, but against the protests of the committee. The cash payment, however, was returned to Courtenay and the biddings re-

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opened. Finally, at a bid of *$2,963,400 by Courtenay, the property was again knocked down, the cash payment of $20,000 again turned over to the master and the sale ended. On July 10th, 1880, thereafter, W. P. Clyde, T. M. Logan and Joseph Bryan filed their petition in re to the July Term of the court, claiming that the sale was complete to the committee at the bid of $2,393,600, and that the master erred in opening the biddings after the property had been knocked down to them at that price; that the receipt of the master of the cash payment of $20,000, and the entry in the book of the auctioneer of the names of the committee as purchasers, fixed and bound the bargain, and that it was thereafter irrevocable, and they prayed relief on that basis. After some further proceedings, and with the proper parties before the court, the whole matter, by order of the presiding judge, was referred to the master, with instructions to take testimony upon the issues raised and report the same to the court. Upon the coming in of the report, Judge Hudson, on August 21st, 1880, and in open court, delivered his decree, which was filed during the session of the court.

It is unnecessary here to state the terms

of this decree. It is sufficient for the questions now involved to say that it was unsatisfactory at least to W. A. Clark, trustee, and John H. Fisher, a holder of second mortgage bonds, and that each of these parties gave immediate notice of his intention to appeal; the notice of Fisher being dated August 25th, and that of Clark August 30th, 1880.

It will contribute to the better understanding of the facts of the case to state at this point that the prominent parties before the court, interested in the issues raised, were W. P. Clyde, T. M. Logan and Joseph Bryan, acting for the committee, W. A. Courtenay individually, W. A. Clark, as trustee for second mortgage bondholders, and John H. Fisher as receiver of the South Carolina Railroad Company, holding a large amount of second mortgage bonds. These parties, as it distinctly appears in the record, from their first appearance in the proceedings below, up to the time the case reached this court, have been respectively represented by their own and different attorneys—W. P. Clyde & Co. by Messrs. Simonton & Barker;

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W. A. *Courtenay by Messrs. Bryan & Bryan at first, and afterwards assisted by Messrs. Lord & Inglesby; W. A. Clark, as trustee, by Messrs. Pope & Haskell; and John H. Fisher by Mr. Corbin.

It also appears that the appealing parties, immediately after the decree was filed, began, each for himself, to prepare and serve the papers necessary to perfect their respective appeals.

To this end Messrs. Pope & Haskell, as attorneys for W. A. Clark, trustee, gave notice of Clark's intention to appeal on August 30th, as above stated. This notice seems to have been properly served within the ten days required by the act. They also prepared and served exceptions, as required, upon the presiding judge and the other parties within ten days after the rising of the court, but they failed to serve any case, either with or without exceptions, on the attorneys of record of Courtenay.

Mr. Fisher failed to have the presiding judge served with his exceptions either within the ten days after the rising of the court or any time thereafter. He failed, too, altogether in having the attorneys of Courtenay served with a case or exceptions, or a case with exceptions, within thirty days after notice of appeal, or at any other time.

Upon the above state of facts, W. P. Clyde & Co. and Mr. Courtenay, after due notice, on December 14th, 1880, moved this court to dismiss the appeal of W. A. Clark, trustee. The court, upon hearing these motions and after full argument, on December 20th, 1880, filed an order dismissing the appeal of John H. Fisher, generally, and the appeal also of W. A. Clark as to W. A. Courtenay individually, but retaining the appeal of Clark as to W. P. Clyde & Co., with the right of Clark's cestuis que trust, should any desire to do so, to come in and avail themselves of the benefits of Clark's appeal against Clyde & Co.; the parties thus coming in to contribute their pro rata share of the expenses incurred, now or hereafter, in prosecuting this appeal.

The duty of preparing the opinion of the court upon this order has been assigned to me, which duty I will now proceed to discharge as clearly and succinctly as I can.

The law in reference to appeals in cases like this now before the court, and especially as to the steps necessary to be taken to perfect an appeal, in their order, will be

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found in the act entitled *"An act to alter and amend the law in relation to appeals from the Circuit Court to the Supreme Court," passed in 1878. 16 Stat. 698. This being an act of the general assembly of the state, is equally binding upon this court, upon the bar and upon all parties litigant, and although it may seem, to some extent, harsh and technical, and may, in its enforcement, sometimes sacrifice merit to mere forms, yet ita lex scripta est, and that, too, by a power higher than courts or parties, and it can be neither modified or evaded. It affords this court no pleasure to consummate, by its order or judgment, mere technical victories in contests before the court, especially where it is apparent that justice or right may be sacrificed thereby; and I may say that in the adoption and administration of its own rules, while a proper regard will always be had to forms of procedure, in so far at least as to prevent uncertainty and confusion in the conduct of causes before the court, yet, as far as practicable, this court will also always see to it that mere forms shall not override substance. But, while this is the spirit of the court in the adoption of its own rules, yet this court has no power to look through and beyond an act of the general assembly to its consequences, with the view to modify its operation, especially where the requirements of the act are plain and its terms are imperative and peremptory. On the contrary, it is the duty of the court to enforce the law as it stands, regardless of results, relying upon the wisdom of the legislature, in the belief that the general benefits resulting from a full observance of the law, will more than compensate for all evils falling to individual or exceptional cases.

The act of 1878, referred to above, in its first section provides that for the purpose of appeal to the Supreme Court from the rulings of the presiding judge in the court below, exceptions may be taken within ten days after the rising of the court at which the case was tried, by service thereof upon the presiding judge and the attorney of the respondent within the ten days.

In the opinion of the court this section applies to all cases, both at law and in chancery, where the order, decree or judgment

appealed from is made during the term of the court at which the case is tried.

Before the passage of this act exceptions

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were required to be *made in open court during the trial of the case, which were either entered at once upon the minutes of the judge or reduced to writing, so that they might be fixed and remain certain. This seems to have been regarded as an evil or an inconvenience in the practice, and the act of 1878 was enacted to remedy this evil, and for that purpose the time for exceptions was extended by this act to ten days after the rising of the court. This extension of time is a privilege allowed by the act to litigants, and is limited to ten days, and it applies, in express words, without exception, to all cases tried by the court.

The second section further provides that within ten days after the rising of the court, as to all orders, decrees and judgments rendered during the term, or if rendered at chambers, then within ten days after written notice thereof, the appellant shall serve the respondent or his attorneys with notice of his intention to appeal, and within thirty days after this notice he shall, in either case, prepare and serve a case or exceptions, or a case with exceptions, unless, as to this last requirement, the judge before whom the case was heard shall extend the time.

The fourth section provides that a failure on the part of the appellant to comply with either of the foregoing sections shall amount to a waiver of his appeal. The language employed in these sections presents their meaning and intent so plainly that it needs no critical analysis to reach that intent. All that is necessary for this purpose is simply to read the sections. Upon this reading it will be seen at once that in every case where tried in open court and disposed of during the term, whether it be at law or a case in chancery, in order to perfect an appeal to this court this act requires three distinct steps to be taken by the appellants within a time limited as to each; a failure as to either of which is fatal—fatal not by the rules of this court, but by the express terms of the fourth section of the act itself.

These steps are as follows: First. Exceptions must be served on the presiding judge and the attorney of the respondent within ten days after the rising of the court. Second. Notice of intention to appeal must be served, also, within ten days after the rising of the court, upon the respondent or his attorney. Third. A case or exceptions, or a case with exceptions, must be served within thirty days after the notice of appeal.

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*This is the meaning of the act as interpreted from its terms, and it has been so construed by this court in accordance with this intent. In the case of Rogers v. Nash, 12 S. C. 560, which was an equity case, the decree being rendered in open court, the court dismissed the appeal, because the appellant had failed to comply with this act, both as to service of exceptions on the presiding judge and as to the service of his case within the time prescribed, the court holding that a failure in either respect was fatal.

The authority of this case was recognized in the recent case of Scurry v. Coleman, ante p. 166; and upon mature consideration, it is now re-affirmed as the law regulating appeals in cases of this kind.

What steps may be necessary in an appeal from an order, decree or judgment rendered at chambers, is not involved in this case, and the court does not feel called upon here to express any opinion on that subject.

Now apply these principles to the facts of this case and the motions made thereon. It is admitted that Fisher failed to have his exceptions served on the presiding judge within ten days after the rising of the court. This, without more, would be fatal under the act. Rogers v. Nash, supra. Can Fisher be relieved from it?

His counsel contends that this defect has been waived by agreement of parties, and he has submitted the following as the agreement:

"It is agreed that the following shall constitute the record for the purposes of the appeal in the above-entitled causes: All the decrees, orders, petitions, answers and exceptions contained in the printed pamphlet thereof, used in said causes at the hearing on August 18th, 19th and 20th, 1880, and the testimony in said cause reported by Barnwell, master, and the opinion and decree of Judge Hudson. It is agreed that said record may be made up at any time before the meeting of the next term of the Supreme Court.

(Signed) "Simonton & Barker.
"D. T. Corbin.
"Pope & Haskell.

"September 1st, 1880."

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*The court recognizes the right of parties to make written agreements and to waive irregularities; and where there is no misunderstanding as to the stipulations, the court would be disposed to enforce such agreements according to the intent of the parties.

In this case, however, there is a misunderstanding. The claim of Mr. Corbin that the agreement here waived preceding conditions is denied by the attorneys of Clyde & Co. Under such circumstances, the court must look to the paper itself. The paper bears date on September 1st, 1880, several days after the time had expired for the service of the exceptions on the presiding judge. There is not a word in it which refers to the exceptions. The appeal at that time was lost and beyond the reach of remedy, but there is nothing in the paper which shows that this was known to the attorneys of Clyde, who signed it. In the absence of such knowledge,

the court cannot conclude that it was understood on both sides to cover past defects, especially when we look at the agreement itself, and find that it is confined entirely to stipulations as to what shall constitute the record, and as to the time within which this record should be prepared in the future. This, then, is sufficient to dismiss the appeal of Fisher as to Clyde & Co., and as to Courtenay individually.

Fisher and Clark each failed to have their case served on the attorneys of Courtenay, or on Courtenay himself. This failure is also attributed to the agreement already discussed. It seems to have been understood by these parties that Messrs. Simonton & Barker represented Courtenay as well as Clyde & Co., and that the agreement signed by Messrs. Simonton & Barker covered Courtenay's case as well as that of Clyde & Co.

The court is satisfied that there has been an honest misunderstanding on this subject, growing out of the fact that the attorneys of Clyde & Co. and of Courtenay were sometimes found together in the various contests below, fighting on the same line and contending for the same ends. But when we look to the history of the case, as found in the record and in the different steps taken by each party, we find a clear and distinct line of cleavage, so to speak, marked step by step on the record, from the first moment the parties appeared in the court below until

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*they reached this court, between Courtenay as an individual and Clyde & Co. as the committee, each being represented on the record by his own and different attorneys. Such being the fact, even if Mr. Simonton intended to bind Courtenay, of which we have no evidence, yet his act being without the knowledge of Courtenay, and not only not ratified subsequently but repudiated by him, could not bind him. The misunderstanding was a natural one, and without fault on either side, and we cannot suppose for a moment that there was any intention to deceive or entrap.

Now, whatever may have been the cause of the failure to perfect their appeal, the parties failing must take the consequences. This disposes of so much of the order as refers to the appeals dismissed.

The appeal of Clark is retained as to W. P. Clyde & Co., with the right of his cestuis que trust, should they desire to do so, to come in and avail themselves of his appeal. Mr. Clark has no personal interest in this matter whatever; he is a mere naked trustee of an express trust, and he is in court solely as the representative, and for the benefit, of his cestuis que trust. In his notice of appeal he recognizes this fact, and expressly states that he appeals in behalf of the holders of the bonds secured by said mortgage. How, then, as long as Clark's appeal stands, can any second mortgage bondholder who may desire to come in be shut out? Nothing, it appears to the court, would be more inequitable and unjust, and it would require an authority so well settled and controlling that the court could not but yield to it, before the court could be led to a conclusion so subversive of the equities of the parties. So far as the court can see, there remains but one of the second mortgage bondholders unsheltered. He may have no merit in his claim, but with this the court has nothing to do. He is a bondholder to a large amount; his representative and trustee is properly in court with his appeal perfected. Who did the trustee appeal for, if not for him; and can the trustee be permitted now to shut the door upon him and exclude him from the right of appealing and assisting to defend and protect his own interests?

It is a familiar doctrine of equity that a trustee can do no act to the prejudice of his cestui que trust, and he will be restrained

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*by injunction from using his powers to the sacrifice of his trust. Even in an action at law in the name of the trustee, he cannot release or discontinue the action without the consent of his beneficiary. Perry on Trusts 467, § 520.

The cases of Shaw v. Railroad Co., 100 U. S. (10 Otto) 611 [25 L. Ed. 757], and Annely v. De Saussure, 12 S. C. 512, relied on in the argument, do not reach the point involved here. In the case of Shaw and the railroad company the cestuis que trust were not parties to the original suit—they were represented therein by their trustee. The case ended without appeal, and the cestuis que trust attempted to have the decree reviewed and reversed by a new proceeding in their own names, and this, too, without any charge of bad faith or otherwise against their trustee.

Their bill or demurrer was dismissed, and the Supreme Court sustained the judgment below, on the ground that the trustee in the suit below represented the bondholders, and whatever bound him bound them. On the same principle, had the trustee appealed, the cestuis que trust would certainly have been entitled to the benefit of the appeal.

In the case of Annely v. De Saussure, supra, the defendant, as executor of a deceased mortgagor, sold at private sale the mortgaged property, as alleged by him, with the knowledge and consent of the parties interested under the mortgage. The plaintiff, who was one of the devisees and executrix of the mortgagee, filed her complaint to vacate this sale of the executor and to foreclose the mortgage. Two other devisees, interested under the mortgage, were made defendants in this proceeding because they had consented to the private sale by the executor. The complaint was dismissed below, but, upon appeal by the executrix, this judgment was reversed and a re-sale ordered. The two defendants, however, who, as it appeared from the report of the referee, had con-

sented to private sale and had received a portion of the proceeds thereof, were excluded from the benefits of the re-sale, the court holding that the successful appeal of the executrix could not inure to their relief. This was upon the ground that they, by consenting to, and ratifying the private sale of, the executor, had separated themselves, to some extent, from the other parties interested in the mortgage, and they

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should be held *bound by their own independent acts. Their rights had been adjudicated below upon facts which distinguished them from the others. They did not appeal, nor does it appear that they claimed the benefit of the appeal of the executrix, who represented herself as devisee as well as executrix, and they were properly held bound by their own acts.

In the case now before the court, Clark has no individual interest. He does not occupy the position both of trustee and cestui que trust as Miss Annely did, nor has his cestui que trust, who now seeks to avail himself of his appeal, separated himself from the trust deed by any positive act of his own, which was adjudicated against him on the trial below, rendering it necessary for him to have appealed in his own behalf and independent of the trustee, as was the case with the two cestuis que trust in Annely v. De Saussure.

The principle decided, therefore, in Annely v. De Saussure, while right on the facts of that case, has no application here.

The holders of bonds secured by the mortgage to Clark, must be allowed the benefit of his appeal, but in coming in they must secure to Clark all expenses necessary to its prosecution which Clark has already incurred or may hereafter incur. Clark's appeal has been retained as to the committee, and as to the questions raised in his exceptions involving the rights of the committee, and none other. A cestui que trust coming in can rise no higher than Clark. On the contrary he must stand on the same plane with Clark, and must be confined to the same questions and against the same parties as has already been directed by the order of this court, which order is hereto appended as the conclusion of this opinion.

McIVER and McGOWAN, A. J.'s, concurred.

The order dismissing the appeal of Fisher, receiver, and sustaining that of Clark, trustee, was filed December 20th, 1880, No. 954, and is as follows:

These were motions to dismiss two appeals from the same judgment, and they were taken up together.

After hearing argument, it is ordered—

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*1. That the motions of Clyde, Logan and Bryan, and W. A. Courtenay, to dismiss the appeal of John B. Fisher, receiver, be granted, and that the said appeal be dismissed.

2. It is ordered that the motion of W. A. Courtenay to dismiss the appeal of W. A. Clark, trustee, be granted, and that said appeal be dismissed, so far as it affects the said William A. Courtenay individually, but not as one of the Clyde committee.

3. It is further ordered that the appeal of William A. Clark, trustee, stand as to all other parties, unaffected by anything contained in this order; with the right on the part of any of the holders of bonds under the second mortgage to Clark, as trustee, who may come in and contribute their pro rata share of the expenses, to avail themselves of the benefit of said appeal. The said right to be limited to the questions made by said appeal as to the parties against whom said appeal is permitted to stand.

The opinion of the court to be filed hereafter.

14 S. C. 396

(Case No. 958.)

DEVEREUX v. CHAMPION COTTON PRESS COMPANY.

(November Term, 1880.)

[*Trial* ⇐325.]

Where a jury, before dispersing, assented to a verdict, which was duly written and sealed up, but upon the re-assembling of court and before publication the foreman openly stated that some of the jurors now dissented from their finding—*Held*, that such verdict should not have been received. Perry v. Mays, 2 Bail. 354, recognized and approved.

[Ed. Note.—Cited in Lagrone v. Timmerman, 46 S. C. 373, 414, 24 S. E. 290.

For other cases, see Trial, Cent. Dig. § 767; Dec. Dig. ⇐325.]

Before Pressley, J., Charleston, February, 1880.

Action by John H. Devereux against the Champion Cotton Press Company for injury to his realty by reason of the unlawful use by the defendant of its property near that of plaintiff. The jury found a verdict for the plaintiff for $1,000, under the circumstances stated in the opinion of the court. The defendant moved for a new trial upon three grounds: (1) that the verdict was without evidence to sustain it; (2) that the

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damages *were excessive; and (3) that the verdict was not the verdict of the jury, but only of a majority of them. The presiding judge overruled the motion. Defendant appealed upon the third ground taken in support of his motion for a new trial.

Mr. C. H. Simonton, for appellant.

Mr. L. De B. McCrady, contra.

January 10th, 1881. The opinion of the court was delivered by

McIVER, A. J. In this case, at the trial below, "the jury had been authorized to seal up their verdict and render it next morning. Then, before rendering it, the foreman * * * stated that the jury had agreed on a verdict, which had been sealed as directed, and that, subsequently, in the morning, some of them had notified him that they did not assent to the said verdict." The Circuit judge, upon being informed that there was no dissent until after the jury had separated for the night, received the verdict and directed the clerk to publish and record it. A motion for a new trial was made on various grounds, one of which was "because the verdict was not the verdict of the jury, but only of a majority of them," which motion was refused, and the defendant now appeals upon the ground above stated. So that the precise question made by this appeal is, whether a sealed verdict, which was assented to by all of the jurors at the time it was sealed and before the jury were permitted to separate, can be afterwards received by the court, published and recorded, in face of the statement made by the foreman as the organ of the jury, that some of the jurors did not then assent to the verdict. This question is, we think, conclusively settled by the case of Perry v. Mays, 2 Bail. 354. In that case, the jury not having agreed when the court was about to adjourn for the day, leave was granted them, with the consent of the parties, to separate after they had agreed and to deliver their verdict next morning. At the opening of the court on the next day the foreman delivered a sealed verdict, when one of the jurors stated that "it was not his verdict, but he had agreed

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not to oppose it, *in order to get out." The verdict was received and recorded, and this was made the basis of the last ground of appeal. Harper, J., in delivering the opinion of the court, said: "No doubt a new trial must be granted on the last ground taken for that purpose. It is said by Blackstone, (3 Com. 377), 'a privy verdict is where the judge hath left or adjourned the court, and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily out of court; which verdict is of no force unless afterwards affirmed by a public verdict given openly in court, wherein the jury may, if they please, vary from their privy verdict; so that the privy verdict is, indeed, a mere nullity, and yet it is a dangerous practice, allowing time to tamper with the jury, and, therefore, very seldom indulged. But the only effectual and legal verdict is the public verdict, in which they openly declare to have found the issue for the plaintiff or for the defendant.' The case of Root v. Sherwood, 6 Johns. 68, seems in point to the present question. Before the jury retired the parties agreed that the jury might deliver a sealed verdict; yet it was held that when the jury came into court to deliver the sealed verdict either party might have the jury polled, and any of the jurors might dissent from the verdict to which they had previously agreed. See, also, the cases of Blackley v. Sheldon, 7 Johns. 32, and Saunders v. Freeman, Plowd. 211. The practice of allowing a jury to give a privy verdict, or to seal up their verdict, is considered by our courts to be a dangerous one, and is never allowed without the consent of the parties. If the parties will consent that the verdict may be thus given, they must take the risk of the jury being tampered with." In addition to the authorities cited in this case, which, upon examination, will be found fully to support it, we may add the cases of Bunn v. Hoyt, 3 Johns. 255; Douglas v. Tousey, 2 Wend. 352; Lawrence v. Stearnes, 11 Pick. 501. In the last-named case the verdict was agreed upon during the night, though not reduced to writing, when the jury was permitted to separate, with the understanding that they would meet in the morning and put the verdict in proper form. When they assembled the next morning one of the jurors refused to concur in the verdict which had been agreed upon the night before, and stated to

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the court that a verdict had *been agreed upon the night before in which he then concurred, but that after their separation he had more maturely considered the whole subject, and could not conscientiously assent to the verdict. Shaw, C. J., in delivering the opinion of the court, said: "The only verdict which can be received and regarded as a complete and valid verdict of a jury upon which a judgment can be rendered, is an open and public verdict, given and assented to in open court as the unanimous act of the jury, and affirmed and entered of record in the presence and under the sanction of the court." Then, after alluding to "a convenient practice," which had been adopted in this country, of permitting a jury to seal up their verdict and separate, in case they should come to an agreement while the court was not in session, proceeds to say: "But in such case the verdict is to be affirmed in open court as the unanimous act of the jury and in presence of the whole panel. * * * Such an affirmation is the only evidence the court can receive of the free and unanimous assent of the jury to the verdict." These authorities establish the proposition that until a verdict has been published and recorded, it may be recalled and altered by the jury, and if it is made known to the court, when it is proposed to render the verdict, that any one of the jurors does not then assent to it, such verdict cannot be received, but the record should be recommitted to the jury with directions to retire to their room until they

have agreed, as seems to have been done in Bunn v. Hoyt, supra, and in Douglas v. Tousey, supra.

The judgment of the Circuit Court is reversed and a new trial is ordered.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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14 S. C. *400

*(Case No. 959.)

STATE v. WEEKS.

(November Term, 1880.)

[1. *Criminal Law* ⇐94.]

Trial justices have no jurisdiction of the offence of stealing, taking away or letting loose a boat under the act of 1695, (2 Stat. 105, and Gen. Stat., ch. CXXIX., § 10,) for whether the offence be larceny or trespass, subject to criminal prosecution, the penalty, being indefinite in amount, may exceed the limits prescribed for such inferior court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 137–166; Dec. Dig. ⇐94.]

[2. *Justices of the Peace*, ⇐38.]

Damages, indefinite in amount, given by statute for a trespass, may not be sued for in a trial justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 117; Dec. Dig. ⇐38.]

[3. *Justices of the Peace* ⇐34.]

A forfeiture of $20 cannot be recovered in a trial justice's court, under a statute which provides for its recovery in a court of record.

[Ed. Note.—Cited in Hasten Furn. Co. v. Southern Ry., 82 S. C. 242, 64 S. E. 223.

For other cases, see Justices of the Peace, Cent. Dig. §§ 77, 78, 80–82; Dec. Dig. ⇐34.]

[4. *Criminal Law* ⇐90.]

A trial justice's court being an inferior court, has jurisdiction only of matters expressly conferred; and the act of 1695 does not expressly confer jurisdiction, nor are the penalties therein provided within the terms of the general grant contained in Chapter XXV., of the general statutes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129–136; Dec. Dig. ⇐90.]

Before Aldrich, J., Orangeburg, October, 1879.

The case is fully stated in the opinion.

Mr. Joseph M. Skinner, for appellant.

Mr. Solicitor Jervey, contra.

January 10th, 1881. The opinion of the court was delivered by

McIVER, A. J. This is an appeal from the judgment of the Circuit Court affirming a judgment rendered by a trial justice in a prosecution under an old act passed in 1695, (2 Stat. 105), incorporated in General Statutes, Chapter CXXIX., Section 10, page 716. The phraseology of the act is not free from obscurity, and is as follows: "Whoever shall steal, take away or let loose any boat * * * shall be liable to such fine or fines as the court shall, in their discretion, think fit, if the matter of fact be felony or larceny, and make good to the person or persons injured all damages they shall sustain; and in case the matter of fact be a trespass only, the

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person or persons commit*ting such offence shall make good to the person injured all damages that may accrue thereby, and moreover forfeit and pay, for every time he or they shall be found guilty thereof, the sum of twenty dollars, one moiety to him or them that will sue and prosecute for the same in any court of record in this state, besides his charges therein expended."

In this case proceedings were commenced in the usual way by an affidavit, in which the prosecutor charged that the defendant "did feloniously break loose, steal and take away" a certain boat belonging to the prosecutor, upon which a warrant, in the usual form, was issued. Under this warrant the defendant was arrested and carried before the trial justice, who upon a preliminary examination, decided "that there is no cause of action for a felony but sufficient cause for a trespass," whereupon the words "feloniously" and "steal" were erased from the papers and the defendant was tried for trespass. The jury charged with the case returned the following verdict: "We find for the plaintiff $5." For some reason, not disclosed by the "case" submitted here, this verdict was erased, but by what authority or by whose directions, does not appear, and another verdict was returned in the following words: "We, the jurymen on this case, after mature consideration, unanimously find the defendant, R. F. Weeks, guilty of trespass, and in consideration thereof find [meaning fine, we suppose,] the said R. F. Weeks the sum total of $5 for damages." Upon this verdict the trial justice rendered judgment for $20 forfeiture under the statute, and $5 damages found by the jury, together with $16.05 costs.

As it is very clear that the trial justice had no jurisdiction of the case, it will not be necessary to consider in detail the several errors alleged in the grounds of appeal as having been committed in the course of this anomalous proceeding.

If the offence charged should prove to be a larceny, then, certainly, the trial justice had no jurisdiction, for the only limit to the amount of the fine to be imposed is the discretion of the court, while a trial justice's jurisdiction is limited to the trial of such offences as are punishable by a fine not exceeding $100, or imprisonment not exceeding thirty days. If, however, the offence should prove to be "a trespass only," then, conceding

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*what is by no means clear, that it was the intention of the act to make it the subject of a criminal prosecution, the penalty is not limited in amount but is indefinite, and may exceed the limits prescribed for the jurisdiction of a trial justice; for the act provides that "the person or persons committing such offence shall make good to the person injured

all damages that may accrue thereby, and moreover forfeit and pay for every time he or they shall be found guilty thereof the sum of twenty dollars, one moiety thereof to be paid to the state treasurer for the public use, the other moiety to him or them that will sue and prosecute for the same in any court of record in this state." Now if this language should be construed as providing for two proceedings—one in which the person injured seeks damages, and the other in which an informer sues for the forfeiture—it is still obvious that the trial justice could not take jurisdiction of either; for in the former case the damages to be recovered being indefinite in amount, cannot be said to be within the jurisdiction of an officer who is limited to a certain definite amount: while in the latter, though the amount of the forfeiture is within the jurisdiction of a trial justice, yet, as the statute expressly provides that the forfeiture is to be sued for in a court of record, and as a trial justice's court is not a court of record, that officer is thereby excluded from taking jurisdiction. In addition to this, trial justices' courts being courts of inferior and limited jurisdiction, cannot take jurisdiction of any case except where it is conferred by some statute. The statute under which the prosecution in this case was commenced does not confer jurisdiction upon a trial justice, and the offence here charged is not specifically mentioned among those enumerated in Chapter XXV., general statutes, in which the "criminal jurisdiction" of trial justices is defined; and it does not come within that general class which is there described as "offences which may be subject to the penalties of either fine or forfeiture not exceeding one hundred dollars, or imprisonment in the jail or work-house not exceeding thirty days," because, while the forfeiture attached to this offence is less than the sum above stated, that is not the only penalty; for, as we have seen, the statute provides that the person committing this offence "shall make good to the person injured all

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damages *that may accrue thereby, and moreover forfeit and pay for every time he or they shall be found guilty thereof the sum of twenty dollars."

The judgment of the Circuit Court is reversed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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14 S. C. 403

(Case No. 960.)

OSTENDORFF v. COUNTY COMMISSIONERS OF CHARLESTON.

(November Term, 1880.)

[1. *Clerks of Courts* ⇐29.]

For work done by a clerk of court officially, he can recover only such compensation as is fixed by the fee-bill; but preparing a new index to judgments and decrees is no part of the regular and ordinary duties of such office.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 39; Dec. Dig. ⇐29.]

[2. *Counties* ⇐113.]

A Circuit judge has no power to bind the county to pay for work done upon the public records of his court, in accordance with the recommendation of the grand jury, nor can he refer it to a master of the court to fix the proper compensation for such work, nor, upon report made, order payment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 178; Dec. Dig. ⇐113.]

[3. *Counties* ⇐125.]

In the absence of contract no action will lie against the county commissioners demanding payment for work done upon public records of the Circuit Court, although such work, when done, was used by the public.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 186; Dec. Dig. ⇐125.]

[4. *Counties* ⇐113.]

The county commissioners are the legally constituted agents of the county, and to them alone is given the power to contract county obligations.

[Ed. Note.—Cited in Edmondston v. County of Aiken, 14 S. C. 622; Richland County v. Miller, 16 S. C. 249; Walpole v. City Council, 32 S. C. 554, 11 S. E. 391; Day & Co. v. Pickens County, 53 S. C. 47, 30 S. E. 681.

For other cases, see Counties, Cent. Dig. §§ 174, 178; Dec. Dig. ⇐113.]

Before Wallace, J., February, 1878, Aldrich, J., December, 1879, and Pressley, J., February, 1880, Charleston.

This case is fully stated in the opinion of the court.

Mr. J. E. Burke, for appellants.

Mr. H. A. M. Smith, contra.

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*January 10th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This case was submitted on an agreed statement of facts. At the February Term of the court for Charleston county, 1878, the grand jury made a presentment, recommending "that the books containing the index of judgments and decrees from January 1st, 1870, to the present time, be written and arranged lexicographically, under the directions of the court." Whereupon Judge Wallace ordered "that the clerk have the index re-written and lexicographically arranged." It seems that under this order the clerk commenced to do the work himself, and October 1st, 1879, rendered a bill against the county commissioners for the sum of $1636, for the performance of about one-third of the whole work, embracing only judgments and decrees, "where the names of the defendants commence with the letters A, B, C, D, E and F."

The county commissioners refused to allow the account, so far as it exceeded the rates fixed by the act of 1878 for copying papers, which would, by a liberal construc-

tion, give for the services then rendered, the sum of $122.40. From this audit the clerk appealed to the Court of Common Pleas. Judge Aldrich heard the appeal and ordered that the claim be referred to W. D. Porter, Esq., one of the masters, "to ascertain and report what would be proper compensation for the work done by the clerk, with leave to report any special matter." The county commissioners excepted to this ruling. The master, conceiving that under the order of Judge Aldrich he had no right to consider any question but that expressly referred to him, "to ascertain and report what would be a proper compensation for the work done by the clerk," took testimony and recommended that he should be paid at the rate of forty cents per name, which would amount to the sum of $654.40. The county commissioners also excepted to this report.

The case, upon the exceptions, came on to be heard before Judge Pressley, who, announcing that "the legal questions had been virtually decided by the previous orders, and that it would be improper in him to set aside the order of another Circuit judge," confirmed the report and ordered the county

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commission*ers to pay the plaintiff the sum of $654.40. From this and both the previous orders the county commissioners except, upon the following grounds:

"1. Because the law imposes upon the county the obligation to pay for the services of the clerk at the rates allowed by law; that these rates for copying and recording are fixed in the fee-bill for the clerk; that these rates furnish the proper measure of compensation for the work done, and that the amount allowed is greatly in excess of these rates.

"2. Because if the services of the clerk are not to be paid according to the fee-bill, then, by act of 1878, he can charge nothing for his services at all, and the appeal from the county commissioners should be dismissed.

"3. Because the only obligation upon the county to pay for said services is that imposed by statute—that such obligation is not imposed by order of this court, made by Judge Wallace, directing the work to be done, the county not being a party in that proceeding—and the obligation imposed by statute is to pay at the rate fixed by law.

"4. That the work is still unfinished as a whole and the bill was prematurely presented for audit.

"5. That the order of reference did not necessarily imply that the clerk was not to be paid according to the fee-bill.

"6. At most, under the fee-bill, the clerk was entitled to no more than the amount stated in the master's report, as the value by the said fee-bill of copying the said names three times."

In order to prevent confusion it is necessary to understand clearly in what character this claim is made. In form, it is a proceeding by the clerk of the court, as such, against the county commissioners of Charleston county for services rendered as clerk. But, as we understand it, from the character and amount of the claim, it is, in reality, an action by John H. Ostendorff, as an individual, against the county of Charleston for the value of said services. If we are to consider this as a claim by the clerk in his official character for ordinary services rendered in the discharge of his official duties, and in reference to which a Circuit judge, in enforcing the law, had the right to make orders, then of course the clerk must look to the law

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as fixing the compensa*tion for such services. "Fees of the clerks of the Circuit Court in state cases, and for all other services, to be paid by the county at the rates allowed by law." 15 Stat. 991.

In this view there is no controversy in the case. The aggregate of the "fees" at the rate allowed by law for the work done, amounts, as is admitted, to $122.40, the sum allowed by the county commissioners.

But it is manifest that something more is claimed. The work done was in restoring and improving the public records in the clerk's office, and while it was closely connected with the regular and ordinary duties of the clerk, it was not part of them. The clerk was not bound to perform the work without special agreement with those authorized to contract, and the order of Judge Wallace neither dispensed with the necessity of a contract, nor in itself constituted one. It is not denied that the work was proper, if not necessary. It was done under an order of a judge, suggested by the presentment of a grand jury of the county, and, so far as performed, it has been done well. The proof seems to show that it required particularity, and was something more than mere copying, within the meaning of the "Act to regulate the costs of plaintiffs' and defendants' attorneys, and the costs and fees of clerks of courts, Probate judges, sheriffs and other officers." 16 Stat. 624.

Under the circumstances it would be only just that the plaintiff should be paid, not an extravagant price because of the accidental circumstance that as clerk he had control of the books and papers which gave him a sort of monopoly of the work, but, considering all the facts, reasonable compensation. The question of strict legal right, however, has been made, and our duty is simply to announce the law. If the plaintiff should receive less than a just compensation, it will be the result of his own act in doing work without legal authority or agreement with the proper parties. In so far as this is an action by John H. Ostendorff, as an individual, for the value of work done upon contract, express or implied, we think it cannot be maintained, and that there was error on the

Circuit, both in referring the matter of compensation to the master and in confirming his report, which could have been made only on the ground of contract. No legal con-

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*tract, nor assent to the work from which a contract would be implied by the proper party, appears in the case. No assent can be presumed from the use by the public of so much of the work as was done. The public, as matter of right, are entitled to the use of public records without imposing any obligation upon the county commissioners against their protest. Nor could the plaintiff, by voluntarily doing work which was useful to the county, make himself a creditor of the county, so as to enable him to sue and recover upon an assumpsit for its value. Neither the grand jury, nor the judge himself presiding in the Circuit Court, could make a contract to bind the county. The judge, under the law, might direct the clerk in all matters pertaining to his office, but he had no authority to order him to perform work for the county beyond the scope of his official duties, and thereby make a contract for the county, nor to fix the compensation therefor. Although the work may have been proper to be done and upon the records of the clerk's office, to which the clerk alone had access, yet the order of the judge could not make a legal county claim. The grand jury, if they think proper, may make recommendations as to the propriety of having work done for the benefit of the county, which the judge may refer to the county commissioners for their action, but they alone, the county commissioners, can make contracts binding on the county. Lesley v. Com'rs of Public Buildings, 1 Speers 32; State v. Com'rs of Public Buildings, 12 Rich. 300.

In this last case cited, Judge Withers, as the organ of the court, said: "The presentment of grand juries upon matters within the discretion vested in other bodies, are but advisory to such bodies and suggestive to the court. Successive judges are as little qualified by proper information as they would be inclined by disposition to determine any matter such as is in controversy here; and a matter not expressly enjoined upon the commissioners by law, but referred to discretion, should be left with those whom the legislature have directly appointed to exercise that discretion."

In the case from Speers, David Lesley was Ordinary of Abbeville county. He desired a seal for his office, which he purchased, and sued the commissioners of public buildings

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for the *money paid for it, and the court held that "they were not liable to be sued for money expended by the Ordinary in purchasing articles for the use of his office, when the articles were not furnished at the request of the commissioners."

The board of county commissioners is one of the most important agencies created by the constitution of 1868. It is the local administrative body of the county—both to contract and provide payment. Before the present constitution there existed in the state for the purpose of facilitating local government, a number of district boards—such as commissioners of roads; of the poor; to approve public securities; and commissioners of public buildings. The powers and duties of all these boards were, by the constitution, united in the boards of county commissioners, and others no less important were added, including the payment of contingent accounts, formerly paid by the state. The act of 1875, "to reduce all acts and parts of acts in relation to county commissioners, their powers and duties, into one act, and to amend the same," (15 Stat. 985), contains, among others, these provisions:

"That county commissioners elected in pursuance of Section 19, of Article IV. of the constitution, shall have jurisdiction over * * * all matters relating to taxes and disbursements of money for county purposes, and in every case that may be necessary to the internal improvement and local concerns in their respective counties." § 1.

"To cause to be levied, collected and paid to the county treasurer a certain sum of money, which, in their judgment, may be necessary to pay all claims against the county for fees, disbursements, services or labor," &c. § 10, subd. 4.

"And all work given out by the county commissioners to be done on public buildings as aforesaid, when the amount shall exceed the sum of one hundred dollars, shall be done by contract, and the commissioners are hereby required to advertise the same," &c. § 14.

"No accounts shall be audited and required to be paid by the county commissioners for any labor performed—fees, services or disbursements, or any other matter, unless such account shall be made out, &c. * * *

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No allowance or payment beyond *legal claims shall ever be allowed, and the board of county commissioners in any county may refuse to audit or allow any claim or demand, whatever, unless made out and verified in the manner herein specified." § 21.

"County commissioners shall, annually, on or before the first day of November of each year, prepare and make up the estimate for all county charges and debts for the fiscal year then ensuing, * * * and the rate of taxation necessary to raise money to meet the same." § 31.

It thus appears that the county commissioners are the legally constituted agents of the county, and, as such, make all estimates and disbursements for county purposes. They are supposed to know best the needs and means of the county, as they are charg-

ed with the duty of liquidating, so they alone are given the power to contract county obligations. It would necessarily lead to confusion to allow one official, who may not be a citizen, to make, by a simple order, contracts binding upon the county, and thus to administer their local affairs without the checks imposed by the law, and without the knowledge, consent or request of those upon whom the duty and responsibility are imposed.

The orders in the Circuit Court of February Term, 1878, of December 19th, 1879, and of May 27th, 1880, which recognize and impose as a legal demand, recoverable against the county of Charleston, the claim of John H. Ostendorff for compensation for doing the work aforesaid in the clerk's office of Charleston county under an order of court, without the request or consent of the county commissioners of that county, should be reversed, and it is so ordered.

SIMPSON, C. J., and McIVER, A. J., concurred.

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14 S. C. *410

*(Case No. 961.)

STATE v. GILL.

(November Term, 1880.)

[1. *Jury* ⇐110.]

Objection by a prisoner that jurors were improperly excused by the Circuit judge, comes too late after verdict, unless it appears that defendant was injured thereby.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 520; Dec. Dig. ⇐110.]

[2. *Criminal Law* ⇐968.]

The Circuit judge excused two jurors, one of whom, summoned under the general venire, lived at a distance from the court-house, and in his stead was called a juror from that vicinity; but the prisoner, afterwards put upon his trial for murder committed at the court-house, did not exhaust his peremptory challenges. *Held*, that there was no ground for arresting the judgment.

[Ed. Note.—Cited in State v. Dodson, 16 S. C. 460.

For other cases, see Criminal Law, Cent. Dig. §§ 2423–2432, 2435–2444; Dec. Dig. ⇐968.]

[3. *Homicide* ⇐200.]

In a trial for murder, A was not permitted to repeat declarations made by deceased, a short time before his death, which deceased prefaced with the words "If I die." B, a brother of deceased, afterwards testified that deceased, a few moments before his death, when fully aware of his condition, made a statement, charging the prisoner with cutting him, and that A was then present. *Held*, that the Circuit judge did not err in permitting this declaration of deceased to go to the jury.

[Ed. Note.—Cited in State v. Nance, 25 S. C. 172; State v. Johnson, 26 S. C. 153, 1 S. E. 510.

For other cases, see Homicide, Cent. Dig. § 425; Dec. Dig. ⇐200.]

[4. *Homicide* ⇐207.]

Dying declarations, to be admissible in evidence, need not be, in any case, reduced to writing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 439; Dec. Dig. ⇐207.]

[5. *Criminal Law* ⇐885.]

The jury before agreeing upon a verdict in a capital case, returned into court and inquired of the presiding judge, whether they could, upon conviction, recommend the defendant to mercy; to which inquiry he replied affirmatively. *Held*, that the judge committed no error in this, or in failing then to instruct the jury that such recommendation could not affect the sentence.

[Ed. Note.—Cited in State v. Dodson, 16 S. C. 462; State v. Murrell, 33 S. C. 100, 11 S. E. 682; State v. Bennett, 40 S. C. 311, 18 S. E. 886.

For other cases, see Criminal Law, Cent. Dig. § 2108; Dec. Dig. ⇐885.]

[6. *Jury* ⇐75.]

[In the absence of any showing to the contrary, it will be presumed that the action of the court in excusing two jurors was based on affidavits, as required by statute.]

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 390; Dec. Dig. ⇐75.]

[7. *Jury* ⇐135.]

[Cited in State v. Prater, 26 S. C. 202, 2 S. E. 108; State v. Anderson, 26 S. C. 601, 2 S. E. 699; State v. Weaver, 58 S. C. 109, 36 S. E. 499, to the point that the right of peremptory challenge is not a right to select the jury, but only the right to reject a certain number of jurors.]

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 599–606; Dec. Dig. ⇐135.]

[8. *Criminal Law* ⇐731.]

[Cited in State v. Robinson, 27 S. C. 618, 4 S. E. 570, to the point that the province of the jury is to pass upon issues of fact, and that they have nothing to do with the consequences of their verdict.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1694, 1695; Dec. Dig. ⇐731.]

Before Pressley, J., Hampton, June, 1880.

The case is fully stated in the opinion of the court. The prisoner was not in this court at the hearing, his presence having been waived by his counsel of record.

Messrs. W. P. Murphy, M. W. Gary and J. W. Moore, for appellant.

Mr. Solicitor Gantt, contra.

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*January 10th, 1881. The opinion of the court was delivered by

McIVER, A. J. The defendant in this case having been convicted of murder, made a motion in arrest of judgment, and also for a new trial in the Circuit Court, and his motions there being refused, he now renews them here upon the same grounds taken in the court below.

The motion in arrest of judgment is based upon the ground that the Circuit judge erred in discharging two of the jurors, one of whom had been drawn from the county at large and summoned under the general ve-

nire. It appears that when the list of jurors, drawn and summoned for the term at which this case was tried, was called over, only twenty-eight answered. The court thereupon ordered sixteen additional jurors to be drawn from the box containing the names of persons residing within five miles of the court-house. After the jurors so drawn had been summoned, ten of them appeared, making, with those already in attendance, thirty-eight jurors, whereupon the Circuit judge, of his own motion, and for cause satisfactory to himself, excused two of the jurors, one of whom lived at a considerable distance from the court-house. It does not appear that there was any challenge of the array, nor was there any objection made until after the verdict in this case was rendered. So that even if these jurors were improperly excused, the objection could not avail the defendant, unless it appeared that he was injured thereby. Gen. Stat., ch. CXI., § 29, p. 523; State v. Stephens, 11 S. C. 319.

In this case there is nothing to show that the defendant's rights were impaired or in any way interfered with by the discharge of these two jurors. It does not appear that his right of peremptory challenge, which, it must be remembered, is a right to reject and not a right to select jurors, (State v. Wise & Johnson, 7 Rich. 412,) was in any way abridged, and we are at a loss to conceive how the discharge of these jurors, even if it had been illegal or irregular, could operate to the prejudice of any of the rights of the defendant. We are unable to appreciate the force of the argument urged here, that the discharge of a juror who lived at a considerable distance from the court-house, and the substitution of one drawn "from the

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vicinity in which the hom*icide was committed, where the prejudice would naturally be strongest against defendant," was necessarily injurious to him. We have always supposed that one of the peculiar merits of our system of trial by jury, is that the jurors were of the vicinage, and Blackstone, in 3 Com. 379, speaks of the right of a person accused of crime to be tried by his neighbors and equals as a "transcendent privilege." But even if there was any force in this argument, the defendant could, by the exercise of his right of peremptory challenge, have excluded every one of those who were drawn from the immediate vicinity where the homicide was committed, to supply the deficiency in the original panel, and, as it does not appear that his peremptory challenges were exhausted, the objection taken cannot avail the defendant. State v. Price, 10 Rich. 351; State v. McQuaige, 5 S. C. 429.

But we are by no means satisfied that any error was committed in discharging the two jurors. The Circuit judge undoubtedly had the right to excuse jurors for good and sufficient cause, and certainly in the absence of any proof to the contrary, we would assume that the judge in this instance had complied with the law by requiring the affidavits provided for by the statute. We are satisfied, therefore, that there was no error in refusing the motion in arrest of judgment.

The first ground on which the motion for a new trial is based, is that, under the circumstances of the case, the dying declarations of the deceased should not have been admitted in evidence. It seems that the first witness offered by the state to prove the dying declarations, one W. H. Bartless, testified as follows: "Was with Connolly [the deceased] some time before, and continued with him to the time of his death; deceased was rapidly sinking; I said to him: 'You are going to die, and if you have anything to say you had better say it.' He then said: 'If I die,'" at which point he was stopped, and objection was made that the form of expression used indicated that the deceased had not then lost hope, and, therefore, the declarations were incompetent; and the objection was sustained. Subsequently another witness, J. Q. Connolly, a brother of the deceased, was offered by the state for the same purpose, who testified as follows: "Was with deceased at the time of his death;

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he was very low; asked for *his wife; was told that she was sent for; replied: 'Lord, I'll never see her—I am going to die.' W. H. Bartless was also there. I said to deceased: 'Who cut you?' He said: 'Gouthe held me and Gill cut me.' Deceased was conscious of his approaching death; asked for a preacher to pray for him; took my hand; told me good-bye and died a few minutes afterwards. W. H. Bartless was present at the time; I am brother to the deceased."

The rule as to the admissibility of dying declarations is, that two things must be made to appear before the declarations can be admitted. First. That the death of the declarant was imminent. Second. That he was so fully aware of this as to be without any hope of life. State v. Quick, 15 Rich. 349; State v. McEvoy, 9 S. C. 212.

It is very clear that the testimony of J. Q. Connolly, if believed by the judge before whom the case was tried, was amply sufficient to establish both of these propositions, and whether it should be believed was a question for the Circuit judge alone, so far as the competency of the declarations was concerned. It is argued, however, that the testimony of J. Q. Connolly should not have been regarded as sufficient to warrant the admission of the dying declarations, because, as it is contended, he was contradicted by the other witness offered by the state. Even were this so, we do not see how we could impute error to the Circuit judge in holding the testimony of Connolly sufficient proof of the preliminary facts necessary to the admissibility

of the declarations. But we are unable to perceive any necessary conflict between the two witnesses. They might have been, and probably were, speaking of two different conversations, or, at least, of two different parts of the same conversation. Bartless, manifestly, was speaking of a conversation between himself and the deceased, while Connolly was speaking of a conversation which he had with deceased. Bartless was with the deceased some time before his death, and at what particular time the conversation he was proceeding to narrate took place, does not appear, while the conversation testified to by Connolly was only a few minutes before the death of the deceased. It is true that Bartless was present when the conversation tes-

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tified to by Connolly took place, but he *does not say that no such language was used, or that he did not hear deceased say what was testified to by Connolly: and it may be that if Bartless had been permitted to proceed with his testimony, he would have testified as Connolly did as to what deceased said a few minutes before his death. Be that as it may, however, it is very certain that the Circuit judge had before him testimony amply sufficient to establish the facts necessary to be proved, in order to render the dying declarations competent evidence, and we see no error in admitting them.

The next ground is, that there was error in admitting parol testimony, showing the dying declarations of the deceased, without first requiring proof that there was no opportunity to reduce the same to writing at the time they were made. We are not aware of any authority for the proposition upon which this ground is based, and none has been cited to us. Indeed, from the fact that this ground was not urged in the argument here, we presume that the counsel have felt themselves unable to sustain it; and we know of no law which requires that dying declarations should be reduced to writing before they can be received in evidence, where there is opportunity to do so at the time they are made.

The last ground upon which the motion for a new trial is based is stated in the following language: "It is respectfully submitted that when the jury having returned into court and asked instructions of the presiding judge 'if they [the jury] could, upon conviction, recommend the defendant to mercy,' his Honor erred in this, that, though he instructed them that they could so bring in a verdict, he omitted to instruct them that such recommendation would, in no way, affect the sentence." It appears from the "case" as submitted here, that after the jury charged with this case had retired to their room they returned into court and asked the judge "if they [the jury] could add to their verdict a recommendation of the defendant to mercy." They were told that they might do so, but they were not informed that such a recommendation "would in no wise alter the sentence of the law or mitigate the punishment." The verdict, as rendered, was in the following form: "Guilty, and recommended to mercy."

It will be observed that the judge was sim-

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ply asked whether *the jury could recommend the prisoner to mercy in case they convicted him, and not what would be the consequence or effect of such a recommendation. If, therefore, the judge, instead of simply answering the question put to him by the jury, had volunteered a statement of the consequences which would or would not follow from such a recommendation, we think there would have been more reason for complaint. The province of the jury was simply to pass upon the guilt or innocence of the accused, and they had nothing whatever to do with the consequences flowing from their verdict; and if the judge had undertaken to explain to them what would be the effect of their finding, his conduct might have exposed him to the charge of endeavoring improperly to influence the minds of the jurors. But when, in response to their inquiry, he simply informed them that they could do that which it has been the long-established practice for juries to do—a practice extending back as far as our earliest reported cases, (State v. Frink, 1 Bay 168)—we cannot say that there was any error in so doing. After most diligent search, we have been unable to find any authority condemning this practice, and, on the contrary, in the case of State v. Frink, supra, the practice was not only sanctioned but was allowed to operate to the benefit of the prisoner by securing a postponement of the execution of the sentence until an opportunity could be had for applying for executive clemency. So, also, we find that in case of State v. O'Brian, 22 La. An. 27, it was held that the addition to a verdict of a recommendation to mercy did not vitiate the verdict.

It is argued here that there was error in informing the jury that they might add to their verdict a recommendation to mercy, because the fact that they made such an inquiry indicated that there were some on the jury who would not consent to a verdict of guilty upon any other terms. This argument rests wholly on conjecture, and one which we could not for a moment entertain, because, without the shadow of evidence to support it, such a conjecture necessarily involves the gravest imputations upon the jury. Their business was to try the issue presented to them, and if they were satisfied, from the

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evidence, of the prisoner's *guilt, it was their duty to say so, no matter what might be the consequences. If, on the other hand, they were not satisfied of his guilt, it was equally their duty to say so; and to suppose that any juror who doubted as to the guilt of the prisoner could be induced to unite in a verdict

which his judgment did not approve, would be to suppose that such juror was willing to violate his oath, and that, too, in a case involving the gravest consequences. Such a supposition we do not feel at liberty to make in the absence of any evidence to sustain it. On the contrary, we think that the more reasonable supposition, and one which involves no imputation whatever upon the jury, is, that the jury being all satisfied of the guilt of the prisoner, saw some extenuating circumstances in the case which induced a desire to recommend the prisoner to mercy, in the hope that it would have some weight with that department of the government to which such appeals are properly addressed, and only desired to know whether they would be permitted by the court to add such a recommendation to their verdict. We see no error, therefore, in the answer which the Circuit judge made to the question propounded by the jury, and, on the contrary, think, if he had answered otherwise, he would have deprived the defendant of a benefit secured to him by a long and well-established practice which we nowhere find condemned, but, on the contrary, sanctioned, and which, in this case, may, as it has in others, prove to be of inestimable value.†

The Tennessee cases cited in the argument for appellant (State v. Crawford, 2 Yerg. 60, and Cochran v. State, 7 Humph. 544,) do not apply, for in each of those cases there was evidence submitted showing that one of the jurors was not satisfied of the guilt of the prisoner, and only consented to the verdict because he believed that the recommendation to mercy would secure the pardon of the prisoner. Here, however, there is no such evidence, and in the absence of such evidence it would be a most unwarrantable assumption on our part to presume that any one of the

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*jurors in this case had perjured himself by agreeing to a verdict which he did not believe was sustained by the testimony.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

† The sentence of the prisoner, in this case, has been commuted by the governor to imprisonment at hard labor in the state penitentiary for life.—REPORTER.

14 S. C. 417

(Case No. 962.)

STATE, ex relatione HAMER v. STACKHOUSE.

(November Term, 1880.)

[1. *Constitutional Law* ⇦60, 278.]

The act of February 15th, 1872, (15 Stat. 42), which empowers a landowner to secure a right of way over the lands of another, violates none of the provisions of the constitution of this state.

[Ed. Note.—Cited in Ex parte Bacot, 36 S. C. 134, 15 S. E. 204, 16 L. R. A. 586; Beaudrot v. Murphy, 53 S. C. 120, 30 S. E. 825; Gilmer v. Hunnicutt, 57 S. C. 171, 35 S. E. 521.

For other cases, see Constitutional Law, Cent. Dig. §§ 89, 908; Dec. Dig. ⇦60, 278.]

[2. *Private Roads* ⇦2.]

This act, in authorizing a road or highway to the nearest highway, was intended to secure to parties a way of ingress and egress, by whatever name called, to the nearest highway, and does not confine the referees to a location upon the nearest line to the highway.

[Ed. Note.—For other cases, see Private Roads, Cent. Dig. § 14; Dec. Dig. ⇦2.]

[3. *Eminent Domain* ⇦19; *Private Roads* ⇦2.]

This act is of force throughout the state, as well within the limits of incorporated cities and towns as elsewhere, except where acts of incorporation, by express words or by necessary implication, exclude it. There is no such exclusion in the charter of Little Rock, Marion county.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 57; Dec. Dig. ⇦19; Private Roads, Cent. Dig. § 3; Dec. Dig. ⇦2.]

[4. *Estoppel* ⇦27; *Private Roads* ⇦2.]

Where one opens a road over his own land, from the back part to the highway, and afterwards, by deeds without reservation of a right of way, conveys the intervening lots to others, who close up this road, he is not estopped from demanding that a road be opened to him over those lots under the act of 1872.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 63; Dec. Dig. ⇦27; Private Roads, Cent. Dig. § 5; Dec. Dig. ⇦2.]

[5. *Prohibition* ⇦5.]

Prohibition is the proper remedy for keeping referees appointed under this act within the limits of their jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 21; Dec. Dig. ⇦5.]

[6. *Prohibition* ⇦13.]

But prohibition is preventive only, and, therefore, after the road has been opened and this quasi court dissolved, redress cannot be obtained under this remedy.

[Ed. Note.—Cited in Spencer v. Mahon, 75 S. C. 236, 55 S. E. 321.

For other cases, see Prohibition, Cent. Dig. § 62; Dec. Dig. ⇦13.]

[7. *Highways* ⇦50.]

[Cited in State v. Kendall, 54 S. C. 195, 32 S. E. 300, to the point that persons laying out a highway under the provisions of the statute constitute a quasi court.]

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 151–154, 169–172; Dec. Dig. ⇦50.]

[This case is also cited in State ex rel. Gibbes v. Kirkland, 41 S. C. 35, 19 S. E. 215, as to the object of writs of prohibition.]

Before Hudson, J., Marion, April, 1880.

Application for a writ of prohibition upon the relation of R. P. Hamer against E. T. Stackhouse, R. Murchison, A. Schafer, referees, and D. W. McLaurin and R. R. Hays, restraining the defendants from proceeding

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further in the matter of establishing *a road from the lands of McLaurin and Hays over

land belonging to the relator. This road was established by the referees named, under their hands and seals, March 19th, 1880; notice of the application for this writ was dated March 20th; and the hearing was had by the Circuit judge April 10th.

For a few years prior to 1877, McLaurin owned a lot of land in the town of Little Rock, in Marion county. About the same time the wife of McLaurin purchased from Hamer another lot of land adjoining and took titles. Her husband assumed control of this lot also, and laid out a road from the back part of his own lot across other parts of his lot and on the edge of the lot of his wife, to the public highway leading through Little Rock to Marion C. H. In 1877, McLaurin sold to Hays a part of the back of his lot, and to Mrs. Sternberger the front part of his lot. In 1878, Mrs. McLaurin having failed to pay for her purchase, reconveyed to Hamer. In neither the deed to Sternberger nor in the deed to Hamer was there any reservation of a right of way over this road; and the land so conveyed intervened between the land retained by McLaurin and the land sold to Hays on the one part, and the highway on the other part, along the line of this road.

Sternberger and Hamer afterwards moved their fences so as to obstruct this road. McLaurin and Hays, in February, 1880, gave the necessary notice under the act of February 15th, 1872, of their intention to establish a right of way over the lands of Sternberger and Hamer, one or both, to the highway. Hamer protested and declined to name a referee, whereupon the referee named by McLaurin and Hays, and the referee named by Sternberger, selected a referee for Hamer; and these three referees made their report, whereby they established a road just where the former road had been, and awarded the damages. In their report they state that the road was not located by the most direct line to the highway, and gave their reasons for the location selected.

The order of the Circuit judge is as follows:

D. W. McLaurin, a citizen and resident of the town of Little Rock, in the county of Marion, is the owner of a parcel or lot of

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*land in the said town without a right of way thereto, or mode of ingress and egress to any public road or highway.

To obtain this communication with the highway, he applied to the persons whose lots shut him out from the main street for permission to open a street of sufficient width from the public road or main street to his lot. This consent he failed to obtain from Mr. R. P. Hamer, one of the owners of intervening land. Whereupon he proceeded, under act of February 15th, 1872, to have the said street laid out by a board of referees, whose action is set forth in a report or finding accompanying these proceedings, with a plat of the road, street or highway which they have given to D. W. McLaurin over the lands of R. P. Hamer and others. In order to prevent the accomplishment of this matter, R. P. Hamer, the only dissenting landowner, applies for this writ of prohibition against D. W. McLaurin and the said board of referees.

The town of Little Rock was incorporated March 9th, 1872. 15 Stat. 130. In that act no power is given to the town council to open a street except by consent of the owner of the land through which it runs; and unless relief can be had under the act of February 15th, 1872 (15 Stat. 42), D. W. McLaurin is without the means to obtain access to the public road from his lot by any existing law. The sole question presented by the record, which it is necessary to determine, in my opinion, is whether the act of February 15th, 1872, is in operation within the limits of an incorporated town. It is to be observed that the power conferred by that act upon referees is not conferred upon any of the authorities of the town of Little Rock; but by the tenth section thereof all similar or like power is denied to them; and if the act of February 15th, 1872, cannot be enforced within the limits of that town, its citizens are in a worse plight in this regard than those without the corporate limits, in the event of being without access to a public highway.

The act in question is general, and, in our judgment, is of force in every part of the state, as well within as without the limits of incorporated towns, unless the act of incorporation, by express words or by necessary implication, excludes it. It was a general law before Little Rock was incorporated,

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and we find *nothing in the act of incorporation which expressly or by implication excludes its operation within the town.

We therefore adjudge the referees aforesaid have jurisdiction of the subject matter of this action sought to be prohibited, and that, having jurisdiction thereof, they have not exceeded it in their findings and proceedings. We deem it useless to notice other points raised in the application for the writ and in the argument of counsel.

It is adjudged that the petitions or suggestions in prohibition be dismissed with costs, and the writ is denied.

The relator appealed upon the following grounds:

1. Because his Honor, J. H. Hudson, erred in holding that the referees have jurisdiction of the subject matter of their action sought to be prohibited herein.

2. Because his Honor, J. H. Hudson, erred in holding that the act of the legislature of February 15th, 1872, is of force throughout the state as well within the limits of incorporated cities and towns, as elsewhere, except where acts of incorporation, by express words or by necessary implication, exclude it, and that it is neither excluded by express

words nor by necessary implication by the act of incorporation of the village of Little Rock, S. C.

3. Because his Honor, J. H. Hudson, erred in holding that said referees having jurisdiction in the premises, did not exceed their jurisdiction in their findings and proceedings.

4. Because his Honor erred in holding that it was useless to notice the point raised (which is hereby renewed) that said act of February 15th, 1872, is unconstitutional, null and void.

5. That his Honor erred in overruling the position that D. W. McLaurin could not lawfully demand a way or right of way over lands of others after having deliberately sold off the very lands without reservation.

Mr. J. M. Johnson, for appellant.

1st Ground of Appeal.—The act of February 15th, 1872, providing for referees, authorizes said referees to construct, first, a highway or road; and, second, to the nearest

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highway then *existing. "A highway is not a street, either technically or in common parlance." 12 Rich. 418; Dill. on Mun. Corp. 518. As the act provides for highway or roads, and not streets, the referees had no jurisdiction. The act provides that it shall be to the nearest highway. The relator set forth in his prayer that the right of way would not be to the nearest highway if opened through his land. The referees find the prayer true. Dill. on Mun. Corp., § 469, and authorities cited; Cooley on Const. Lim. 528, 541. Hence, the referees, not having complied with the only mode prescribed by the statute, their act is void.

2d Exception.—General road acts do not apply to incorporated cities and towns, having special power to regulate and improve streets. 12 Rich. 407; 18 N. J. Eq. 305; 14 S. & R. 448. A general act in the nature of the act of February 15th, 1872, does not apply to the streets of a town, the charter of which confers on the corporation the authority to regulate streets and sidewalks, on the principle that the general legislation on a particular subject must give way to special legislation on the same subject. 33 N. J. L. 280; 16 Pick. 508; 1 Overton (Tenn.) 311. So that the power being placed in the intendant and wardens of Little Rock under the charter, (§ 10), by special legislation, the act of February 15th did not apply and the referees had no jurisdiction.

3d Exception.—The fourth section of the act defines the duties of the referees—first, to faithfully determine the location; and the first section defines the location to be "to the nearest highway then existing." The referees find, as a fact, in their report, "that to pass over the lands of the relator would lengthen the way to the public way," so, by their own finding, they have exceeded the power placed in them by the act, and, therefore, their act is void.

4th Exception.—The act of February 15th, 1872, authorizing three persons, styled "referees," to open highways, is unconstitutional, for the following reason, to wit: It contravenes Article I., Section 14 of the constitution. The law of the land in regard to taking private property for public purposes, rests upon the right of eminent domain; to put that right into active energy a power is lodged with the legislature by the people. The legislature holds the position of a trus-

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tee, burthened with the perform*ance of a specific trust. This trust cannot be delegated. Again, the right of eminent domain can only be brought into active energy where the public is to be benefited, and it was never meant to benefit one private individual at the expense of another. Cooley on Const. Lim. 530, 531.

5th Exception.—D. W. McLaurin, the respondent, is estopped from demanding this right of way on the well-established rule of estoppel. The principle is that where a man has entered into a solemn engagement by deed, under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted. D. W. McLaurin, in executing title to the relator, parted with all right, title and interest in and to said land. That in now demanding and obtaining this right of way or highway, D. W. McLaurin becomes possessed necessarily with an easement—which vests in him an interest in said highway—and this, under his deed to the relator, he is estopped from doing under all the principles laid down in the books.

Mr. C. A. Woods, contra.

January 10th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The question which arises first in this case, is that presented in the fourth ground of appeal. It is this: Is the act of February 15th, 1872, under which these proceedings were instituted, constitutional? This should be considered first, because the decision of this question will determine whether or not it will be necessary for the court to proceed further.

If the act of 1872 is unconstitutional and void, then there is an end of this case. If, on the contrary, that act is constitutional and valid, then it will be necessary for the court to pass upon the other questions involved.

Section 14, Article I., of the constitution, provides that no person shall be despoiled of his property but by the judgment of his peers or the law of the land.

Section 23 of the same article provides that "private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the

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consent of the owner *or a just compensation being made therefor; provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations and for works of internal improvement, the right to establish depots, stations, turnouts, &c., but a just compensation shall, in all cases, be first made to the owner." These two sections are in the same constitution and in the same article. They must be construed as parts of the same instrument, and to each must be given its legitimate effect and intent. It cannot be supposed that either was intended to be an unmeaning jargon; on the contrary, we must suppose that the framers of the constitution had a purpose in each.

The first guarantees to every citizen the constitutional right to demand the judgment of his peers and the application of the laws of the land before he shall be despoiled of his property. It throws around the citizen the protection of the courts and of the law, and it ensures to him the right of trial by jury—that inestimable right for which so many sacrifices have been made by our ancestors, and which has long been regarded as the bulwark of our liberties. It is a descendant of Runnymede and Magna Charta, and will never be yielded without a struggle by any free people to whom it may be or has been secured. But while this is true in a general sense, yet this right, great as it is, has a legitimate boundary. No citizen, under any circumstances, should be made to forfeit or be despoiled of his property but by the judgment of his peers or the law of the land; yet every citizen should be willing, under proper conditions, under proper laws and upon just compensation, to surrender his property when demanded by public necessities or the welfare of society. It is in this sense that the second section referred to above should be construed in connection with the first. They tend to the same end—the welfare of the people—and there is no conflict between them.

Hence the framers of the constitution, while recognizing the sanctity of the rights guaranteed in the first section, thought proper to make provision in the second, not only in the appropriation of private property for public use, but, in the matter of the right of way, private property even for private

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use; and to *this end, in the second section above, will be found an express grant of power to the legislature to secure, by proper laws, a right of way, both to corporations and to persons, over the lands of others, upon just compensation being first made to the owner of said lands. The act of February 15th, 1872, is a law of this kind. Its very end and purpose is to secure a right of way to parties walled in by the lands of others. It has no other object, and it provides the necessary machinery for ascertaining the just compensation required by the constitution in such cases.

It does not say what law shall be enacted to ensure the enjoyment of the right intended to be secured, nor does it indicate any special provision or limitation which, in the opinion of the framers of the constitution, might be necessary; it simply delegates the power, in general terms, to make laws for that purpose, leaving the character and terms of the laws to the law-making power of the state, the only condition being that just compensation shall be first made to the owner of the property required to be sacrificed.

The act in question seems to have been passed in pursuance of the authority of this section, and we cannot understand how, when looked at in the light of that section, it can be regarded as unconstitutional, and, therefore, null and void.

Holding the act to be constitutional, it now becomes necessary to proceed to the consideration of the other questions presented in the grounds of appeal.

1. Did the presiding judge err in holding that the referees had jurisdiction of the subject matter of the action sought to be prohibited?

The act of February 15th, 1872, authorizes the referees to construct a highway or road to the nearest highway then existing; and the argument relied on here to show that the referees did not have jurisdiction is, first, that the way opened by them is neither a highway or a road; and, second, that it does not run to the nearest highway.

In a strict technical sense, it may be that the way opened is not a highway or a public road; but this is clearly not the character of the wrongs intended to be provided for in this act. The purpose of this act is to open to parties, otherwise cut off, a way

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*of ingress and egress to and from their lands to the nearest public highway, and the terms used in the act must be construed under the control of that object; and whether it be called a highway or a road—in that the end intended is accomplished—the act is satisfied.

The construction contended for by the appellant is too strict and narrow, and, if enforced, would negative the act entirely and leave it a dead letter on the statute book. Parties never, or seldom, desire a highway or public road, in the ordinary sense, leading from their private premises to the nearest highway, and this act was not passed to accomplish any such purpose. The appellant, too, has failed to apprehend the true intent of the act as to the second point. The act does not say that the road must be opened on the nearest line to the highway, but to the nearest highway; leaving it to the referees to determine the exact route. This seems to

have been done in this case, and it does not appear that the referees transcended their jurisdiction in this respect.

"The presiding judge held that the act is of force throughout the state, as well within the limits of incorporated cities and towns as elsewhere, except where acts of incorporation, by express words or by necessary implication, exclude it," and that it is neither excluded by express words or by necessary implication by the charter of the village of Little Rock; and this ruling is made the subject of the third ground of appeal. We see no error in the presiding judge in this respect.

The act is a general and public act, and it is limited to no special locality, and it necessarily applies to the whole state, including towns and cities, unless excluded by express words or by necessary implication in the act of incorporation of some town or city. No such express words or necessary implication are found in the act incorporating the village of Little Rock.

This act was passed to meet a necessity which is left unprovided for both in the powers of the county commissioners and the municipal authorities of Little Rock. The county commissioners are confined in their jurisdiction to the public roads and highways of the county, and the municipal authorities of Little Rock to the public roads and streets of the village.

This is a contest in reference to a special

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private way provided *for in this act of 1872, in which the public has no interest whatever, and which is altogether beyond and outside of the jurisdiction of either of the agencies above referred to. Such being the fact, the judge was right in his ruling objected to in the second ground of appeal.

We can see no error in that part of the judge's order in which he ruled that the referees had not exceeded their jurisdiction in their findings and proceedings, as contradistinguished from the subject matter.

There appears nothing in their mode of proceeding contrary to law or the act under which they were acting; nor can we say that the judge erred in declining to overrule and reverse their finding.

In the fifth ground of appeal it is stated that McLaurin deliberately cut himself off from the nearest highway by selling to other parties intervening lots, without reservation, and upon that ground the presiding judge should have held that he could not claim this right of way over the lands of Hamer. If the facts sustained this position there might be reason to consider this exception, but the record shows a different state of facts. It is stated in the record, or rather in the uncontradicted affidavit of McLaurin, that McLaurin, at one time, had control of all the lots and lands embraced in this contest; that, while thus in control, he opened the precise way which has been opened by the referees, and that this way was in existence when he sold off the lots to Hays and Mrs. Sternberger, and so continued until he sold to Hamer afterwards, when it was closed up by Hamer and Mrs. Sternberger moving in their fences. It is true that McLaurin made no reservation, in his different deeds, of this road, but he sold the lands with this road established and in his use, and it can hardly be supposed that he intended to yield this right of way—the only one he had—and that he deliberately cut himself off from the highway leading from Little Rock to Marion Court House. He no doubt supposed that this road, being already open and in use, would remain so.

This being so, we do not think this act precluded the referees from taking jurisdiction.

The question whether the referees, under

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this act, constitute *such a tribunal as would be subject to the restraining powers of prohibition when transcending their jurisdiction, has not been raised in the pleadings or argument. But in considering and passing upon the grounds of appeal, we have impliedly recognized the right of the appellant to apply for this mode of redress, and it may not be out of place to present our views on that subject. Originally, the writ of prohibition was understood to be a writ issuing out of some superior court, "directed to the judge and parties of an inferior court, commanding them to cease from the prosecution of a suit upon a suggestion that either the cause originally or some collateral matter therein does not belong to that jurisdiction, but to the cognizance of some other court." 3 Bl. Com. 112. But in practice this writ has subsequently gone beyond this limit, and it has not only been used to restrain inferior judicial tribunals within the orbit of their jurisdiction as to the subject matter conferred upon them, but it has also reached to their collateral proceedings when contrary to the common law or some statutory provision. Nor has it been confined entirely to inferior judicial tribunals, as seemed first to be intended; on the contrary, it has been extended to other public functionaries, officials and persons charged with the performance of a duty not wholly judicial, and not even very extensively or strongly marked with a judicial character. State v. Com'rs of Roads of Christ Church Parish, 1 Mills' Const. 55 [12 Am. Dec. 596]; State, ex rel. Mrs. Kohne, v. James Simons and B. C. Pressley, 2 Speers 761.

The referees provided for under the act of 1872 are constituted a sort of court to hear and determine the question of right of way of one citizen over the lands of another, and its action is without appeal. And we have no hesitation in saying that prohibition, under the latitude above, is not only a peculiarly

proper, but a necessary remedy to keep this quasi court within the boundary of its extraordinary powers: and, consequently, we have felt fully warranted in entertaining this appeal.

We might say further, as applicable to the facts of this case, that the writ of prohibition is a preventive remedy and not remedial. It comes too late after the mischief, if

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any has been done. *While the hand is uplifted it can arrest and prevent the blow, but, the blow once received, this writ is powerless to redress.

It seems in this case, that, whether legally or not, the road in controversy is open, the court dissolved and the parties dispersed. Under this view, even though the appellant had the right and the law on his side, he could not obtain redress through this proceeding.

The order below is affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

14 S. C. 428

(Case No. 963.)

STATE v. DAVID.

(November Term, 1880.)

[1. *Criminal Law* ⇐951.]

One convicted of murder moved at the same term for a new trial, upon the ground of insufficiency of evidence, which motion was overruled, and sentence was passed. At a subsequent term, but before execution of the sentence, this defendant moved for a new trial upon affidavits of after-discovered evidence, which motion was refused, upon the ground that there was no power to grant it. *Held*, that the Circuit Court did possess this power, but that it should be exercised with great caution.

[Ed. Note.—Cited in Altee v. South Carolina Ry. Co., 21 S. C. 559; State v. Price, 35 S. C. 278, 14 S. E. 490; State v. Don Carlos, 38 S. C. 227, 16 S. E. 832; Turner's Motion, 39 S. C. 416, 17 S. E. 888; State v. Turner, 39 S. C. 424, 17 S. E. 885; State v. Rhodes, 44 S. C. 331, 21 S. E. 807, 22 S. E. 306; State v. Johnson, 45 S. C. 491, 23 S. E. 619; Jones & Williams v. Fitzpatrick, 47 S. C. 58, 24 S. E. 1030; Varn v. Green, 50 S. C. 405, 27 S. E. 862; Brown v. Carolina Midland Ry., 67 S. C. 490, 46 S. E. 283, 100 Am. St. Rep. 756; Reed v. Southern Ry., 75 S. C. 172, 55 S. E. 218; Mills v. Atlantic Coast Line R. R., 87 S. C. 157, 69 S. E. 97, 99; State v. Bradford, 87 S. C. 549, 70 S. E. 308; State v. Jones, 89 S. C. 53, 71 S. E. 291, Ann. Cas. 1912D, 1298; State v. Bethune, 93 S. C. 202, 75 S. E. 281; Miller v. Atlantic Coast Line R. Co., 95 S. C. 475, 79 S. E. 645.

For other cases, see Criminal Law, Cent. Dig. § 2352; Dec. Dig. ⇐951.]

[2. *Criminal Law* ⇐1132.]

Appellant having waived the right to be present in this court at the hearing of his appeal—*Held*, that his presence was not necessary.†

[Ed. Note.—Cited in State v. Jefcoat, 20 S. C. 386; State v. Williams, 40 S. C. 379, 19 S. E. 5.

For other cases, see Criminal Law, Cent. Dig. § 2982; Dec. Dig. ⇐1132.]

[3. *New Trial* ⇐1.]

[Cited in State v. Nance, 25 S. C. 174; Southern Power Co. v. White, 92 S. C. 221, 75 S. E. 459, to the point that the power to grant new trials is denied to the Supreme Court.]

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 1–3; Dec. Dig. ⇐1.]

[4. *New Trial* ⇐1.]

[Cited in State v. Turner, 39 S. C. 423, 17 S. E. 885; Southern Power Co. v. White, 92 S. C. 222, 75 S. E. 459, to the point that the power to grant new trials in cases tried by the circuit courts was one of their inherent powers.]

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 1–3; Dec. Dig. ⇐1.]

[This case is also cited in Sams v. Hoover, 33 S. C. 403, 12 S. E. 8; State v. Chavis, 34 S. C. 135, 13 S. E. 317, as to when circuit court may entertain motions for new trial; in Boyd v. Munro, 32 S. C. 252, 10 S. E. 963; Sams v. Hoover, 33 S. C. 404, 12 S. E. 8, as to appeals from denial of motions for new trial; in Durant v. Philpot, 16 S. C. 126; Ex parte Carolina Nat. Bank, 56 S. C. 20, 33 S. E. 781, as to procedure for vacating judgments; and in City Council of Anderson v. O'Donnell, 29 S. C. 365, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728, without specific application.]

Before Mackey, J., Abbeville, October, 1880.

At the request of the defendant's counsel, this court heard this appeal in the absence of the prisoner. The case is fully stated in the opinion.

Mr. W. C. Benet, for appellant.

Mr. Solicitor Cothran, contra.

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*January 10th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The appellant, Jeff David, at a special term of the Court of General Sessions for Abbeville county, April, 1878, stood charged with murder. He was tried and found guilty. Before sentence his counsel made a motion for a new trial on the ground of insufficiency of evidence. The motion was refused and the appellant was sentenced to be hanged on May 17th, 1878.

The execution of this sentence has been stayed by executive clemency until now; the last respite fixes the day of execution upon March 18th, 1881.

In October, 1880, a motion was made before Judge Mackey, in General Sessions, at Abbeville, for a renewal and rehearing of the motion for a new trial, Judge Mackey having presided at the session of the court when appellant was convicted. This last motion was made on the ground of after-discovered evi-

† See State v. Gill, ante p. 410.

dence. Upon the hearing of this motion Judge Mackey passed the following order:

"A motion for a new trial in the above case having been made before me by the defendant, on the ground of after-discovered evidence, and argument of defendant's counsel and of the solicitor for the state having been heard thereon:

"It is ordered, that although on the strength of the affidavits of after-discovered evidence submitted by defendant's counsel, I should grant the motion for a new trial if I had the power to do so, the motion is hereby refused, because I conceive that I have not the power to grant it in the case stated.

(Signed) "T. J. Mackey,
"Presiding Judge.

"October 20th, 1880."

The defendant, by his attorney, Mr. W. C. Benet, appealed on the ground that the Circuit judge erred as to a matter of law in holding that he had no power to grant a new trial in the case stated; at the same time stating in his order that if he had the power, upon the affidavits submitted, he would grant the motion.

The only question raised in the appeal is

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this: Was there *error of law on the part of the Circuit judge in holding that he had no power to grant the motion? Whether the affidavits submitted by the appellant, on his motion, were sufficient to call for the exercise of this power is not involved here, nor could it be reviewed if it were; but the question is, admitting that these affidavits were sufficient for this purpose, had the power of the judge been exhausted in his refusal of the first motion at the trial, and from which there had been no appeal?

Formerly, in this state, the Circuit judges had no power to hear motions for new trials. These motions were made before the Appeal Court, which court alone was invested with this power. Since the adoption of the present constitution, however, the grant of power therein to the present Supreme Court does not embrace the hearing of such motions. The power to hear motions for new trial is, in its nature, an appellate power, and appellate jurisdiction is expressly denied to the Supreme Court by the constitution, except as to cases in chancery. State v. Bailey, 1 S. C. 1.

While this is true as to the Supreme Court of this state, yet the Circuit Courts are invested with full powers on this subject. It belongs to these courts as an incident to their original jurisdiction, and, besides, by act of general assembly, (14 Stat. 136), it is expressly declared "that Circuit Courts shall have power to grant new trials in all cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law of the United States."

The act of 1869 (Gen. Stat. 497), which prescribes the mode for vacating erroneous judgments and the time within which motions may be made for this purpose, has no application to criminal cases; it is confined in its terms to judgments and decrees rendered by the Court of Common Pleas.

Before the amalgamation of the two courts of law and equity in this state each of these courts had power under certain circumstances to set aside judgments and decrees and to grant trials de novo; not strictly by motion for new trials, but upon other principles in the nature of a bill of review and rehearing for after-discovered testimony. The mode of procedure in these courts being different aft-

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er the adoption of the constitution of *1868, all the power of the two courts was, by that constitution, vested in the Court of Common Pleas, and the act of 1869, supra, seems to have been passed to provide a uniform mode of procedure in such cases, so that now, since that act, erroneous judgments and decrees, which formerly had to be assailed according to the forms in use in the respective courts, may be vacated on motion in the Circuit Courts under the provisions of the act of 1869, provided that the motion is made within two years after the rendition of the judgment assailed; but this act, as has already been stated, has no application to criminal cases. The power of the Circuit Courts to grant new trials in criminal cases comes directly from the act of 1868, supra, and also as an incident to its original powers. State v. Bailey, supra.

The Circuit judge, in this case, gives no reason in his order why, in his judgment, he was without power in the premises. The only facts which distinguished this case from others where motions for new trials have been heard and granted are, first, this is a second motion after the refusal of the first; and, second, this is made after sentence.

Generally motions for a new trial must be made upon the minutes of the court and before the adjournment of the court at which the trial was had, or before sentence or judgment, or upon a case made up and settled by the judge who tried the case, and, when once thus heard, it is final. The order in such case cannot afterwards be reviewed either by the judge himself, who heard it, or by another judge. These motions, however, are made upon matters growing out of the trial, and as to facts occurring at the trial, and, when once passed upon, the action of the court is conclusive, unless an error of law is involved, giving a right of appeal to this court.

But in the courts of law of the United States a party may, under certain circumstances, become entitled to a new trial on account of newly-discovered testimony; the ground being that the facts upon which he now relies are external to those which transpired at the trial.

Can this appellant be cut off, then, from the

opportunity of availing himself of this testimony because, at the time of his conviction, he moved for a new trial on the then exist-

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ing facts, *and, failing in that, sentence had been pronounced against him? If this be so, the right of a new trial on the ground of after-discovered testimony is a delusion and a snare. It is a promise to the ear, but broken to the hope. If this be so, the only possible case in which such testimony could be made available would be where the party had waived his motion at the trial.

The right to a new trial on newly-discovered testimony, when sufficient, is as fully settled and guaranteed by the law as any other, and this right cannot be lost because a new trial had once been refused upon facts wholly different from and not involving this newly-discovered testimony.

It is true, as a general rule, such applications come too late if made after judgment, but it is within the discretionary power of the court still to hear, even after judgment entered, and even after the judgment has been affirmed on appeal. McMicken v. Webb, 6 How. 293 [12 L. Ed. 443]. If this is so in civil cases, how much more important is it in criminal cases, involving liberty and life. There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury; and, as was said in the case of State v. Harding, 2 Bay 268, it would have a mischievous tendency after all the evidence on the part of the state had been fully disclosed to allow one with his life in danger an opportunity, by the assistance of confederates, to procure unprincipled witnesses to contradict the evidence on the part of the state, and thereby defeat the ends of justice; but this case does not involve the discussion of the facts and principles which should control the court on motions of this kind.

The only question involved is the existence of this power; if it exists, no doubt it will be exercised wisely and discreetly. Our judgment in this case may be of no practical benefit to the appellant, but the case has come up in the regular channel of appeal, and it has become our duty to decide the questions of law involved. It is our opinion that the Circuit Court has discretionary power to hear and determine motions of the kind made in this case, and, therefore, that the Circuit

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judge was in *error when he refused the motion on the ground of the want of legal power: and it is so adjudged.

At the hearing of this case, the appellant being absent, the question was raised whether his presence was necessary; the court ruled that the hearing might proceed without the presence of the prisoner. As this is a departure from the practice heretofore obtaining in this state, although not embraced in the appeal, it may not be improper for the court to state briefly the grounds of this ruling. The practice of having the prisoner in cases of felony present in the appellate court was because of the ancient practice and precedents in the English courts. This practice grew up in England because a person indicted for felony could not at common law appear by attorney or counsel. Therefore his presence was always required in every stage of the proceedings.

In the United States a different system prevails. In all criminal cases and in all the courts the accused is entitled to counsel. In this state he is entitled, by Article I., Sec. 13, of the constitution, to be fully heard in his defence by himself or by his counsel, or by both; and if he claimed the right to be present and be heard in his defence, he would be entitled to that privilege, but his personal presence is not necessary in this court as a condition precedent to the hearing of such questions as may be raised here by appeal.

In Commonwealth v. Castello, 121 Mass. 371, indictment for forgery, it was held that a defendant in a criminal case had no right to be personally present at the hearing of a motion on his behalf for a new trial, and his absence would not invalidate sentence subsequently passed upon him. See also 2 Dutcher 605, where the same doctrine in substance is held.

The court therefore deemed it unnecessary in this case for the prisoner to be personally present.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. *434

*(Case No. 964.)

MOON v. JOHNSON.

(November Term, 1880.)

[1. *Appeal and Error* ⇐103.]

In an action to recover the possession of real estate, an order refusing plaintiff leave to file a supplemental complaint, setting up a title deed to the land in question, is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 701; Dec. Dig. ⇐103.]

[2. *Ejectment* ⇐115.]

Plaintiff can recover only upon the cause of action existing when suit was commenced; and therefore in an action for the recovery of real property, he cannot, by supplemental complaint, set up a legal title acquired after suit brought. Bank v. Manufacturing Company, 3 Strob. 190 [49 Am. Dec. 640], recognized and followed.

[Ed. Note.—Cited in McCaslan v. Latimer, 17 S. C. 128; Johnson v. Johnson, 27 S. C. 313, 3 S. E. 606, 13 Am. St. Rep. 636; Anderson v. Pilgram, 30 S. C. 504, 9 S. E. 587, 4 L. R. A. 205, 14 Am. St. Rep. 917; Garlington v. Copeland, 32 S. C. 66, 10 S. E. 616; Correll v. Georgia Construction & Investment Co., 37 S. C. 449, 16 S. E. 156; Jacobs v. Gilreath, 41

S. C. 146, 19 S. E. 308, 310; Bank of Charleston v. Dowling, 45 S. C. 682, 23 S. E. 982; Martin v. Jennings, 52 S. C. 375, 29 S. E. 807; Cauthen v. Lancaster Cotton Oil Mills, 96 S. C. 345, 80 S. E. 615.

For other cases, see Ejectment, Cent. Dig. § 373; Dec. Dig. ⟸115.]

[3. *Pleading* ⟸276.]

[Cited in Copeland v. Copeland, 60 S. C. 139, 140, 38 S. E. 269, to the point that the leave of the court is necessary to file a supplemental complaint.]

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 833, 835; Dec. Dig. ⟸276.]

Before Thomson, J., Greenville, April, 1880.

The case is sufficiently stated in the opinion.

Messrs. Garlington & Moore, for appellant.

Messrs. Earle, Wells & Westmoreland, contra.

January 10th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This was an action by appellant to recover possession of real estate. The title deed set up by the appellant was a deed from the Probate judge in partition. After the cause was on the calendar the decision in Davenport v. Caldwell, 10 S. C. 317, was announced. The appellant then commenced proceedings in the Court of Common Pleas to confirm the partition of the Probate Court. Under these proceedings this partition was confirmed, and by order of the court the master executed titles to the appellant of the land in question. The respondent was not a party to the confirmation proceedings.

The appellant then made a motion to the Circuit Court for leave to file a supplemental complaint so as to set up the deed of the master.

This motion was refused by the Circuit

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judge "on the ground *that a cause of action, under a different deed, is set out in the alleged complaint, and the same relief sought as in the first complaint."

The appellant appealed on the grounds:

1. Because the plaintiff was entitled to a supplemental complaint as a matter of course.

2. Because the code allows the plaintiff to file a supplemental complaint, alleging facts material to his case occurring after the former complaint, and of which he was ignorant at the time.

3. Because, under the code, the plaintiff is entitled to file a supplemental complaint to set up a judgment or decree of a court of competent jurisdiction rendered since the commencement of the action.

The leave of the court is necessary, in all cases, to file a supplemental complaint, and although this leave will be generally granted, yet it is by no means a matter of course order to which a party is entitled whenever he may choose to apply for it. On the contrary, the motion must be made in due time, in good faith, and upon facts warranting the favorable action of the court, and, when thus made, it rests in the discretion of the court whether it shall be refused or granted, and even after granted it may be withdrawn when proper. Whitaker's Pr. 213.

In this case the motion was refused. The respondent makes the point that an order granting or denying a supplemental complaint is within the discretion of the court, and therefore not appealable.

This is the first question involved, and we find it at the threshhold of the case. Under the code, Section 11, any intermediate judgment, order or decree, involving the merits of the action, is the subject of appeal. Does this order involve the merits of the action? The action is one to recover the possession of real estate. In the judgment of the appellant his recovery depends upon setting up the deed which he desires to bring before the court by means of the supplemental complaint. The order of the judge has denied him this privilege. This order, then, strikes at the very foundation of the appellant's action, and clearly involves its merits. Whitaker's Pr., vol. II., p. 216, § 193.

Mr. Whitaker says, "An order granting or

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refusing leave to *plead supplementarily, involves the merits and is appealable." Harrington v. Slade, 22 Barb. 161; St. John et al. v. Croel, 10 How. Pr. 253; Brown et al. v. Irish Presbyterian Congregation, 6 Bosw. 259.

In the case of Edwards v. Edwards, ante p. 11, in this state, though the question was not directly involved, yet this court reviewed the order of the court below, allowing a supplemental complaint.

In our judgment the order in this case is appealable.

In the second and third grounds of appeal the appellant states correctly the facts and circumstances under which a party is generally entitled to a supplemental complaint; but we do not see that the Circuit judge, in refusing the appellant's motion, has violated any legal right of the appellant as claimed in these grounds. While in a supplemental complaint a party may allege facts material to his case, and of which he was ignorant at the commencement of his action, as stated in the second ground of appeal, and while, under certain circumstances, he may set up a judgment or decree of a competent jurisdiction, rendered since, as stated in the third ground, yet it is a well-settled rule of pleading that the matter of a supplemental complaint must be consistent with and in aid of the case made by the original pleadings, and that it cannot make a new and different case. Wait's Pr. 476. Nor can a suit, originally defective, be sustained or cured by means of a supplemental pleading. Whitaker, vol. II., p. 214; McCullough v. Colby, 4 Bosw.

603. In the case of McCullough v. Colby, the very point arose, and the court said "that facts accruing after suit brought cannot be inserted under any circumstances in the original complaint by way of amendment, nor by supplemental complaint when the original complaint failed to state a cause of action."

"No party," says the court, "can recover in an action which was commenced when the cause of action had not accrued." So, too, in the case of Bank of State of South Carolina v. S. C. Manufacturing Co., 3 Strob. 190 [49 Am. Dec. 640], which was an action, like this, to try titles, the court held that in an action to try titles, as well as in all other actions, the question always is, did the plaintiff have a cause of action when the suit was commenced? In this case the plaintiff had purchased land at sheriff's sale, and com-

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menced *his action before he obtained the deed of the sheriff, but he received the deed after the commencement of the action. Upon these facts being developed, he was nonsuited, and the non-suit was sustained in the Appeal Court, that court deciding that whatever may have been the equity of the plaintiff, the title to the land was inchoate—it was executory—and that the legal estate could never pass until the deed was executed and delivered. Such a defect, it is well settled, cannot be cured by supplemental complaint. The case before the court is very similar to the one of Bank v. Manufacturing Company.

At the commencement of the action it is admitted that the appellant had no legal title to the land. He claims to have obtained title since, and while his original action was still pending; and he seeks, by supplemental complaint, to set up this title in his original suit, and to recover upon that. According to the above authorities, this is a fruitless effort. He must stand or fall on the cause of action as it existed when he began his suit. His difficulty, therefore, is beyond the reach of a supplemenal complaint.

The order of the court below is affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. 437

(Case No. 965.)

CRENSHAW v. THACKSTON.

(November Term, 1880.)

[1. *Mortgages* ⇐427.]

A mortgaged his land to B, to secure a debt. A afterwards sold a part of this land to C, who agreed to pay the mortgage debt, and reserved enough of the purchase money for that purpose. C. sold to D, who made no promise to pay this debt, but had knowledge of the mortgage and also of the agreement between A and C. B being about to foreclose the mortgage, D paid it off, taking an assignment, and then assigned it to E. *Held*, that A was a necessary party to an action brought by E to foreclose this mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1280; Dec. Dig. ⇐427.]

[2. *Mortgages* ⇐280.]

The land in the possession of D is primarily liable for the payment of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 737, 740–750, 757–760; Dec. Dig. ⇐280.]

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*Before Pressley, J., Pickens, October, 1879.

Action by S. D. Crenshaw against John S. Thackston and N. T. Wilson, commenced in August or September, 1879. The mortgage bears date February 8, 1876, and was given to secure the payment of a sealed note for $346.55, with ten per cent. interest, due January 1st, 1877. Sometime during the year 1876, Thackston sold to M. W. Ford one hundred acres of this land, for about $1400, of which Ford retained $378.25, to pay off the mortgage debt, under agreement to do so, and paid the balance, about $1000, in cash. In January, 1877, Ford sold to N. T. Wilson for $1000. The witnesses agree that Wilson did not agree to pay the mortgage debt, or to pay more than $1000 for the land. N. T. Wilson paid the debt and took an assignment of the mortgage, December 1st, 1877, and assigned the same to plaintiff, in trust for R. T. Wilson & Co., August 18th, 1879.

All other facts, and the findings of disputed facts, are stated in the Circuit decree, which is as follows:

In this case, plaintiff seeks the foreclosure of a mortgage held by him as assignee of N. T. Wilson. The defendant Thackston was the owner of two hundred and sixteen acres of land, which he mortgaged to R. Lenhardt, to secure payment of a note of $346.55. Subsequently, he sold one hundred acres of said land to M. W. Ford, who retained enough of the purchase money to pay the mortgage, and signed an agreement to pay the same. Afterwards, being in failing circumstances, he conveyed the land to defendant N. T. Wilson, in payment of a debt due to R. T. Wilson & Co. The weight of testimony leads me to the conclusion that N. T. Wilson then knew of the said mortgage, and that Ford was to pay it. He admits, in his own testimony, that at the time of this purchase, Ford told him that he owed that much on the purchase of the land from defendant Thackston, and this was sufficient notice to put him upon further inquiry in the matter. Subsequently, the two hundred and sixteen acres were advertised for sale by Lenhardt, to foreclose his mortgage, and Wilson, to

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prevent the sale, paid *the mortgage debt and took an assignment of the same, which he thereafter assigned to the plaintiff, in trust for R. T. Wilson & Co. On this state of facts, I decide that Ford's agreement with

Thackston made the hundred acres, then sold to Ford, first liable for the said mortgage debt, and that by reason of sufficient notice, it remained so liable in the hands of Wilson. Plaintiff, as his assignee, is bound by the equities between him and Thackston, and they discharged the land of the latter from the lien of said mortgage when Wilson became the owner thereof, with liability to pay it out of his own land.

It is therefore ordered and adjudged that, as to the defendant Thackston, the complaint be dismissed, with costs.

If plaintiff desires to press his case against the land of Wilson, leave is hereby granted him to move, in term time or at chambers, for a decree of foreclosure and order of sale in that respect.

The plaintiff and the defendant Wilson excepted to this decree and appealed to the Supreme Court, upon the following grounds:

1. Plaintiff and defendant Wilson except to so much of said decree as holds that the defendant Wilson's knowledge that Ford owed $346.55 to Thackston, as a part of the purchase money, was sufficient notice to put him upon further inquiry in this matter; this plaintiff and defendant Wilson taking the position that the agreement between Ford and Thackston was a mere personal covenant between them, and not a covenant running with the land, there being no mention made in the deed from Thackston to Ford of the same.

2. Plaintiff and defendant Wilson except to said decree upon the further ground that, even if Wilson had knowledge, at the time of his purchase of the one hundred acres of the land, there was an agreement between Thackston and Ford that the latter was to pay the Lenhardt mortgage, it was a mere personal confidence reposed in Ford by Thackston, and Ford says was not assumed in any manner by Wilson, who paid to Ford $1000 for the land, alleged by all parties to have been the full value of the same.

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*3. Plaintiff and defendant Wilson further except to said decree upon the further ground that, if Wilson knew of the agreement between Thackston and Ford that Ford was to pay off the Lenhardt mortgage, but did not assume or agree to assume the same himself—and the testimony shows that he did not assume or agree to assume the said debt—then his afterwards becoming the owner of the mortgage on the two hundred and sixteen acres does not make his one hundred acres first liable to the payment of said mortgage debt, the deed from Ford to Wilson containing the covenant of warranty, which embraces all the five English covenants, the covenant of warranty was itself a covenant to pay the encumbrance, and consequently, Wilson or his one hundred acres of land is not first liable for the mortgage debt. The court, in Evans v. McLucas, 12 S. C. 56, say that "a parol contract in addition to this formal one would have been senseless and useless."

4. Plaintiff and defendant Wilson further except to said decree upon the ground that he, the plaintiff, being the assignee of the Lenhardt note and mortgage, stands in the shoes of Lenhardt, and is entitled to have all the land to stand as a security for his mortgage debt, and it was error in the Circuit judge to dismiss the complaint as to the defendant Thackston.

5. Plaintiff and defendant Wilson except further to said decree upon the ground that Thackston, by the terms of the note and mortgage now sued on, was liable to pay off the same; that he claims that Ford assumed this liability by special agreement; that Ford has not paid the same; that Wilson never promised to pay the said debt; has received no consideration from which the law would imply a promise or agreement to pay, and consequently, Thackston's one hundred and sixteen acres of land are first liable for the mortgage debt.

6. Because the decree is in other respects contrary to law.

Messrs. Cothran & Ansel, for appellants.

Mr. T. H. Cooke, contra.

January 10th, 1881. The opinion of the court was delivered by

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*SIMPSON, C. J. The appeal in this case is from the decree of Judge Pressley above, and in this decree will be found a statement of all the facts material to the questions presented for our consideration.

We concur with the presiding judge as to the result, except so far as he dismissed the complaint as to the respondent, Thackston, with costs. If the appellant is a bona fide holder and owner of the mortgage debt, we think that Thackston was a proper party to these proceedings, and the appellant is entitled to hold him responsible until his note is satisfied out of some portion of the lands covered by the mortgage. The presiding judge may have believed that the assignment of the note and mortgage by Wilson to the appellant was pretensive and fraudulent, but he does not say so, and does not give that as his reason for dismissing the complaint as to Thackston, and we can find no sufficient warrant for this portion of his decree.

The basis of appellant's action is the note of Thackston and the mortgage which he executed, and in a suit on that note and for the foreclosure of this mortgage he, Thackston, was a necessary party, whatever may be the equities between him and the other defendant. But, as already stated, we concur with Judge Pressley in holding that portion of the mortgaged premises in the possession of the appellant, Wilson, primarily liable for

this debt as between Wilson and Thackston.

In the case of Marsh v. Pike, 10 Paige 596, Marsh had mortgaged certain real estate in New York to Pike. Marsh afterwards conveyed the premises to another party, deducting the amount of the mortgage from the purchase money; the purchaser agreeing to pay off and discharge the mortgage.

Some time after this the grantee of Marsh conveyed to a third party, who also agreed with his grantor to pay off and satisfy the mortgage.

The court held that the effect of these several conveyances and agreements was, in equity, to place Marsh as a surety for the payment of the bond and mortgage, and to make the two purchasers the principal debtors—the first being primarily and the latter secondarily liable to him for the payment of the debt—and while he, Marsh, could not

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compel the mortgagee to pro*ceed for foreclosure against the subsequent purchasers in possession, yet, by having the mortgage assigned to him, he would be subrogated to the rights of the mortgagee and could proceed himself against the land. This case, in its facts, is nearly on all fours with the case now under consideration. The only difference is that the record does not show that Wilson, when he purchased from Ford, agreed to satisfy the mortgage debt. He had knowledge, however, of this statement of Ford, and he knew that Ford, when he conveyed to him, Wilson, was in failing circumstances, and these facts will be found sufficient, we think, to bring Wilson under the operation of the doctrine announced in Marsh v. Pike, in accordance with the fundamental and well-established principles of equity—principles that commend themselves to every lover of justice and fair dealing between man and man.

Thackston sold his land to Ford; leaving in the hands of Ford enough of the purchase money to pay off the mortgage which Ford solemnly agreed in writing to discharge. Ford, on approaching insolvency, sold to Wilson for the precise sum which Ford had paid in cash to Thackston—$1000—Wilson being fully informed of the mortgage and the agreement of Ford. Wilson then paid off the mortgage and had it assigned to himself, and instead of instituting proceedings thereon in his own name, as assignee, assigned it to the present appellant, who has brought the action.

All this may have been fair and bona fide, but it has the appearance of an arrangement to defeat Thackston of his just rights. Whether this be so or not, abstract justice is with him, and it is gratifying to know that there are well-established principles of equity which will protect him.

In the case of Massey v. McIlwain et al., 2 Hill's Eq. 421, the high, equitable doctrine that where one purchases property subject to the equity of another, with notice of this equity, he is bound by it, and holds the property subject to the equitable rights of the other, was recognized and enforced. The rule in equity, as was said in that case, being, that an agreement in writing to convey land in consideration of an adequate price will, in equity, bind the estate and prevail against

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any subsequent lien; *and, as was done in that case, will follow the land into the hands of any subsequent purchaser, with knowledge of the equity growing out of the agreement. In that case this doctrine was fully discussed by Chancellor Johnson, who delivered the opinion of the court, sustaining it by various authorities. And many other cases might be referred to, but the general principle is familiar, and has been long established.

Now, in the case before this court, there can be no doubt that had Lenhardt, the original mortgagee, instituted proceedings to foreclose this mortgage against Thackston and Ford before Ford conveyed to Wilson, Thackston's equity arising under the agreement by Ford to pay off the mortgage and the bond which he had retained as part of the purchase money to pay would have entitled Thackston to claim that the mortgage of Lenhardt should be primarily foreclosed on that portion of the land which he had conveyed to Ford. And under the code, (Section 298,) which authorizes the court to adjust the rights between defendants, as well as enforce those of the plaintiff, the court would not have hesitated to afford him that relief.

Such being the fact, and Wilson, according to the finding of Judge Pressley, having bought, not only with a knowledge of the mortgage, but also of the express agreement of Ford, will not the equity of Thackston, as held in the cases referred to above, follow the land into the possession of Wilson? We think so, and it is so adjudged.

The decree of Judge Pressley is affirmed except as to the dismissal of the complaint as to Thackston, with costs. The mortgage should be foreclosed on the land in possession of Wilson first, and if that should fail to satisfy the debt, then the remainder should be paid from the land covered by the mortgage in the possession of Thackston, and the case is remanded for this purpose, should the plaintiff desire to proceed further.

McIVER and McGOWAN, A. J.'s, concurred.

14 S. C. *444

*(Case No. 969.)

THE BANK OF CHARLESTON NATIONAL BANKING ASSOCIATION v. ZORN.

(November Term, 1880.)

[Reported and Annotated in 37 Am. Rep. 733.]

[1. *Motions* ⇐19.]

A motion, made at the trial and without notice, to strike out a part of the answer, may be entertained by the Circuit judge, if the defendant does not object to the hearing of the motion.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 14; Dec. Dig. ⇐19.]

[2. *Bills and Notes* ⇐427.]

In an action by the endorsee of a promissory note against the maker, the Circuit judge properly refused to strike out a defence, which, in substance, was a plea of payment without notice of transfer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233–1244; Dec. Dig. ⇐427.]

[3. *Witnesses* ⇐255.]

A witness, to refresh his memory, may refer to an account current furnished him by his factor, if such examination enables him then to testify from his own recollection. The rules stated.

[Ed. Note.—Cited in State v. Collins, 15 S. C. 379, 40 Am. Rep. 697; State v. Jones, 29 S. C. 226, 7 S. E. 296; Fritz v. Burriss, 41 S. C. 153, 19 S. E. 304; Rose v. Winnsboro National Bank, 41 S. C. 193, 19 S. E. 487; Ragsdale v. Southern Ry., 72 S. C. 124, 51 S. E. 540; Franklin v. Atlanta & C. A. L. Ry. Co., 74 S. C. 337, 54 S. E. 578.

For other cases, see Witnesses, Cent. Dig. § 888; Dec. Dig. ⇐255.]

[4. *Trial* ⇐199.]

In charging the jury that if they believed the plaintiff was guilty of laches in not demanding payment of the note at the office of W. & D. before their failure, and that plaintiff would have received the money if the note had been presented, and by their failure to do so the defendant lost his money, they should find for defendant, the Circuit judge did not leave to the jury the legal question of what was laches.

[Ed. Note.—Cited in Norris v. Clinkscales, 47 S. C. 520, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. §§ 467–470; Dec. Dig. ⇐199.]

[5. *Bills and Notes* ⇐394.]

The maker of a promissory note, which was payable to his factors at their office, placed there funds sufficient to meet the note at maturity, and afterwards, in settlement, was charged with the amount, and a balance in cash was paid to him, but the note was not produced or taken up. After the subsequent failure of the factors, the note was presented by an endorsee, who had received it before due for value. *Held*, that the maker was not responsible for the payment of the note, by reason of his failure to take up the note at the time of the settlement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1045; Dec. Dig. ⇐394.]

[6. *Bills and Notes* ⇐452.]

While it is not necessary, as a prerequisite to action brought, that such endorsee should have demanded payment on or after maturity, at the place designated, yet for any loss which the maker shows to have resulted from the failure to make such presentment and demand, the holder is responsible.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1303, 1352–1364, 1367–1376; Dec. Dig. ⇐452.]

[This case is also cited in McNair v. Moore, 58 S. C. 435, 33 S. E. 491, 74 Am. St. Rep. 760, and distinguished therefrom.]

Before Aldrich, J., Barnwell, February, 1880.

This action was commenced January 7th, 1878, and was upon a promissory note, made by J. B. Zorn, the defendant, on January 29th, 1876, for $157.51, and payable to the order of Wroton & Dowling, at their office, in Charleston, on October 1st, 1876, and endorsed before maturity to the Bank of Charles-

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ton Na*tional Banking Association, as collateral security to a note of Wroton & Dowling, given for money borrowed from plaintiff, the collaterals being in the proportion of about $2 for every $1 of the principal debt. The note of Wroton & Dowling was renewed several times after October 1st, 1876, the defendant's note, with other collaterals, remaining in the possession of the bank.

The complaint was in the usual form, endorsee versus maker. A motion was made at the trial without previous notice, to strike out the first defence in the answer as irrelevant, which was overruled and the ruling excepted to. This defence was as follows:

Alleges for a first defence:

1. That Wroton & Dowling, the payees of the note mentioned in the complaint, were, at the time it was delivered, and from thence hitherto until their failure in business as hereinafter mentioned, factors and commission merchants, doing business in the city of Charleston, and the said note was given for advances made by them to this defendant.

2. That according to the regular course of dealing universally recognized and observed between factors and their country customers, such advances, even when secured by negotiable paper, were also accustomed to be met by shipments of cotton in the fall and winter following, to be sold by the factor on commission, the net proceeds to be applied to the customer's account of the current year.

3. That besides the sum expressed in the said note, other advances to a considerable amount were made to this defendant by said Wroton & Dowling during the year 1876, to meet which, this defendant, from time to time, during the fall of that year and up to January 18th, 1877, forwarded cotton to said firm, the net proceeds of which were applied to his credit on general account, and on the day last mentioned his entire indebtedness to said firm, including the sum for which said note was given, was fully paid and satisfied.

4. That plaintiff received the said note from Wroton & Dowling, together with a

number of other notes of their country customers, as collateral security to a note of said firm, given to plaintiff for a loan of money. That the plaintiff well knew the

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*course of dealing hereinbefore referred to, had uniformly acquiesced in the same when such collaterals were delivered to it, and knew further that the note of this defendant came within the scope of said usage, and was in due course to be paid by proceeds of cotton to be forwarded as aforesaid.

5. That this defendant never had notice, or even an intimation, that his said note was held by plaintiff, nor that payment direct to the plaintiff instead of the said Wroton & Dowling was expected or required until April, 1877, after said firm had failed in business and become insolvent.

The evidence showed that Wroton & Dowling were cotton factors and commission merchants in Charleston, and the defendant, a farmer, resident in Barnwell county, was one of their customers, the note in suit having been given for supplies of merchandise advanced defendant by them, the understanding being that it was to be met by the proceeds of cotton to be shipped to them by defendant for sale on commission, as was the general custom in Charleston between factors and their country customers. Defendant testified that he knew the note would be put in some bank by Wroton & Dowling as collateral to their own notes for loans. The custom between Wroton & Dowling and the bank (which was a general custom between factors and banks in Charleston), was that when a note was paid, Wroton & Dowling would call at the bank and take out the paid note, either paying to the bank the amount of their own note when due, or depositing other notes in the place of the collateral note. Plaintiff never demanded payment of the collateral note at the office of Wroton & Dowling. The collection and lifting of such notes was left invariably to the factor.

On January 18th, 1877, Zorn had a settlement with Wroton & Dowling, when they paid him a balance, as per account current, then delivered to him by them, in which the amount of the note in suit, as well as other indebtedness, was charged and deducted from the credits. Zorn, at this settlement, asked that the note be delivered to him, when Wroton said that it had been misplaced, but that he would get it and send it to him in a few days. The note was never

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sent, and Zorn made no further *inquiry about it. Wroton testified that if Zorn had insisted on it the note would have been procured for him, or its amount paid to him when the settlement was made. About six weeks after this settlement, Wroton & Dowling failed. They had become embarrassed in business by reason of the failure of their customers to forward cotton to meet their engagements in the fall of 1876, and in November suspended. The banks that held their paper, including the plaintiff, through its president, Mr. Johnson, agreed, after consultation together, that the firm should go on collecting, and apply proceeds of after-collections towards payment of their country customers, the $5000 then on hand to be distributed in paying the several banks pro rata. In February, 1877, $5000, proceeds of collections on hand at date of agreement, were so applied, the plaintiff receiving $1000, and delivering up, with its collaterals, another note of Wroton & Dowling held by plaintiff. The pro rata distribution thus made, pursuant to agreement, was without reference to the collaterals of country customers, from whom the collections were made. Wroton testifies that but for this arrangement to apply collections pro rata, without reference to the source of collection, the firm would have been able to take up the paid collaterals held by the banks. The note of Wroton & Dowling to the plaintiff, to which the note in suit was collateral, was renewed several times after their suspension in November; the collaterals, including the note in suit, remaining in pledge. Wroton & Dowling finally failed in February or March, 1877. Defendant never had any intimation of their embarrassment or suspension until March or April, 1877, after their failure; nor was he informed until then that the plaintiff held his note.

There was a further arrangement or custom between plaintiff and Wroton & Dowling, that demand for payment at the office of the latter was waived, they agreeing to pay at the bank. But there was no proof that defendant was privy to such arrangement or was informed of it. He testified that he had no special understanding with Wroton & Dowling as to the manner of payment, other than the terms of the note indicated, and that he would meet it by forwarding cotton.

An account current between defendant and

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Wroton & Dow*ling was introduced to show that Zorn had in their hands, on October 1st, 1876, funds more than sufficient to pay the note, and that the note was charged in the account, and the amount thereof was never withdrawn by defendant. This account was objected to as not the best evidence, and the objection was sustained, but the witness was allowed to state that the account was received by him from Wroton & Dowling on January 18th, 1877, when they settled; that defendant then compared the bills of goods, memoranda and account sales of cotton sent to him at the times of the several transactions itemized in said account with the several items of the account, and found them to correspond, and the account to be correct in all particulars, and now testifies to its correctness, and that if, by the account, it appeared that he had sufficient funds in their hands on October 1st, it was correct. Witness was

then allowed to refresh his memory by the account, and then to state that he had such funds there on the day named, and that he had not, since October 1st, 1876, withdrawn so much of said fund as covered the amount then due on said note. Counsel was also allowed to use this account in his argument, to show to the jury that by deducting the debits from the credits on October 1st, defendant had to his credit more than enough to pay the note, and that enough to pay the note remained in the hands of Wroton & Dowling to his credit, from October 1st, 1876, up to the time of their failure in February or March, 1877.

No demand for payment was ever made at the office of Wroton & Dowling, and Wroton testified that if such demand had been made the note would have been paid.

The testimony adduced was altogether on the part of the defendant, who, under the pleadings assumed the burden of proof. The plaintiff offered no testimony.

The court charged the jury that if they believed the plaintiff was guilty of laches in not demanding payment of the note at the office of Wroton & Dowling before their failure, and that plaintiff would have received the money if the note had been presented, and by their failure to do so the defendant lost his money, they should find for defendant; and further, that the bank was bound to demand payment at the said office, if

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funds *to meet it were there on October 1st, 1876, and remained there up to the time of the failure of Wroton & Dowling.

The court refused to charge that the defendant was bound to take up his note when he settled with Wroton & Dowling, and that his loss was caused by his failure so to do.

The jury found for defendant.

The plaintiff appealed to this court upon the following grounds, to wit:

1. Because his Honor erred in not ruling out, as irrelevant, the first defence in said defendant's answer contained, and in permitting testimony to go to the jury to establish said defence.

2. Because his Honor erred in permitting the account current between Wroton & Dowling and defendant to be used in evidence, and to be commented upon by counsel, to show that on October 1st, 1876, defendant had in the hands of Wroton & Dowling more than sufficient funds to meet the payment of the note in suit on that day.

3. Because his Honor charged the jury that if they believed the plaintiff was guilty of laches in not demanding payment of the note at the office of Wroton & Dowling, and by that means the defendant lost his money, they should find for defendant; whereas, it is respectfully submitted that the question of laches is one of law for the court, and not of fact for the jury, the facts upon which it was based being admitted.

4. Because his Honor should have charged the jury that the defendant was bound to take up his note when he settled with Wroton & Dowling, and that his loss was caused by his failure so to do.

5. Because his Honor erred in charging the jury that the bank was bound to demand payment at the office of Wroton & Dowling, for the proof was clear that the uniform custom, acquiesced in by all parties, was that payment should be made at the bank.

Mr. John R. Bellinger, for appellant.

Mr. John J. Maher, contra.

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*January 10th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. Did the Circuit judge err in not ruling out the first defence stated in the answer, is the first question for our consideration.

In Cohrs v. Fraser, 5 S. C. 351, where a similar question arose, the court said: "A motion to strike out a part of defendant's answer as inconsistent, contradictory, or for any other cause, should be made after notice in a reasonable time from the filing of the answer." This was regarded necessary to prevent surprise, and perhaps a continuance of the cause. This course was not pursued here, and the judge, therefore, might have declined to hear the motion, but it was heard, and it seems without objection by the defendant, respondent. The question involved is, consequently, properly before us.

The complainant claimed that plaintiff, appellant, was the legal owner and holder of a note on defendant, respondent, made payable to the order of Wroton & Dowling, no part of which had been paid. The first defence set up in the answer was, in substance, payment. It is true that the circumstances and transactions out of which it is claimed by defendant, respondent, that payment had been made, are stated with unnecessary circumlocution and detail, but, when analyzed, the point of this defence seems to be payment without notice of any transfer to the plaintiff.

This was no new contract, changing and altering the original by verbal testimony, but it was a substantial and material defence which the defendant, respondent, had the right to set up, and which the Circuit judge properly refused to strike out.

It is objected, second, that an account current between the respondent and Wroton & Dowling was allowed to be made use of by the defendant, respondent, as a witness, to refresh his memory as to the amount of money in the hands of Wroton & Dowling, at a certain date, sufficient to have discharged the note in question and this is made the second ground of appeal.

The rule upon this subject, in its broadest outline, embraces two classes of cases: first,

where the witness, after referring to the paper, speaks from his own memory, and de-

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pends upon his *own recollection as to the facts testified to; second, where he relies upon the paper and testifies only because he finds the facts contained therein. In the first class the paper is always permitted to be used by the witness without regard to when or by whom made.

In the second class this rule of admission is much more stringent. In fact, it cannot be used unless it be an original paper made by the witness himself, and contemporaneously with the transaction referred to.

Admitted under any other circumstances, it would be obnoxious to the doctrine of hearsay and other important principles regulating the admission of evidence, and would render the administration of justice uncertain and doubtful. The principles above laid down will be found sustained in 1 Greenl., § 436; State v. Rawls, 2 N. & McC. 331; Cleverly v. McCullough, 2 Hill 446; and O'Neale v. Walton, 1 Rich. 234. In this case the account current was offered as evidence, but, upon objection, was ruled out. The witness was afterwards permitted to examine it, and upon this examination he was prepared to speak from recollections, and did so speak, as it appears from the record—at least so we understand from the brief agreed upon by the counsel. Whether he was entitled to credit, testifying under such circumstances, or could speak from memory after examining the paper, was for the jury, and is not a matter before us. The question here is, was it legally competent for him thus to testify? We think this case falls within the first class above referred to, and that there was no error on the part of the Circuit judge in ruling the testimony competent.

We see nothing objectionable in the charge of the judge on the third exception. It is true he did not define to the jury in general terms what, as a matter of law, was the meaning of the term laches. He, however, states "that if the jury believed the plaintiff did not demand payment of the note at the office of Wroton & Dowling [the place of payment] before their failure, and that plaintiff would have received the money if the note had been presented, and by their failure to do so the defendant lost his money, they should find for defendant," on account of laches. In this he kept the question

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of law and the facts separate and *distinct, and the facts only seem to have been submitted to the jury.

The fourth exception raises the question that the respondent was bound to take up his note when he settled with Wroton & Dowling, and that it was error on the part of the judge not to so charge when requested.

The note was due on the 1st of October, 1876, and payable at the office of Wroton & Dowling, in Charleston. The respondents lived in Barnwell county, and the final settlement was made between the parties on the 18th of January, 1877, whether in Charleston or Barnwell does not appear. The theory of the defence is that funds had been left in the hands of Wroton & Dowling to pay this note as far back as October of the preceding year. It seems that it was known by respondent that his note might be deposited with some bank and that the bank was entitled to these funds in the hands of Wroton & Dowling. All, therefore, that the respondent was concerned about in the settlement was that he should get credit for this amount which he had left at the place of payment. This he received in the settlement, and we do not see that his failure to demand and take up the note was in violation of his legal duty; nor was it error in the presiding judge to decline to so charge; parties are presumed to know the law.

This note on its face was payable at the office of Wroton & Dowling on October 1st, 1876, and when the respondent left there on that day the amount required to pay it, it was in effect discharged in the hands either of the payee or any other holder. If he had withdrawn the funds from Wroton & Dowling and paid the note on the day of settlement without taking it up, then he might have been responsible to any third party who may have held it, but this was not done.

The settlement embraced the transactions of the year between the parties, and in the settlement, as we understand it, the respondent was allowed a credit for this note on October 1st preceding, when it fell due.

The last exception alleges error in that the judge charged that the bank was bound to demand payment at the office of Wroton & Dowling, &c. The English commercial

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law, when *strictly applied and enforced, seems to require that demand shall be made at the place of payment, when specified in the note, either on the day of payment or at some future time, and without this, no default arises on the part of the maker for nonpayment.

The American doctrine, however, is not so rigid; demand is not a precedent condition here, and suit may be brought against the maker under that doctrine without presentment or demand at the place mentioned, subject, however, to the right of the maker to prove by way of defence that on the day and at the place specified he had the necessary funds to make payment, and that if any loss has occurred it should be the loss of the holder of the note and not his; in other words, the burden of proof is shifted; instead of requiring the plaintiff to prove that he made demand, the maker, defendant, is

required to prove that he deposited the money according to the terms of the note, and that it was lost to the plaintiff on account of his failure to demand it at the proper place. Wallace v. McConnell, 13 Peters 136 [10 L. Ed. 95]; Story on Promissory Notes, §§ 227, 228, and note to page 287; Walcott v. Van Santvoord, 17 Johns. 248; Clarke v. Gordon, 3 Rich. 313, [45 Am. Dec. 768].

Now, if the matter complained of in the last exception had stood alone in the judge's charge, the exception would be well founded, as the charge in this respect is not in accordance with the above principles, but when the whole charge on this branch of the case is taken together, as appears in the brief, it is apparent that the judge properly qualified the doctrine as a whole when he instructed the jury "that if they believed the plaintiff was guilty of laches in not demanding payment of the note at the office of Wroton & Dowling before their failure, and that plaintiff would have received the money if the note had been presented, and by their failure to do so the defendant lost the money, they should find for the defendant."

This is, we think, in accordance with the American doctrine, and was a part of the judge's charge, and properly qualified that which, when taken in detached portions, might be regarded as error.

The judgment below is affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. *454

*(Case No. 971.)

RILEY v. GAINES.

(November Term, 1880.)

[1. *Execution* ⟸111.]

The lien of a judgment upon the share of a joint tenant is subordinate to the right of his co-tenants to have partition made; and, after partition, the lien is transferred to the interest of the judgment debtor in the land assigned to him, or in the proceeds of the sale.

[Ed. Note.—Cited in Pendergrass v. Pendergrass, 26 S. C. 29, 1 S. E. 45; Ex parte Crawford & Sons, 27 S. C. 162, 163, 3 S. E. 75; Ketchin v. Patrick, 32 S. C. 453, 11 S. E. 301; Holley v. Glover, 36 S. C. 417, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883.

For other cases, see Execution, Cent. Dig. § 219; Dec. Dig. ⟸111.]

[2. *Homestead* ⟸84.]

One tract in severalty being assigned under partition proceedings to one of the tenants, he is entitled to a homestead in such tract, as against a judgment then having a lien upon his real estate.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 122; Dec. Dig. ⟸84.]

[3. *Evidence* ⟸83; *Partition* ⟸113.]

In the absence of evidence upon the subject, it must be assumed that the commissioners in partition acted impartially towards all parties interested.

[Ed. Note.—Cited in Aldrich v. Aldrich, 75 S. C. 373, 55 S. E. 887, 117 Am. St. Rep. 909.

For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. ⟸83; Partition, Cent. Dig. § 434; Dec. Dig. ⟸113.]

[4. *Homestead* ⟸70.]

Lands cultivated by a judgment debtor, adjoining the tract upon which he resides, with his mother, may properly be assigned to him as a homestead exemption.

[Ed. Note.—Cited in Harrell v. Kea, 37 S. C. 377, 16 S. E. 42; McClenaghan v. McEachers, 47 S. C. 449, 25 S. E. 296.

For other cases, see Homestead, Cent. Dig. §§ 100–103; Dec. Dig. ⟸70.]

Before Pressley, J., Anderson, September, 1879.

Hon. THOMAS B. FRASER, judge of the third circuit, sat at the hearing in this court, in the place of Associate Justice McGOWAN, who had been of counsel in the court below.

This was an action by Frances S. Riley, one of the distributees of Nathaniel Gaines, who died intestate, against Clarisy Gaines, Marshall B. Gaines and others, distributees of the said Nathaniel, and also against the State Savings and Insurance Bank of Anderson, South Carolina, for a partition of five tracts of land of which Nathaniel Gaines died seized and possessed. The defendant bank held a judgment against Marshall B. Gaines, obtained before the death of the intestate. The interest of Marshall B. Gaines in these five tracts, according to their appraisement by the commissioners in partition, amounted in the aggregate to $279; and the tract assigned to him in severalty was appraised at $350. The excess he was ordered to pay. All other matters necessary to a full understanding of the case are stated in the opinion of the court.

The defendant bank appealed.

Mr. Jos. N. Brown, for appellant, cited

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Const. of S. C., Art. *II., § 32; 15 Stat. 369; 11 S. C. 333; Thomp. on Home. and Exemp., §§ 100, 145; 5 Cal. 244; 6 Id. 416; 26 Wis. 579; Smith on Homes., § 137; 5 S. C. 11.

Messrs. Moore and Allen, contra.

January 13th, 1881. The opinion of the court was delivered by

McIVER, A. J. Marshall B. Gaines, as one of the heirs-at-law, was entitled to an undivided interest in the real estate of his deceased father, Nathaniel Gaines. Such real estate "consisted of five several tracts or parcels, three of them adjoining each other, one of which embraced the homestead of said Nathaniel Gaines, with whom the respondent [M. B. Gaines] resided, and containing in the aggregate four hundred and ten acres. The other tracts or parcels, containing in the aggregate two hundred and sixty acres, were not connected with the three

places constituting the home place, and were two or three miles distant." The bank, appellant, having obtained a judgment against Marshall B. Gaines, prior to the death of his father, levied on his undivided interest in the said several tracts of land, and advertised the same for sale, when the said Marshall B. Gaines interposed his claim of homestead. It was then agreed that one of the heirs—the plaintiff in this case—should file a complaint for partition, making the said bank and the other heirs parties, so that the rights of the several parties might be determined. To this complaint Marshall B. Gaines filed an answer assenting to the prayer for partition, and setting up his claim of homestead in the portion, whether of money or land, which should be allotted to him on such partition. The bank also answered, denying the claim of Marshall B. Gaines to homestead upon various grounds, which are hereinafter stated. It was conceded at the hearing below that Marshall B. Gaines was the head of a family and resided on the home place with his mother, which, though composed of three tracts, in fact constituted one body of land. The return of the commissioners in partition was made, in which they recommended that the land be divided into five tracts, that tract

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No. 1, embrac*ing the dwelling-house, where the widow and Marshall B. Gaines resided, be allotted to the widow; that tract No. 2, adjoining No. 1 and being a part of the home place and under cultivation by Marshall B. Gaines, be allotted to him, and that the other three tracts be sold. This return was confirmed, except as to the tract allotted to the widow, which was also ordered to be sold, and the Circuit judge having held that Marshall B. Gaines was entitled to claim a homestead in the tract of land assigned to him in the partition, the bank gave notice of appeal upon the following grounds:

"1. Because the said Marshall B. Gaines is not entitled to have a homestead assigned to him in his undivided interest in the real estate of his father, the same not being his family homestead.

"2. Because a defendant in execution has no right of homestead in separate parcels of real estate not adjoining each other.

"3. Because the interest of Marshall B. Gaines in one or more tracts of real estate under levy cannot be transferred to other parcels so as to give him a homestead therein.

"4. Because the interest of said Marshall B. Gaines in said several tracts cannot be assigned to him, whether in money or land, so as to divest the lien of the judgment and execution, and to protect said supposed right of homestead.

"5. Because in no point of view could he be entitled to homestead in any portion except that on which he, with his mother, resided, being the family homestead of his father.

"6. Because the family homestead on which said defendant resided, 'consisting of dwelling-house, out-buildings and lands appurtenant,' was first assigned to his mother and then sold, and he was not entitled to homestead in any other."

Marshall B. Gaines was entitled to an undivided interest in the whole of the real estate of which his father died seized, but where that interest would be located—whether in a single tract or in one-eighth of two-thirds of each of the five tracts, could not be determined until partition was made. It could not be said that he had an interest in any particular tract, or, in fact, in any of the land, for it was quite possible that his interest might have been assigned to him in

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money, and it was not im*possible that he might have no interest at all, if he had received advancements to the full value of his share of the estate. Hence, as said by Duncan, Ch., in Keckeley v. Moore, 2 Strob. Eq. 23, "It is quite manifest that until partition made, it is impossible to determine whether the child will be entitled to any, or to what portion of the estate." Thus, while it is true that the judgment of the appellant was a lien upon the undivided interest of Marshall B. Gaines in the real estate of his deceased father, yet that lien was subordinate to the right of the other heirs to have partition made: and if, upon such partition, the whole of the land had been sold, or if it had been assigned to one or more of the other heirs, the lien of the judgment upon the land would have been divested and transferred to the interest of Marshall B. Gaines in the proceeds of the sale, or in the amount which those to whom the land had been assigned were decreed to pay for equality of partition. Rabb v. Aiken, 2 McC. Eq. 118; Keckeley v. Moore, 2 Strob. Eq. 21; Burris v. Gooch, 5 Rich. 6; Garvin v. Garvin, 1 S. C. 62.

So in this case, after the partition was made, locating what had been before the undivided interest of Marshall B. Gaines in tract No. 2, the lien of the appellant's judgment upon all the balance of the land was divested and transferred to that tract, because it was then ascertained that he had no interest in any other portion of the land, but his entire interest was confined to that tract, and in that tract alone could he be said to have any claim of homestead.

It is true that there may be a practical difficulty in assigning a homestead in a judgment debtor's undivided interest, but that difficulty does not present itself here, because the interest of the judgment debtor, which, at one time, was undivided and uncertain, has now been ascertained and defined, and we see no reason why a homestead may not be claimed therein as well as in a piece of real estate which had always been held in severalty. If the interest of the judgment debtor had been assigned to him in one of

the outlying tracts, then it might have been necessary to consider the question whether such tract was appurtenant to the family residence of the debtor, even though not contiguous to it; but when, as in this case,

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his interest has been ascertained to *be in a part of the home place, adjoining the tract on which he resided, and cultivated by him in connection with the place on which he resided, no such question can arise. We are therefore unable to see any foundation for the first ground of appeal.

The second ground of appeal raises an abstract question not applicable to the facts of this case, for it does not appear that the respondent, Gaines, is claiming a homestead "in separate parcels of real estate not adjoining each other."

As to the third and fourth grounds of appeal, it is sufficient to say that there is no evidence before us that the commissioners in partition assigned tract No. 2 to Marshall B. Gaines, for the purpose of enabling him to defeat the judgment of appellant by setting up this claim of homestead, and, on the contrary, in the absence of any evidence upon the subject, we are bound to assume that the commissioners, in compliance with their sworn duty, acted fairly and impartially, and made such partition as, in their judgment, was best for the interests of all parties concerned.

The fifth and sixth grounds of appeal are not well taken. The constitution does not confine the claim of homestead to the particular tract of land on which the claimant resides, but extends it to lands "appurtenant" to the dwelling, whether of the same tract or not, and respondent here, as we have seen, only claims a homestead in land adjoining and appurtenant to the family residence—in fact, a part of the same body of land on which the residence was located.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and FRASER, A. A. J., concurred.

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14 S. C. 458

(Case No. 976.)

GODBOLD v. VANCE.

(November Term, 1880.)

[1. *Exceptions, Bill of* ⇐39.]

Where the decree in an equity cause is rendered during vacation, there is nothing in the act of 1878, regulating appeals, (16 Stat.

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698,) which *requires the appellant from such decree to furnish the presiding judge and serve the respondent's attorney with a copy of exceptions to the decree within ten days after notice of filing.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 51, 52, 54–56, 60; Dec. Dig. ⇐39.]

2. Is Section 292 of the code of procedure repealed by the act of 1878?

[3. *Appeal and Error* ⇐351.]

Decree in an equity cause, which was heard upon exceptions to a referee's report, was rendered in vacation; within ten days afer notice of the filing plaintiff gave notice that he would "appeal to the Supreme Court and move it to reverse the decree," and within thirty days thereafter served his case, which contained the exceptions to the referee's report and exceptions in detail to the Circuit decree. *Held*, that there had been a technical compliance with the requirements of the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1915–1919; Dec. Dig. ⇐351.]

[4. *Appeal and Error* ⇐1022.]

Findings of fact, concurred in by referee and Circuit judge, sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇐1022.]

[5. *Executors and Administrators* ⇐213; *Limitation of Actions* ⇐143.]

An executor cannot waive the statute of limitations against himself, as to claims due him which were barred at the time of his qualification.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 750; Dec. Dig. ⇐213; Limitation of Actions, Cent. Dig. § 582; Dec. Dig. ⇐143.]

[6. *Payment* ⇐67.]

The giving of a note raises no presumption of the payment by the maker of an antecedent indebtedness not then due.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 162, 189–194, 198; Dec. Dig. ⇐67.]

[7. *Executors and Administrators* ⇐202.]

An instrument, in form a deed, which purported to convey $2000, with enjoyment postponed until the maker's death, upheld as a debt due by the estate of the maker.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 730, 738–745, 748, 754, 763; Dec. Dig. ⇐202.]

[8. *Wills* ⇐764.]

The doctrine of ademption does not apply to devises.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1978; Dec. Dig. ⇐764.]

[9. *Wills* ⇐194.]

The provisions of a deed ineffectual to accomplish the purposes intended, cannot operate as a revocation of a will duly executed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 481–489; Dec. Dig. ⇐194.]

[10. *Appeal and Error* ⇐564.]

[A decree in an equity suit, rendered in vacation upon exceptions to a referee's report, is governed by 16 St. at Large, p. 698, § 2, which provides that the appellant shall, within 30 days after service of notice of appeal, serve a case or exceptions, or a case with exceptions, and is not governed by section 1, which requires that, in appeals from rulings made during term time, a copy of the exceptions must be served within 10 days after the rising of the court.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2502; Dec. Dig. ⇐564.]

[11. *Wills* ⇐475.]

[A testator, by will, gave to his wife $2,000 in lieu of dower. Afterwards, by an instrument in form a deed, he conveyed to her $2,000 to be received by her at his death, in place of

the provision in the will, the conveyance providing also, that if the estate should be insolvent after his death, her claim to dower should not be barred. *Held*, that the instrument should be upheld as a declaration of a debt due, and that the will, the deed, and the provision therein should be treated in accordance with the obvious intention of the testat r.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 996; Dec. Dig. ⊂⊃475.]

Before Pressley, J., Abbeville, September, 1879.

This was an action commenced July 17th, 1878, by Francis M. Godbold, as executor of John Vance, deceased, against Nuella E. Vance, (widow of testator,) Nannie M., Sarah, Mary A., and Thos. W. Godbold (grand-children) and James C. Moore and others, creditors of John Vance.

In April, 1872, John Vance made his will, whereby inter alia he devised and bequeathed as follows:

2. To my wife, Nuella Vance, I devise and bequeath the tract of land whereon I now reside in Abbeville county, containing forty acres, more or less, together with the household and kitchen furniture, my buggy and harness and wagon and all stock of every kind which may be on the place at the time of my death. I also bequeath her the sum of two thousand dollars, ($2000,) which my executors are to pay as soon after my death as possible.

The said property and pecuniary legacy, I give to my said wife in lieu and in bar of dower absolutely; excepting this tract of land, which is to be hers for life only, but

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at her death to go *to the child, or children, if any, of our marriage. In default of such child or children living at her death, I authorize and empower my said wife by will to dispose of it as she pleases.

In a codicil executed January 27th, 1874, the testator directed as follows:

1. In addition to the provisions made for my wife, Nuella E. Vance, in section two of my last will, I hereby give, devise, and bequeath to her (during her life only) ten (10) acres of wood land, lying on the road leading from Hodges Depot to Smith's Bridge, bounded by said road, by J. M. Graham and by my old homestead place. At the death of my wife I direct that said ten acres of land shall revert to my estate and shall be disposed of along with my old homestead place, of which it is now a part, as directed in the third and fourth clauses of my will.

2. The real estate bequeathed to my wife in the second clause of my will and described as the "place whereon I now live," consists of three separate parcels, each represented by a separate plat and title deed and amounting in all to forty acres.

3. If from any cause, my personal estate should be insufficient to discharge and pay the legacy bequeathed to my wife in the second clause of my will, I will and direct that my executors shall sell so much of the old homestead place as shall be necessary therefor; and from the proceeds of such sale, they shall make up and pay to her the full amount of said deficiency.

On June 21st, 1875, John Vance duly executed and delivered to his wife, Nuella E. Vance, his deed, which is as follows:

This indenture, made June 21st, 1875, between John Vance, party of the first part, and his wife, Nuella E. Vance, party of the second part, both of the county and state aforesaid, witnesseth, that whereas the said John Vance did, on the sixth day of April, A. D. 1872, make and publish a will, and also did make and attach thereto a codicil, dated the 27th of January, 1874, wherein and whereby he did devise and bequeath to his said wife, the said Nuella E. Vance, certain real and personal property, money, &c., in lieu and for dower; and whereas it is now his desire to secure this provision to her beyond any contingency:

Now, know all men by these presents, That I, the said John Vance, moved by the foregoing consideration, as well as in consideration of the sum of one dollar to me in hand paid by the said Nuella E. Vance, at and before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged,) have given, granted, released, con-

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veyed, and confirmed, and by these *presents do give, grant, bargain, release, and convey and confirm unto the said Nuella E. Vance, her heirs and assigns forever, the following property, to wit:

First. The tract of land on which I now reside, &c.; second, all my household and kitchen furniture, &c.; third, the sum of two thousand dollars ($2000) in cash; together with all and singular the rights, members, hereditaments thereunto belonging or in anywise incident or appertaining: To have and to hold the above-granted and described property and money, and every part and parcel thereof, with the appurtenances, to the said Nuella E. Vance, her heirs and assigns, to her and their only proper use, benefit, and behoof forever. Provided, however, and the foregoing deed is made upon the express condition that during my life I have and retain full possession, control and management of all the above-granted property, with the rents, issues, and profits thereof, as fully to all intents and purposes as if this deed and conveyance had not been made; and that at my death my said wife shall receive the above-granted and described property and money in lieu and bar of dower and of the provision made for her in the second clause of my last will above mentioned, (and said will and codicil are hereby confirmed except said second clause.) It is further provided that should my estate become insolvent in any way so that my said wife, the said Nuella E. Vance, shall fail to receive the

property and money herein conveyed to her, or any part thereof, then her right and claim of dower shall not be barred, anything herein or in my will above mentioned to the contrary notwithstanding.

And it is further provided, That if I should outlive my said wife, that at her death this deed and conveyance shall become utterly null and void, anything herein to the contrary notwithstanding.

In witness whereof I, the said John Vance, have hereunto set my hand and seal the day and year first above mentioned.

John Vance. [L. S.]

Signed, sealed, and executed and delivered in presence of Geo. G. Allen, L. K. Dantzler.

This deed was duly recorded. On April 10th, 1877, testator made and delivered to his wife his sealed note for $50. April 21st, 1877, testator died, and during the same month plaintiff qualified as executor. In May, 1878, the widow, Nuella, filed her petition in the Court of Probate, calling the executor to account, and for payment of legacy,

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&c. Pending these pro*ceedings, this action was commenced in the Court of Common Pleas for a construction of will and codicil and deed, and an adjudication of the rights of the widow and grand-children, an injunction against creditors' suits, sale of land in aid of assets, account by executor, and also an account by the widow of moneys and other property received by her. Defendants answered.

Creditors were enjoined and called in, and Edward Noble, Esq., was appointed special referee, to take proof of claims and of assets, to state the accounts of the executor, and of Mrs. Vance, &c.

The referee took testimony, stated the accounts of the executor and reported as follows:

The deed of June 21st, 1875, was made as an irrevocable disposition of property at the instance of the wife. One of the charges of the complaint is that Mrs. Vance has been paid the said $2000 in her husband's lifetime, and she is required by the order of reference to account for all money belonging to the testator at his death which came into her possession or into the possession of another with her knowledge and for her benefit. Much testimony has been taken before the referee in regard to this charge, which is attached hereto as part of this report. The evidence is not sufficient, it appears to me, to sustain the charge—indeed, there is no evidence to support it except the possession by the testator in 1870 of upward of $7000, and in 1872 of upward of $2000. The testator, in listing his property to the auditor in 1869, returns no money or credits; in 1870 he returns $7000; in 1871 he returns $3000; in 1872, $200; in 1873, $200; in 1874, nothing. In no subsequent return does the testator list money or credits. Mrs. Vance denies that she has been paid, and says she has not had any of testator's money belonging to him at his death, and no one for her has had any of testator's money. Dr. B. C. Hart and Dr. F. F. Gary, men of high character and intimate with the testator, testify that they heard testator declare in 1876 and 1877 that he had no money, and Mrs. Vance says the same thing. Mrs. Vance's claim under the deed of gift of June 21st, 1875, is therefore sustained as unpaid.

The accounts of the executor are submitted. In his hands I find the sum of $161.67 applicable to debts. * * *

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*Portions of Mr. Godbold's claims are barred by the statute of limitations, namely, accounts for 1869 and 1870, amounting to $1087.06, but no exception has been taken to them on that ground and they have been allowed. If these barred accounts are not allowed, there would still be due Mr. Godbold $1570.91, and after discounting the two notes he owes the estate there would be a balance in his favor of $279.41.

The plaintiff filed the following exceptions to the above report:

"1. Because the said referee had no power under the order of reference to decide the question of fact as to whether or not the sum of $2000 mentioned in the deed of gift executed by the testator to the defendant, Nuella E. Vance, was received by her in the lifetime of the said testator.

"2. Because the said referee erred in not holding the pretended gift of $2000 in the deed of gift executed by the testator to the defendant, N. E. Vance, to be a nullity.

"3. Because the referee erred in not holding that the said sum of $2000 was received by the said defendant, N. E. Vance, in the lifetime of the testator, or otherwise satisfied to her.

"4. Because the said referee erred in allowing the said N. E. Vance interest on the said sum of $2000.

"5. Because the said referee erred in not charging the said N. E. Vance with having in her possession at least $10,000 belonging to the said testator.

"6. Because the said referee erred in not charging the said N. E. Vance with certain personal property belonging to the said testator and not conveyed to her by the will, codicil or deed, to wit, one piano, some silverware and several head of cattle.

"7. Because the said referee erred in stating that the deed conveyed to the said N. E. Vance, among other things, all the property on the premises, instead of stating that it conveyed all stock of all kinds that might be on the place at the time of testator's death.

"8. Because the said referee failed to report as a part of the assets two small tracts of land in the village of Cokesbury, one containing about two acres and the other about twenty-five acres."

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*The defendant, Nuella E. Vance, filed the following exceptions to said report:

"1. Because the referee erred in finding that John Vance in 1875 was in possession of $2000.

"2. Because the referee erred in finding that the only lands which are assets in the hands of the executor are the two tracts mentioned in his report.

"3. Because the referee erred in finding that the deed mentioned in his report was executed at the instance of the defendant, Nuella E. Vance.

"4. Because the referee erred in finding that no objection was made to the accounts of F. M. Godbold for 1869 and 1870, on the ground that they were barred by the statute of limitations.

"5. Because the referee erred in allowing the accounts of F. M. Godbold against the estate of John Vance, deceased."

May 17th, 1880, Judge Pressley rendered the following decree:

On 6th of April, 1872, John Vance made his will, wherein he devised to his wife, Nuella, the tract of land on which he then lived, with the furniture and other articles thereon; also the sum of $2000, to be paid to her as soon after his death as possible; the whole to be in bar of her dower in his estate. To this will he added a codicil in January, 1874, whereby he made the said $2000 legacy a charge upon his old homestead, and directed a sale of so much thereof as would pay said legacy in case his personal assets were deficient. This arrangement was not satisfactory to testator's wife. She objected that it was revocable, and did not make her safe in renouncing her dower in certain lands which her husband desired to sell. To satisfy her in this respect he executed a deed, on June 21st, 1875, wherein he conveyed to her the property and the $2000 mentioned in the second clause of his will, and provided that it should not bar her right of dower, unless she should receive the whole of the said property and money. The complaint in this case, by the executor of John Vance, alleges that his wife received the said $2000 in his lifetime, and calls on her to account for other moneys, which he, John Vance, is supposed to have had at the time of his death, which came into her possession. The referee

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in the case *reports there is no evidence that such money was or is in her possession, or that she received the $2000, and I do not find any testimony sufficient to sustain said allegations. The codicil to testator's will and a clause in the deed both seem to me indicative that testator contemplated the probability that the said $2000 might not be paid out of his personal estate, and possibly not out of his land.

In the proceeding before the referee the plaintiff in this case proved an account against his testator's estate, of which a part, for the years 1869 and 1870, are barred by statute of limitations. The referee reports that no one before him interposed the bar of the statute, and that part of his report is excepted to by the attorney of Nuella Vance. Exceptions on other grounds have been filed by both the attorneys for plaintiff and the defendant. I confirm the referee's report, and overrule all the exceptions but that which relates to the statute of limitations. The accounts of the executor for 1869 and 1870 are clearly barred, and he, as executor of the estate, could not waive the statute in his own favor.

It is adjudged and decreed that Nuella E. Vance has the right to retain the land and personal property thereon, as reported by the referee; also that she is entitled to receive from the estate, personal or real, of John Vance the sum of $2000, with interest from the probate of the will: or, failing to receive the same, that she is entitled to her dower out of the real estate, heretofore sold or to be sold by order of the court.

As election by her may be necessary, the case is recommitted to the referee to inquire and report what assets of said estate are applicable to the payment of her claim, and whether she elects to look to such assets for payment or to take her dower.

Either party to this case may apply at foot of this decree for any order necessary to carry into effect the report of the referee, except as hereby modified.

On Thursday, June 24th, 1880, the foregoing decree was filed in the office of the clerk of the Court of Common Pleas for Abbeville county, and on the same day notice of the filing was given to the parties.

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*On Saturday, July 3d, the plaintiff duly filed and served the following notice of appeal:

Take notice that the plaintiff will appeal to the Supreme Court from the decree of Judge B. C. Pressley in the above-stated case, rendered on the seventeenth day of May, eighteen hundred and eighty, and move it to reverse the same.

On the same day the defendant, Nuella E. Vance, duly filed and served the following notice of appeal:

Take notice that the undersigned excepts to the judgment or decree of his Honor, Judge B. C. Pressley, in the above-stated case, and appeals to the Supreme Court from the same on the following grounds:

"1. Because his Honor erred in finding that the plaintiff in the proceeding before the referee proved an account against his testator's estate.

"2. Because his Honor erred in overruling the fifth exception of Nuella E. Vance to the referee's report."

The plaintiff's exceptions to the decree of Judge Pressley were on the following

grounds, as stated in the case prepared for the hearing of the appeal:

"1. Because his Honor erred in holding that the accounts of the plaintiff against his testator are barred by the statute of limitations, although it was not pleaded by any defendant, nor was the objection made by any creditor who proved his demand before the referee.

"2. Because his Honor erred in overruling plaintiff's exceptions to the report of the referee.

"3. Because his Honor erred in not holding that the giving of a note by the testator to the defendant, Nuella E. Vance, a few days before his death, affords a conclusive presumption, in the al sence of rebutting or explanatory evidence, that it was a settlement in full of all demands held by her against him.

"4. Because his Honor erred in not deciding that the deed revokes the legacy to said defendant contained in the will and codicil.

"5. Because his Honor erred in not decid-

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ing that the convey*ance by the deed of the property therein mentioned is an ademption and satisfaction of the devises and legacies contained in the will and codicil.

"6. Because his Honor erred in not deciding that said defendant, having accepted the gift by deed and retained the property as her own, is concluded by it.

"7. Because his Honor erred in not deciding that certain parts of the deed are testamentary, and that therefore as to them it cannot operate either as a will or as a deed.

"8. Because his Honor erred in deciding that this it a proper case for election by the defendant, Nuella E. Vance, she having already made her election by accepting the deed and holding and retaining the property therein conveyed as her own.

"9. Because the decree of his Honor is in all respects contrary to the law of the case and the evidence adduced before the referee.

"10. Because his Honor erred in confirming the referee's findings upon questions of law, the said referee having no power under the order of the court to decide such questions."

The notice of appeal and exceptions of Nuella E. Vance were served on Judge Pressley and plaintiff's attorneys within ten days from the notice of filing the same. The case and exceptions were served on the defendants' attorneys within thirty days from the time plaintiff's notice of appeal was served, but the exceptions of the other appellant were not served within ten days after written notice of the filing of the decree.

Messrs. Burt & Graydon, for plaintiff.
Mr. E. B. Gary, for Mrs. Vance.

February 26th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action in the nature of a suit in equity, instituted by F. M. Godbold, as executor, to marshall the assets of the estate of John Vance, deceased. It was referred to Edward Noble, Esq., as

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referee, to state the assets and the *creditors according to their legal priorities. To his report both parties filed exceptions, which were argued before Judge Pressley, who rendered his decree after the rising of the court, May 17th, 1880. Written notice of it was served upon the parties. The attorney of Mrs. Vance served Judge Pressley and plaintiff's attorney with notice of appeal and copy of exceptions within ten days from notice of filing of the decree. The plaintiff served defendant's attorney with notice of intention to appeal within ten days, and copy of the case, with exceptions, within thirty days, but omitted to serve upon Judge Pressley and the attorney of the opposite party copies of his exceptions to the decree within ten days.

This raises a preliminary question upon a motion to dismiss plaintiff's appeal upon the ground that copy of his exceptions was not furnished the presiding judge and served upon the attorney of respondent within ten days after notice of decree filed. The plaintiff did file exceptions to the report of the referee, which was nearly identical with the decree, and also printed them in the "case" filed within thirty days. This is not, therefore, a case of surprise, but only a question of technical compliance or non-compliance with the law.

The right of appeal is valuable, and the law prescribing the manner in which appeals may be prosecuted should be construed liberally. This court has lately had occasion to consider the subject and to be constrained, by force of the provisions of the act of 1878, (16 Stat. 698,) to dismiss appeals in several cases, but this is the first case that has come before us upon motion to dismiss under that act, where every requirement of the act itself had been complied with, and the only objection made was that something else was omitted, supposed to be required by a previous law.

The first and second sections of the act of 1878 cover different classes of cases and contain different requirements. The first section manifestly relates only to "rulings" made during term time, and requires "copy of exceptions to be furnished the presiding judge and served upon the attorney of respondent within ten days after the rising of the court," &c. The cases provided for by this section and to which these requirements

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apply are *generally law cases tried by a jury, but it has been held that the words "all cases tried in the Circuit Courts" embrace as well equity cases heard in term time and decided in open court.

The second section is more comprehensive. It provides for cases heard in term time, and also every order, decree or judgment or other matter from which an appeal may be taken, and only requires "that the appellant or his attorney shall, within ten days after decree filed, give notice to the opposite party or his attorney of his intention to appeal, and within thirty days after notice shall prepare a case or exceptions, or a case with exceptions, and serve them," &c.

The decree in this case was in an equity suit and rendered in vacation, and, therefore, as to an appeal, cannot fall within the first section, which applies only to "rulings" in cases heard and decided in open court, but under the second section, which, in express terms, includes "decrees." We suppose to those matters which fall under this section and not the first, only the requirements of this section apply. If so, the plaintiff complied strictly with every requirement of this second section as to notice of intention to appeal and serving "a case," and we cannot say that his appeal is waived under the act of 1878, which imposes the penalty of "waiver" only when "the appellant shall fail to perfect his appeal according to the provisions of either of the foregoing sections." We think there is nothing in the act of 1878 which requires that this appeal should be dismissed.

But it is said that the act of 1878 is not the only law upon the subject; that the second section of that act was not intended as a new law by way of substitution for the old provisions of the code as to appeals, but only as an amendment to them, leaving untouched Section 292 of the code as to the manner of taking an appeal from a judgment rendered by the court, which is in these words: "For the purpose of an appeal (in cases decided by the court) either party may except to a decision on a matter of law arising upon such trial within ten days after notice in writing of the judgment in the same manner and with the same effect as upon trial by jury." Gen. Stat. 637.

"The court" may try law cases, and this

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section seems to *apply exclusively to that class of cases, for it speaks only of excepting "in a matter of law."

This court is not limited to a correction of errors at law, but in "cases in chancery" has appellate jurisdiction, and may review and reverse findings of fact by the court below. Besides, there is grave doubt whether this provision is not repealed by the act of 1878, which deals exhaustively with the same subject, and seems to have been intended as a system in itself. As was said in the case of Scurry v. Coleman, ante, p. 166: "The law governing appeals to the Supreme Court was changed by the act of 1878, as to the time within which an appeal shall be perfected, which then expressly repeals all acts and parts of acts inconsistent therewith. It covers the whole subject of appeals to the Supreme Court. Are the provisions of the act of 1878 inconsistent with those of the code before referred to?" So, we repeat, as to the section of the code under consideration here. It has been held that the act of 1878 "does not profess to be an amendment of the code." Rogers v. Nash, 12 S. C. 560. This court, however, has never expressly decided the question as to Section 292 of the code, and we think it is not necessary to do so in this case. If that section is not superseded by the act of 1878, and embraces "cases in chancery" as well as law cases tried by "the court," still, properly construed, there is nothing in it which requires the dismissal of this appeal. The section does not, in terms, require copy of exceptions to be furnished the presiding judge, but allows either party to except "in the same manner and with the same effect as upon trial by jury." In construing these words we must have reference to the law as it then stood as to exceptions upon "trial by jury." At the adoption of the code exceptions had to be made in open court. It was not necessary that they should be in writing, but enough to have them noted on the judge's minutes and settled after, as prescribed by the rules of court. The idea of furnishing copy of exceptions to the presiding judge was suggested for the first time in the act of 1878, the first section of which requires copy of exceptions to be furnished the judge for the reason that, in cases provided for by that section, ten days to except was allowed. We do not think this section of the code can be

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interpreted by reference to the act *of 1878, and enlarged by incorporating into it provisions of an act passed long after, and which makes entirely new regulations upon the subject.

Whether this section is superseded or not, it is not now necessary, in appealing from a decree in chancery rendered in vacation, to furnish the judge who rendered the decree with a copy of the exceptions thereto. This view of the law is fortified by reason. We are unable to understand the object in requiring copy of exceptions to be furnished the judge, whose whole decree is in writing, in a suit in which he is not expected to make a report or settle a case.

As to the service of exceptions upon the attorney of the opposite party, claimed to be necessary, the notice of appeal, taken in connection with the full exceptions to the referee's report and in "the case," may be considered as a technical compliance.

The notice was in these words: "Take notice that the plaintiff will appeal to the Supreme Court from the decree of Judge B. C. Pressley, rendered May 17th, 1880, and move it to reverse the same." Considered as an exception, this is certainly not full, but it

is more than a mere notice of an intention to appeal. It is true, as stated in the case of Norton v. Livingston, ante p. 177: "That the points of law, wherein error is charged, should be specifically stated, otherwise the court has no guide as to the points contested;" but that was a law case, tried by a jury, and the only exception was to "the charge of the judge." This was an equity suit, and the whole decree in writing. The motion to dismiss the appeal is refused.

John Vance executed his will April 6th, 1872, and by it gave his wife, Nuella E., the tract of land on which he then lived, with the furniture and other articles thereon, and also the sum of $2000, to be paid to her as soon after his death as possible; the whole to be in bar of dower in his lands. In 1874 he added a codicil to his will, whereby he made the said legacy a charge upon his old homestead. The wife of testator objected that the provision was revocable and did not make her safe in renouncing dower in certain lands which her husband wished to sell. To satisfy her upon this subject, he executed a deed, June 21st, 1875, which was delivered

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and recorded, whereby he "gave, *granted, released, conveyed and confirmed" the property which had been given by the will, reserving to himself the possession and use of it for life: provided, that it should not bar her right of dower unless she realized the whole property and money. The testator died in April, 1877. F. M. Godbold, son-in-law of the testator, qualified as executor and instituted this proceeding, charging that the widow had received the $2000 in the lifetime of the testator, and demanding an account for other moneys alleged to have gone into her possession during the life of her husband. The executor presented accounts against the estate, running from 1869 to 1877, and the questions in the case arise out of these accounts and the claim of the widow.

The referee reported as to the claim of the widow, "that there was no evidence that such money was or is in her possession, or that she had received the two thousand dollars. Her claim under the deed of gift of June, 1875, is, therefore, sustained as unpaid. * * * Although the claim is, in form, a gift, and not strictly a debt, yet it is in lieu and bar of dower, and has a valuable consideration to support it," and he accordingly placed the claim in the list of debts established. He reported as to the claim of the executor that "portions of Mr. Godbold's claims are barred by the statute of limitations, namely, the accounts for 1869 and 1870, amounting to one thousand and eighty-seven dollars and six cents, but no exception has been taken to them on that ground, and they have been allowed," &c.

Both parties excepted to the report. Judge Pressley overruled all the exceptions on both sides and confirmed the report, except as to the accounts of the executor for the years 1869 and 1870, which he held were barred by the statute of limitations. He adjudged "that Nuella E. Vance has the right to retain the land and personal property thereon, as reported by the referee; also, that she is entitled to receive from the estate of John Vance the sum of two thousand dollars, with interest from the probate of the will, or, failing to receive the same, that she is entitled to her dower out of the real estate heretofore sold or to be sold by the order of the court." He remitted the case to the referee to inquire and report what assets are liable to the pay-

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ment of her *claim, and whether she elects to look to such assets for payment or take her dower.

Both parties filed exceptions to the decree, and the appeal comes to this court. The exceptions are numerous and will not be considered seriatim, but according to the subject matter.

1. The claim of the executor as a creditor of the estate. On one side it is insisted that the accounts were not properly proved, and on the other that they were all established, and it was error to apply the bar of the statute to any part of them. The Circuit judge concurred with the referee that they were established. When such concurrence exists, it is the practice of this court to affirm the judgment, unless it is without any testimony to sustain it, or is manifestly against the weight of the evidence. We cannot say that there was no testimony tending to prove these accounts. Upon the subject of applying the statute to the accounts for the years 1869 and 1870, we also agree with the Circuit judge. The creditor was executor of the estate, which it was his duty to protect. It is against the policy of the law to allow an executor to waive the statute against himself as creditor. "An administrator cannot retain, for a debt of his own, which was barred by the statute of limitations at the death of his intestate." Cooper v. Peyton, Rich. Eq. Cas. 259.

2. As to the claim of Mrs. Vance. All the other exceptions relate to this subject.

1. It is contended that the $2000, conveyed by the deed, was received by Mrs. Vance in the lifetime of her husband, and the fact that shortly before his death, in April, 1877, he gave her a note for $50, affords conclusive proof that she was paid in full. The presumption claimed from giving the note could only arise as to a debt due and payable at the time. By the deed, Mrs. Vance was not to receive the $2000 until testator's death. The referee says: "The evidence is not sufficient to sustain the charge; indeed, there is no evidence to support it, except the possession, by the testator in 1870, of upwards of seven thousand dollars, and in 1871 of upwards of two thousand dollars." The judge says: "I do not find any testimony sufficient to sustain

said allegations." In this state of the case this court cannot undertake to review the

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testimony and disturb the decree. See *Rep. Shand's note, 12 S. C. 612. We have looked carefully through the testimony and fail to find any direct evidence of payment.

2. It is insisted that the paper called a deed, purporting to convey property to be delivered at donor's death, is testamentary in its character, and at least, in part, void for the want of three witnesses, or if the deed is good as to the tangible property it is certainly void as to the $2000 in money, which cannot be identified and has no existence, except as a measure of value. The paper, in form a deed, purported to convey a particular sum of money—to give a present interest, with enjoyment postponed until donor's death. It does not appear that any particular dollars were present or delivered, but the deed is under seal and was delivered. We suppose that the thing itself was not so earmarked that the donee could have taken possession at the death without resort to the executor, but was rather in the nature of a direction to the executor to pay. The purpose of the parties was to make the provision irrevocable, and that intention must be carried out if it can be done without violating any principle of law. Without going into the question whether money, like ordinary personal property, is capable of being conveyed in presenti to take effect in futuro, there is no doubt that this money would have been recoverable if John Vance had given an obligation for it in the form of a note or bond without three witnesses. That the payment was appointed to be made at the death of the obligor, is not, of itself, an objection to the papers being considered an irrevocable obligation. 3 Term 322; 5 Term 381; 8 Term 483. Must the intention fail only for the reason that the paper is in form a deed and not a bond? "An instrument intended to take effect at the donor's death, but not having the formalities of a will, will not be held testamentary, and therefore void, if it can operate in some other character, which appears to have been intended." Carter v. King, 11 Rich. 125, and authorities there cited.

3. It is further insisted that the conveyance of the same property by deed was an ademption of the devises and legacies, and that in no event can Mrs. Vance have dower either by election or to make up the full sum

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of $2000. The doctrine of ademp*tion does not apply to devises, and is always a question of intention. Allen v. Allen, 13 S. C. 512 [36 Am. Rep. 716]. The purpose of the will, the codicil, and the deed, was the same, and whatever Mrs. Vance receives under the deed cannot, of course, be again claimed under the will; but the deed itself provides that "should the estate become insolvent, so that my said wife shall fail to receive the property and money herein conveyed to her, or any part thereof, then her right and claim of dower shall not be barred." We do not think that the mere acceptance of the deed could be an ademption of anything except in so far as the property covered by it was actually received in the lifetime of the testator. It was the intention of the testator to secure to his wife, in any event, the whole property given. He gave it by will, fortified it by a codicil, and finally made it irrevocable by deed. This anxious intention cannot be defeated by the application of the doctrine of ademption. If the provision of the deed should fail in whole or in part, it would be in violation of the terms of the deed itself to make that which was ineffectual for the purpose intended effective only in defeating another provision for the same purpose. Dawson v. Dawson, Rice's Eq. 243; [Dawson v. Dawson] Cheeves' Eq. 148; Floyd v. Floyd, 3 Strob. 54 [49 Am. Dec. 626]; Pringle v. McPherson, 2 Brev. 290 [3 Am. Dec. 713]. Revocation is a question of intention. In the case Ex parte Earl of Ilchester, 7 Ves., Jr., 374, Lord Alvanly examines this doctrine at great length, and concludes with these very strong words: "There is, therefore, no authority in the way of this proposition, that an instrument imperfect to the point to which it is directed, shall not operate as a revocation of a will duly executed."

The Circuit decree is affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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14 S. C. *476

*(Case No. 978.)

WARREN, WALLACE & CO. v. LAWTON.

(November Term, 1880.)

[1. *Agriculture* ⇐15.]

Crop of A was sold after his death, under warrant, to enforce an agricultural lien, which was executed by him during his lifetime. Within thirty days after sale, the administrator of A, claiming the proceeds of sale, gave notice to the sheriff of such claim, and at the same time served an affidavit that no advances were made under the lien to be used in making the crop so sold, but that the lien was only executed to secure the re-payment of money paid to a third person to settle an old debt due by A. *Held*, that this affidavit sufficiently raised the issue which, under the statute, must be determined by trial in the Court of Common Pleas; and, meantime, a rule against the sheriff, moved for by the liencees, was properly discharged.

[Ed. Note.—Cited in Sease v. Dobson, 33 S. C. 237, 11 S. E. 728; Georgia, etc., Ry. Co. v. Ridlehuber, 38 S. C. 318, 17 S. E. 24.

For other cases, see Agriculture, Cent. Dig. §§ 42–49; Dec. Dig. ⇐15.]

[2. *Agriculture* ⇐15.]

The creditor is entitled to the summary remedy of the act only where the money is

due for advances made to enable the debtor to make the crop, and the affidavit required of the debtor to raise the issue for trial is sufficient if it denies indebtedness under the lien.

[Ed. Note.—Cited in Kennedy & Son v. Dunbar, 46 S. C. 521, 24 S. E. 383.

For other cases, see Agriculture, Cent. Dig. § 47; Dec. Dig. ⟸15.]

Before Aldrich, J., Barnwell, February, 1880.

This was a rule issued February 17th, 1880, upon J. W. Lancaster, sheriff of Barnwell county, to show cause why he should not be required to pay over to the relators, Warren, Wallace & Co., money realized under a warrant to enforce an agricultural lien. The warrant was entitled Warren, Wallace & Co. v. Thomas P. Lawton, as administrator of the estate of B. W. Lawton. The lien was executed May 2d, 1879. The case is sufficiently stated in the opinion.

Mr. John M. Cranston and Mr. W. P. Murphy, for appellants.

Mr. J. J. Brown, contra.

February 26th, 1881. The opinion of the court was delivered by

McIVER, A. J. This was a rule on the sheriff requiring him to show cause why he should not be directed to pay over to the

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*appellants the proceeds of the sale of the crop of the intestate, B. W. Lawton, made by him on January 8th, 1880, under a warrant issued by the clerk to enforce an agricultural lien given by the said Lawton to the appellants to secure advances to be made during the year 1879. The sheriff showed for cause, that on January 20th, 1880, he was served with a notice, by the respondent, not to pay over the proceeds of such sale to the appellants, for the reason that no advances were made for that year by the appellants to the intestate; and that, subsequently, he was also served with a notice by Mrs. Josephine B. Lawton not to pay over the proceeds of the sale, for the reason that she was a lien creditor of the intestate, and that no advances had been made to said B. W. Lawton for the year 1879 by the appellants; and asked the instructions of the court in the premises. At the hearing, before the Circuit judge, it appeared that the notice from the respondent, referred to in the sheriff's return, was accompanied by an affidavit, which, among other statements, contained the following: "That no advances were made by said Warren, Wallace & Co. to said B. W. Lawton during said year to be used in making the crops of the said B. W. Lawton, and that the money loaned and called advances in the lien given on the crops for 1879 was money loaned, not to B. W. Lawton, but paid to other parties in settlement of an old debt. The deponent is certain that no money passed between the said Warren, Wallace & Co. and B. W. Lawton during the year 1879, and that no advances for the purpose of assisting his agricultural interests were, in any manner, made to B. W. Lawton by said Warren, Wallace & Co. for that year." It also appeared that the notice from Mrs. Josephine B. Lawton was likewise accompanied by an affidavit, which, from the view we take of this case, it will not be necessary to set out particularly. The Circuit judge discharged the rule, and from his decision this appeal is taken.

The statute (March 4th, 1878, 16 Stat. 410,) under which the appellants proceeded in this case, is a very rigorous one, and gives a creditor a very summary remedy, but it is not wholly unmindful of the rights of the debtor. To obtain the remedy provided for by it the creditor must first make an affidavit "that the person to whom such advances

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have been made, is about to sell *or dispose of his crop, or in any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due." This must, of course, mean the amount due under the lien, and cannot apply to any other indebtedness. Otherwise a creditor might resort to this means of securing an antecedent unsecured debt, while it is plain that the sole purpose of the statute was to provide for the security and prompt collection of the debts contemplated by it, to wit, advances made in pursuance of the agreement provided for in the preceding section of the act. The statute then proceeds to provide a mode by which the debtor may, to a certain extent at least, be protected not only from any erroneous or excessive charge on the part of the creditor, but also from having the proceeds of the sale of his crops applied to any other debts than those for which they may be specially pledged, viz., advances made for the purpose of enabling him to raise such crops. This is effected by the proviso to the third section of the act, which declares: "That if the person to whom such advances have been made shall, within thirty days after such sale has been made, give notice in writing to the sheriff, accompanied with an affidavit to this effect, that the amount claimed is not justly due, that then it shall be the duty of the sheriff to hold the proceeds of such sale subject to the decision of the court upon an issue" made up to determine whether the amount claimed under the lien is justly due. When, therefore, the person to whom the advances are alleged to have been made, or, as in this case, his administrator, gives such notice to the sheriff, accompanied by an affidavit to the effect that the amount claimed under the lien is not justly due, the sheriff is required by the act to hold the proceeds of sale until the issue thus raised between the parties has been determined. In this case we think the affidavit accompanying the notice to the sheriff from the respondent was sufficient to raise the issue contemplated by the act.

It is argued, however, that the affidavit of the respondent does not come up to the requirements of the act, because it not only does not deny that the amount claimed is justly due, but, on the contrary, impliedly admits that the claim was justly due for money paid by appellants to other parties

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in settlement of an *old debt due by the intestate, B. W. Lawton. We cannot concur in this view. As we have before said, the affidavit required of the creditor before he can obtain a warrant to enforce his lien, must be regarded as an affidavit, to the effect that the amount claimed is then due under the lien, and all that the debtor is required to do in order to raise the issue contemplated by the act, is to deny that allegation. If there is nothing due under the lien, then the creditor can get nothing under the summary remedy provided for by the act, no matter how much the debtor may owe him on other accounts, and for the collection of such other indebtedness he must, like all other creditors, resort to the ordinary process of law. Any other construction would be a manifest perversion of the purpose of the act, as well as a violation of the agreement of the parties. The act gives a special and very summary remedy for the collection of a debt of a particular character, which there is no warrant for extending to debts of any other character. The parties agree that to secure the prompt collection of a debt contracted for the purpose of enabling the debtor to make a crop, that the creditor shall have the promptest and most efficient means for collecting that debt; but they do not agree that the creditor shall have the same prompt and efficient means for collecting any other debt that the debtor may happen to owe. The affidavit required of the debtor will, therefore, be sufficient if it is to the effect that the amount claimed is not justly due under the lien; for otherwise an unfortunate debtor who happened to owe only a small balance under an agricultural lien, and at the same time was otherwise largely indebted to the person holding the lien, would be liable to have his whole crop seized and summarily sold, and the whole proceeds applied to debts due a single creditor, when, perhaps, there were other creditors who, being forced to employ the slower processes incident to the ordinary remedies for the collection of debts, would thereby be entirely deprived of their rights.

The notice to the sheriff having been given by respondent within the time required by the statute, accompanied by an affidavit which, as we have seen, was sufficient to raise the issue contemplated by the act, it

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was the duty of the sheriff to hold *the proceeds of the sale until such issue should be determined, and the rule was, therefore, properly discharged.

The order of the Circuit judge discharging the rule upon the sheriff, in this case, is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concur.

14 S. C. 480

(Case No. 980.)

SHERIFF v. WELBORN.

(November Term, 1880.)

[1. *Execution* ⇐112.]

A, a judgment creditor, having purchased his debtor's land at sheriff's sale, brought his action and obtained judgment for the recovery of the land so purchased. The land was subsequently sold by a United States marshal to B under a judgment against the same defendant, of older lien than A's. In action by A against B for the recovery of this land, which was of less value than $1000, and all that the debtor had—*Held*, that B could not now require A to show that his judgment was based upon a contract of older date than the homestead law.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 228; Dec. Dig. ⇐112.]

2. Particularly in this case, where there is no proof that the judgment debtor was the head of a family.

[3. *Execution* ⇐320.]

A purchaser of land at a marshal's sale proved the judgment and the marshal's deed, but not the execution nor the levy. *Held*, that he had not established his title, and that the recitals of execution issued and levy made, contained in the deed, were not proof of the facts so recited.

[Ed. Note.—Cited in Parr v. Lindler, 40 S. C. 203, 18 S. E. 626.

For other cases, see Execution, Cent. Dig. §§ 940–945; Dec. Dig. ⇐320.]

4. Cases reviewed, and Hopkins v. De Graffenreid, 2 Bay 441, overruled.

[5. *Appeal and Error* ⇐671.]

This court can consider only such facts as are stated in the case.

[Ed. Note.—Cited in Sawyer, Wallace & Co. v. Macaulay, 18 S. C. 546; Welch v. Gleason, 28 S. C. 250, 5 S. E. 599.

For other cases, see Appeal and Error, Cent. Dig. § 2872; Dec. Dig. ⇐671.]

[6. *Homestead* ⇐177.]

[Where a judgment was recovered against a debtor, and land sold under execution without claim of homestead being made, such judgment is conclusive of the right of the debtor to a homestead as against him and parties claiming under him.]

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 347; Dec. Dig. ⇐177.]

[This case is also cited in Kennedy v. Kennedy, 86 S. C. 497, 68 S. E. 669, without specific application.]

Before Pressley, J., Pickens, October, 1879.

Action commenced February 13th, 1879, by Exodus Sheriff against A. J. Welborn, for recovery of possession of a tract of land, formerly the property of N. H. Wel-

born. Judgment was rendered in the United States District Court for the District of South Carolina, on August 4th, 1874, in favor of the United States against N. H. Welborn. On February 7th, 1877, Exodus Sheriff recovered a judgment against N. H. Welborn in the Court of Common Pleas

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for Anderson county. A transcript *was filed in Pickens county, and, by virtue of an execution issued thereon, the land of the defendant was sold by the sheriff of Pickens county on August 6th, 1877, and purchased by Exodus Sheriff. On March 25th, 1878, Sheriff obtained a judgment against N. H. Welborn for the possession of this land. On January 6th, 1879, this same tract of land was sold by the United States marshal under the judgment of the United States court, and was purchased by A. J. Welborn, who, it seems, obtained the possession.

The recitals in the marshal's deed were as follows:

To all to whom these presents may concern: I, R. M. Wallace, marshal of the United States for the District of South Carolina, in the state aforesaid, send greeting. Whereas, by virtue of a fi. fa. issued out of the United States District Court for the District of South Carolina, tested the 21st day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and returnable according to law, to me directed, and lodged in my office on the 21st day of October, one thousand eight hundred and seventy-eight, commanding me of the goods and chattels, houses, lands and other hereditaments, and real estate of N. Harvey Welborn, to levy the sum of one thousand and forty dollars, debt and costs, which the United States, on the 25th day of August, 1874, by judgment of the said court, at Greenville, S. C., lately recovered against the said N. Harvey Welborn, I have levied upon a certain tract of land in the District of South Carolina, in the county of Pickens aforesaid, hereinafter more particularly described. And whereas, after due and legal notice, the said tract of land was, on the 6th day of January, one thousand eight hundred and seventy-nine, being the first Monday in the said month, between the hours of eleven in the forenoon and three o'clock in the afternoon of that day, at the court-house in Pickens county, openly, publicly and fairly, and according to the usage and customs of vendues, by me sold for and towards satisfaction of the said judgment and execution, unto A. J. Welborn, for the sum of one hundred and thirty dollars, he being at that price, the highest and last bidder for the same.

The other facts of the case are stated in the opinion. The jury found for the plaintiff and defendant appealed.

Messrs. Earle, Wells & Taylor, for appellant.

Mr. A. Blythe, contra.

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*March 1st, 1881. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover possession of a tract of land originally belonging to one N. H. Welborn, under whom both parties claimed title. The plaintiff's title was derived from a sale made by the sheriff under an execution issued to enforce a judgment recovered by plaintiff against said N. H. Welborn, a transcript of which was docketed in the county where the land in dispute is situate, on June 5th, 1877. The plaintiff having bought the land at this sale, brought an action against the judgment debtor to recover possession and recovered a judgment therein. It appeared on this trial that "this was the only land the said N. Harvey Welborn owned, and he resided thereon as his home, and the said land was not worth more than one thousand dollars."

The plaintiff having proved his title closed, when a motion for a nonsuit was made upon the ground that the land in question being the homestead of the said N. H. Welborn, the sheriff could not make a valid sale of it under execution, and therefore the plaintiff had no title. This motion was refused upon the ground "that plaintiff's recovery of the land in his action against N. H. Welborn was conclusive of the question of his right of homestead, and it was therefore unnecessary to prove, in this case, that the judgment of Exodus Sheriff v. N. H. Welborn, was upon a cause of action existing prior to 1868;" and the defendant excepted.

This exception raises the first point presented by this appeal. In addition to the reason given by the Circuit judge for refusing the motion, which is quite conclusive, (inasmuch as the failure to interpose the claim of homestead on the trial of the former action to recover possession of this land effectually prevents not only the said N. H. Welborn, but the defendant, who claims under him, from now raising that question,) we may add that it nowhere appears that N. H. Welborn ever could have claimed a homestead in that or any other land, inasmuch as it nowhere appears that he was the head of a family. It is very clear, therefore, that the motion for a nonsuit was properly refused.

The defendant claimed title through a sale purporting to have been made by the United

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States marshal under a judgment re*covered in the United States court, prior in date to that under which the plaintiff claimed, and, to support his claim, offered in evidence the certified record of said judgment with the deed from the marshal, but failed to produce any execution issued to enforce the judgment or account for its non-production, and failed to prove any levy, but relied on the recitals in the marshal's deed, a copy of which is set out in the "case." The Circuit judge held "that the failure by appellant to intro-

duce on the trial any execution from the United States court or any levy by its proper officer," was a deficiency fatal to appellant's case, and that such deficiency "could not be supplied by the recitals in the deed, which, standing alone, could not show title in the appellant;" to all of which defendant excepted. So that the question presented by this exception is, whether a sale under an execution can be proved by the mere recitals in the deed of the officer making such sale, or must the execution be produced, or in case of its loss must secondary evidence of its existence and contents be adduced?

For the purposes of this case, a sale by the United States marshal under an execution issuing out of the United States court, may be regarded as standing upon the same footing and governed by the same principles as a sale made by the sheriff under an execution issuing out of the state court. There can be no doubt but that a judgment merely will not authorize the sheriff to make a valid sale of land. There must not only be an execution conferring upon him authority to make such sale, and a levy made under such execution, but there must be an execution which has not lost its active energy; for while a sheriff may sell under an execution, which, at the time of the sale, has lost its active energy, provided the levy has been made before, (Gibbes v. Mitchell, 2 Bay 120; Toomer v. Purkey, 1 Mills' Const. R. 323 [12 Am. Dec. 634]; Wheaton v. Sexton, 4 Wheat. 503 [4 L. Ed. 626]; Remington v. Linthicum, 14 Pet. 84 [10 L. Ed. 364]) yet if he undertakes to make a sale of lands under an execution, which has lost its active energy before he has made a levy,† the sale will be absolutely void. Sims v. Randall, 2 Bay 524.

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*It is contended, however, that conceding all this, yet it is not necessary to offer the execution in evidence and the levy made under it, but that this may be supplied by the recitals in the sheriff's deed. This, it seems to us, would be an anomaly. The validity of the sale depends upon the question whether the officer making it had authority so to do, and to receive his mere assertion, in the form of a recital in his deed as proof of his authority, would look very much like allowing a person to make evidence for himself. The execution issuing out of and under the seal of the court is the sheriff's authority to sell, and without it the sale would be a nullity. It would seem, therefore, that the highest and best evidence would be the mandate of the court bearing its seal, and to say that the mere assertion of the officer that he had acted under and by authority of such mandate, supersedes the necessity for producing such mandate, would be to place it in the power of the officer to sell the property of the citizen without any authority at all. But to sustain the position taken by the appellant, the case of Hopkins v. De Graffenreid, 2 Bay 441, is cited, and that case does sustain the proposition that it is not necessary to introduce the execution in proof of a title claimed under a sheriff's sale, but that the recitals in the sheriff's deed will be sufficient evidence of his authority to sell. That case, however, was decided as far back as 1802, by a divided court, and does not seem to have been since recognized, or even referred to by the court in any case that we have been able to find. On the contrary, the proposition established by it has been again and again ignored, and the case cannot be regarded as authority. In Barkley v. Screven, 1 N. & McC. 408, decided in 1819, the question was whether it was necessary to introduce all the intermediate executions to establish a title under a sheriff's sale, and the court held that all that was necessary was the judgment and the execution under which the sale was made, and that it was unnecessary to introduce all the intermediate executions. In Vance v. Reardon, 2 N. & McC. 299, decided in 1820, it was held that to make out a title to personal property under a sheriff's sale, the production of the execution under which the property was sold was indispensable. Johnson, J., in delivering the opinion of the court, uses this language: "This question is, I

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think, *conclusively settled by this court in the case of Barkley v. Screven, supra, in which it was determined that although it was not necessary to produce all the executions intervening between the judgment and that under which the sale was made, the latter was indispensable, as the authority under which the sheriff acted, and that the judgment on which it was founded ought also to be introduced. It is true, that in that case lands were the subject of litigation, but I am unable to see any reason why the rule will not apply equally to personal property." In Richardson v. Broughton, 2 N. & McC. 417, decided in 1820, it was held that where a person claims land under a sheriff's sale, the judgment and execution under which the land was sold must be produced in evidence. In Smith v. Libby, (MS., decision in 1822,) 2 Rice's Dig. 328, a plaintiff in an action of trespass to try titles, as a part of his title relied upon a sale made by the sheriff. He produced the judgment and proved the sale, but could not introduce the execution, as it was not to be found either in the clerk's or sheriff's office after diligent search. The court held that the clerk's office being the proper repository of all process issuing from the court, after the purpose for which it was issued had been accomplished, proof that the execution in question was not to be found there after diligent search, was sufficient

† This fact, viz., that the levy had not been made until after the execution had lost its active energy, does not appear in the case as reported in Bay, but in Toomer v. Purkey, 1 Mills' Const. R. 323 [12 Am. Dec. 634], it is stated as distinguishing the one case from the other.

proof of its loss. In Harrison v. Maxwell, 2 N. & McC. 349 [10 Am. Dec. 611], the question was as to the effect of a misrecital of the fi. fa. in the sheriff's deed, and, in speaking of the effect of recitals in the sheriff's deed, the court uses this language, (the italics being ours): "It is not the recital of a power or authority to sell and convey which gives the right, *nor is it evidence of the right.* * * * The levy and sale invest him with the title, so far as to enable him to convey, *and it is incumbent on the party claiming under him to show these powers; the recital will not do it.*" In Sawyer v. Leard, 8 Rich. 271, the question was whether the sheriff should be allowed to testify that he had not levied on the land in dispute, and the court, in discussing that question, says: "It may be shown that the sheriff had no execution justifying his levy and sale, and, therefore, no authority to sell, as this contradicts only a recital in his deed, which is not even prima facie evidence of his official authority."

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*Now it is very clear that if the court had intended to be governed by the doctrine laid down in Hopkins v. De Graffenreid, none of the foregoing decisions could have been made.

The cases cited by the appellant in his brief to sustain the rule laid down in Hopkins v. De Graffenreid, do not, in our judgment have that effect. Henry v. Ferguson, 1 Bail. 513, was a case in which the defendant in an action of trespass to try titles, not being the judgment debtor, undertook to question the regularity of the judgment under which the plaintiff claimed, and it was held that a purchaser at sheriff's sale was not bound to examine into the regularity of the proceedings on which the judgment under which the sale is made was founded, and that third persons cannot take advantage of such irregularities. It is difficult to see how this case can be regarded as either recognizing or sustaining Hopkins v. De Graffenreid. In Ingram v. Belk, 2 Strob. 207 [47 Am. Dec. 591], the questions were as to the regularity of the judgment and execution under which the sale was made, and it was again held that third persons could not take advantage of mere irregularities; that an execution, issued more than a year and a day after the judgment was rendered, was not void but voidable merely, and a purchase made under it before it had been set aside was good. But there is nothing in the case which warrants the idea that mere recital in a sheriff's deed would supersede the necessity for proof of the execution and levy under which the sheriff sells. In Floyd v. Mintsey, 5 Rich. 365, the question was as to the sufficiency of the evidence offered to establish the judgment under which it was claimed that the land was sold, and although the Circuit judge, in his report, does say "if the existence of a judgment had been proved, I suppose evidence of fi. fa. might have been derived from the sheriff's deed," yet the Court of Appeals say nothing whatever upon this point; in fact there was nothing in the case to call for any expression of opinion as to the effect which should be given to recitals in a sheriff's deed. In Stuckey v. Crosswell, 12 Rich. 278, there are some remarks made which seem to countenance the idea that the recitals in a sheriff's deed might supersede the necessity for introducing the execution and proving the levy and sale made thereunder, but

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that was not the point under consider*ation in that case, and it cannot be regarded as deciding the question. In addition to this, the action in that case was against the defendant in the execution, and as the doctrine is well established that the sheriff, in making the sale, acts as the defendant's agent, it may very well be that such defendant would be estopped from denying the recitals in the deed of the sheriff, which is, in law, his own deed, and in that way such recitals might be regarded as proof of the facts so recited as against the defendant in the execution, while they would be no evidence against a third person. In Fretwell v. Neal, 11 Rich. Eq. 559, Wardlaw, Ch., in the Circuit decree, says that there was prima facie proof of the existence and loss of the execution under which the property in question was sold, and Johnston, Ch., in delivering the opinion of the court, says: "The great lapse of time which has occurred tends very much to support the defendant's case. This is true not only in supplying lost papers, but in raising the presumption that there was no wrong committed." This case, therefore, cannot be regarded as affording the slightest support to the doctrine laid down in Hopkins v. De Graffenreid.

From this review of the authorities it is very manifest that the doctrine laid down in Hopkins v. De Graffenreid has never been recognized in any subsequent case, but, on the contrary, the court has made several decisions which not only ignore that doctrine but are plainly inconsistent with it. Under these circumstances, and in view of what we understand to have been the universal practice in regard to the necessity for producing the execution under which the sheriff sells, and proving a levy and sale thereunder, we feel justified in declaring that the case of Hopkins v. De Graffenreid is not authority.

It is true that it is stated in appellant's second exception that search had been made for the execution under which the marshal sold, and that it could not be found, but this fact does not appear in the "case" as submitted here, and, therefore, as we have frequently had occasion to say, it cannot be considered.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

14 S. C. *488

*(Case No. 981.)

MOTES v. MADDEN.

(November Term, 1880.)

[1. *Limitation of Actions* ⇐102.]

Two months before attaining his majority, a ward executed and delivered to his guardian a receipt for $5475.49 "on final settlement in full of his guardianship accounts with me;" and a copy was filed in the office where guardians' returns were required by law to be filed; this receipt, in fact, represented the balance due upon settlement, and payments were afterwards, and from time to time, made by the guardian to the ward. In a suit upon the guardianship bond instituted by the ward, nine years afterwards—*Held*, that as to the sureties, the action was barred by the statute of limitations.

[Ed. Note.—Cited in Owens v. Watts, 24 S. C. 79; Roberts v. Downs, Id. 588; Waldrop v. Leaman, 30 S. C. 449, 9 S. E. 466.

For other cases, see Limitation of Actions, Cent. Dig. § 505; Dec. Dig. ⇐102.]

2. Smith v. Caldwell, 15 Rich. 365, recognized and followed.

[This case is also cited in Ariail v. Ariail, 29 S. C. 96, 7 S. E. 35, as to the defense of infancy.]

Before Kershaw, J., Laurens, September, 1880.

In this case, Hon. T. B. FRASER, judge of the Third Circuit sat in the place of Chief Justice SIMPSON, who had been of counsel in the court below. The case is fully stated in the opinion.

Messrs. Simpson & Holmes and Geo. Johnstone, for appellants.

Messrs. R. P. Todd and B. W. Ball, contra.

March 4th, 1881. The opinion of the court was delivered by

FRASER, A. A. J. Henry Madden, one of the defendants, was appointed by the Court of Equity for Laurens District, guardian of the plaintiff, and gave his bond as such on March 29th, 1854, in the penal sum of $3000, with William D. Watts and Samuel R. Todd as sureties.

On December 23d, 1868, about two months before plaintiff arrived at the age of twenty-one years, at the request of his said guardian, he went into the office of H. L. McGowan, then commissioner in equity for Laurens District, and executed a receipt in full to his guardian in the following words:

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*"December 23d, 1868.

"Received of Henry Madden, my guardian, on final settlement, five thousand four hundred and seventy-five dollars and forty-nine cents in full of his guardianship account with me.

"John H. Motes.

"Test—H. L. McGowan."

On the same day the guardian placed a copy of this receipt on file in the office of the commissioner in equity for Laurens District "as his closing return on final settlement of his guardianship of the plaintiff's estate." He carried away with him the original receipt and statement of account on which the receipt was based, and retained possession of them until the commencement of this action, February 15th, 1878.

No money was paid when this receipt was signed, but plaintiff admits that he received afterwards about $2200 in land, a wagon, a horse and buggy, &c. The guardian claims in his testimony that the whole amount due was afterwards paid by him to plaintiff.

After this receipt was given and this final return made, Henry Madden, the guardian, was sued to judgment in two cases: Samuel R. Todd v. Henry Madden, judgment $690.37, costs $21.75, interest from May 15th, 1871, and Rebecca Motes v. Henry Madden, judgment $485, costs $17.15, interest from January 1st, 1871, both of which are still unsatisfied. During this same period Henry Madden disposed of some of his property to other persons, of the value of which there is no evidence, before the court.

Regular annual returns were made by the guardian in the office of the commissioner in equity for Laurens District until this final return.

The guardian was the grandfather of plaintiff. It does not appear that there was any actual notice given to the sureties of the character or existence of this receipt or of the final return.

Henry Madden, the guardian, has died since the commencement of these proceedings, and his estate is properly represented as well as that of W. D. Watts, one of the sureties.

Plaintiff arrived at majority February 21st,

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1869, and this *action was commenced February 15th, 1878. The action was, therefore, commenced eight years eleven months and twenty-four days after he came of age.

The referee, James M. Baxter, sustained the plea of the statute of limitations as to the sureties, but held that the estate of the guardian is still liable, and recommended that the representatives of his estate should be allowed to show any further payments made by the guardian in addition to those shown on the reference.

The report of the referee was confirmed by the Circuit judge, and from this decree an appeal has been taken to this court.

"I. Because his Honor erred in not sustaining the exceptions of the plaintiff to the report of the referee, to wit:

"1. That the referee having found as a matter of fact that at the time the receipt was given the plaintiff herein was a minor, and that no money was paid then by Henry Madden to the plaintiff, it is submitted that the referee erred in finding, as a conclusion of law, that said receipt was not void but voidable, and that the plaintiff's right of re-

covery against the sureties was barred by the statute of limitations.

"2. That the referee having found the receipt represented no payment, but stands as an accounting, fixing the liability of Madden, the guardian, to the plaintiff, his ward, it is submitted that the referee erred in his conclusion that this was a material variation of the relation of principal and surety between Madden and his sureties, and in its operation upon the sureties inequitable and fraudulent.

"3. That the referee erred in not stating the accounts between plaintiff and defendant, Madden, and in leaving the reference open for further credits to be established by the representatives of Madden.

"II. Because there was no act of plaintiff which would release the sureties.

"Because if the sureties should be relieved at all it should only be to the extent of the injury shown to have resulted from the act of plaintiff."

The main question in the case is whether

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the sureties in the *guardianship bond of Henry Madden are protected by the plea of the statute of limitation.

Here was a receipt in full, which purported to be a final execution of his trust by the guardian, and a copy thereof filed in the proper office as a final return. It is true the ward was then a minor, and no consideration was then given either in money or other property, though large payments were afterwards made in pursuance, it may be assumed, of the understanding between the guardian and his ward.

In Moore v. Porcher, Bail. Eq. 197, Chancellor Harper, in a Circuit decree which was affirmed in the Court of Appeals, "per curiam," uses the following language: "Without any authority to the purpose, I am of the opinion, from the reason and analogy of the law, that when a trustee does an act which purports to be a final execution of his trust, the statute begins to run from that time so as to bar an account." * * * "When he does an act purporting to be an execution of the trust, he shakes off the character of trustee."

In Glover v. Lott, 1 Strob. Eq. 79, a receipt was given by a minor, about seventeen years of age, for $175.12½ in full of her distributive share in an estate. She was married in June following the date of the receipt, February 15th, 1833. In December following the executor made his final return in the Ordinary's office, passing his accounts in which this payment was regularly entered. The court says "that the husband was entitled to demand and receive this legacy on his marriage. * * * It is no violent presumption to say that both complainants (husband and wife) knew, in 1833, that defendant had done an act purporting to be a discharge of his trust. If it was effectual he was discharged. If it was ineffectual the complainants were put on the assertion of their rights," and the plea of the statute was sustained.

In Coleman v. Davis, 2 Strob. Eq. 341, in which the husband, who was a minor, had given a receipt for a legacy to his wife, the Court of Appeals, in reversing the decree on Circuit, says: "The release was a void contract by reason of infancy. But the transaction out of which it arose gave currency to

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the statute, and *having neglected his remedy for four years after he attained majority, he is barred."

In Payne v. Harris, 3 Strob. Eq. 43, is found the following dictum in the Circuit decree, which decree was affirmed in the Court of Appeals: "I take it that an act done in a public office, open for the information of parties interested, must be taken notice of by them, and that the statute obtained currency against the parties mentioned from the date of the division." Johnston Chancellor.

In Long v. Cason, 4 Rich. Eq. 60, Cason, the guardian, obtained, on his own motion and without the presence of any person authorized to represent his wards, a decree from the Ordinary, fixing the amount of his liability. The court says in reference to this: "These acts of Cason, purporting to be a full execution of his trust, place him in the character of a stranger to his former wards and their new guardians, and put them on the assertion of their rights at the hazard of losing those rights by lapse of time." The reference is to these acts in a public office, and the dictum of Chancellor Johnston, in Payne v. Harris, is quoted with approval as applicable thereto.

It seems to be the only proper conclusion that this receipt, given by the plaintiff to his guardian in full of his guardianship account, purported to be a termination of his trust, and that its being used as evidence of a final settlement by placing a copy on file in the proper office, operated as notice to all interested, including the sureties to the guardianship bond.

If this were all, there can be no doubt that all parties, guardian and sureties, would be entitled to claim that the statute commenced to run in their favor from the time the ward came of age. It is claimed, however, that no money was paid at the time, and that full payment has never been made, as was agreed between the guardian and ward when the receipt was given, and that the liability of the guardian thus continued as to himself still exists also as to the sureties. It may be conceded that the guardian is not entitled to plead the statute because of his private agreement with his ward and his subsequent admissions, but it does not appear by what authority the sureties are to be bound by the continuance of his liability beyond the peri-

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od fixed by a long *line of decided cases for the currency of the statute. The guardian

and ward unite in doing an act which, on its face, put the statute in operation, and by a private arrangement, to which the sureties are not parties, and of which they have no notice, so arrange as to postpone for years the time when the statute will begin to run. The sureties may well say that they are not parties to such a compact.

In Smith v. Caldwell, 15 Rich. 365, it is held that when one payment is made by one joint contractor within four years after the accrual of the cause of action, it makes a new starting point as to all of them; but that a second payment within four years from this first payment, but more than four years after the first accrual of the cause of action, does not prevent the bar of the statute as to those joint contractors not concerned in making such second payment. "It does not follow that the implication which arises (says the court) from the personal act of a contractor, and which contemplates a period of four years, must, by a new implication, attach also for another period of four years to a new promise made by a co-contractor without the knowledge of the former." "The original contract looked to its fulfillment or its bar by the statute." "A distinction between the original contract and the new promise in reference to the authority of one joint contractor to bind the other does annex the statute to the contract."

The accrual of the cause of action takes place when this act is done purporting to terminate the trust, as it does upon the maturity of a note. The creditor and one joint contractor cannot extend the time by any transaction between themselves in the latter case, and it is but a fair application of the principle to hold that a guardian and ward cannot, by a private agreement between themselves, extend the liability of the sureties against the form and effect of a solemn and public act done by them, which, on its face, gives currency to the statute, to the protection of which they are entitled as a part of their original covenant of suretyship.

In this view of the case it is unimportant to consider whether the act of the plaintiff, in signing the receipt while a minor, was void or voidable only, or whether the deal-

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ing between the guardian *and ward was such as of itself to discharge the sureties in whole or in part from their obligation, except as above indicated, to give currency to the statute from the time of his attaining his majority. From this time to the commencement of the action is nearly nine years, and no acknowledgment of liability or promise to pay, made by the guardian after the statute commenced to run and within four years thereafter, can extend the liability to the time of the commencement of this action. A promise made on the very last day of the first four years, if not made until then, could not, on the principle of Smith v. Caldwell, extend the liability to the commencement of this action, nearly five years after.

Under the special circumstances of this case, the referee not being satisfied to close the accounting, we see no good reason why the representative of Henry Madden may not be very properly allowed to prove, within a reasonable time, any other payments made by him towards the extinguishment of the claim admitted to have been just at the date of the receipt.

It is therefore ordered and adjudged that the judgment of the Circuit Court be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. 494

(Case No. 982.)

SULLIVAN v. SULLIVAN MANUFACTURING COMPANY.

(November Term, 1880.)

[1. *Pleading* ⇐216.]

Demurrer to complaint upon the ground that several causes of action have been improperly united, does not raise the question whether the plaintiff, under the facts stated, is entitled to any or all of the relief which he demands.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. ⇐216.]

[2. *Pleading* ⇐216.]

Therefore, where two causes of action were not improperly united, the demurrer was overruled, without any inquiry as to the different kinds of relief demanded, or whether such relief was appropriate to the case made by the allegations of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. ⇐216.]

[3. *Action* ⇐45; *Corporations* ⇐357.]

There is no misjoinder of causes of action where a single action is brought upon a note and upon an account, against a debtor corporation, and also against its directors, who are

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made, by the act of incorporation (under *certain contingencies alleged in the complaint to have happened) jointly and severally liable for all debts of the corporation.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 437; Dec. Dig. ⇐45; Corporations, Cent. Dig. § 1501; Dec. Dig. ⇐357.]

[4. *Corporations* ⇐325.]

The liability of the directors under this statute—the general incorporation act, General Statutes, Chapter LXIV.—arises ex contractu, not ex delicto.

[Ed. Note.—Cited in Hall & Co. v. Klinck, 25 S. C. 352, 60 Am. Rep. 505.

For other cases, see Corporations, Cent. Dig. §§ 1442, 1457, 1458; Dec. Dig. ⇐325.]

[5. *Corporations* ⇐357.]

The permission given to creditors by Section 35 of this chapter, to sue the corporation and the directors, separately, does not forbid their joinder in one action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1500, 1501; Dec. Dig. ⇐357.]

[6. *Corporations* ⇐357.]

The action may be single, although, under the provisions of Section 33, the liability of the

corporation and of the directors, may not be co-extensive; the judgments may be separate, if necessary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1500, 1501; Dec. Dig. ⟸357.]

[7. *Corporations* ⟸215.]

[Cited in Flenniken v. Marshall, 43 S. C. 83, 20 S. E. 788, 28 L. R. A. 402, to the point that the statutory liability imposed is not a penalty.]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 826–828, 845–848, 852, 854; Dec. Dig. ⟸215.]

[This case is also cited in Bird & Co. v. Calvert, 22 S. C. 297, without specific application.]

Before Thomson, J., Greenville, April, 1880.

Action commenced February 17th, 1880, by Hewlet Sullivan against the Sullivan Manufacturing Company, William D. Sullivan, assignee, and G. W. Sullivan, Sr., G. W. Sullivan, Jr., D. D. Moore, and P. P. Cureton, as directors. The case is sufficiently stated in the opinion of this court.

[For subsequent opinion, see 20 S. C. 79.]

Mr. M. F. Ansel, for appellant.

The Court of Equity has no jurisdiction in this case, and this objection never comes too late. Rich. Eq. Cas. 249; 14 Rich. Eq. 154. It is of no consequence in what way this objection is taken. Chev. 5. The plaintiff cannot sue here, because he has no judgment; he has not exhausted his legal remedies. 1 S. C. 96; 14 Rich. Eq. 154; 2 McC. Ch. 416; 4 Rich. Eq. 198; 1 S. C. 192; 12 S. C. 461; 13 S. C. 449. The assignment by the corporation does not dissolve it, nor put it upon the footing of a person deceased. Burr. on Assign. 85, 401 (3d ed). Here several causes of action have been improperly joined together. Wiles v. Suydam, 64 N. Y. 173; 53 Barb. 238–245; Pomeroy's Rem., §§ 474–5; 1 N. Y. 47–76; 35 N. Y. 412.

See 14 Stat. 299, § 35, and Code, § 190.

Messrs. W. E. Earle and J. S. Cothran, same side.

Mr. W. H. Perry, contra.

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*March 5th, 1881. The opinion of the court was delivered by

McIVER, A. J. This was an action on a note made by the defendant company to the plaintiff, and on an account for cotton sold and delivered by the plaintiff to said company. The plaintiff, in his complaint, alleged the creation of the corporation under an act entitled "An act to regulate the formation of corporations," passed December 10th, 1869, which is incorporated in the General Statutes, Chapter LXIV., p. 356; the making of the note; the sale and delivery of the cotton; that the corporation is insolvent; that the defendant, George W. Sullivan, Sr., claims that the corporation is indebted to him in a very large amount, which claim, the plaintiff alleges, is fraudulent, pretensive and without consideration; that the defendants named as such are directors of the corporation; that the officers of the corporation have executed a deed of assignment of all of the property of the corporation to the defendant, William D. Sullivan, which is alleged to be fraudulent, null and void, and made with intent to defraud the creditors of said corporation; that the defendants who are named as directors, by virtue of certain acts and omissions set out in the complaint, have become jointly and severally liable for the debts of the corporation, and that the members or stockholders of said company have likewise become jointly and severally liable for the debts of the company, by virtue of certain provisions of the act under which the company was formed, and that the provisions of the charter of said company have been violated in many other particulars not specifically set forth. The plaintiff then demands judgment: First. Against the company for the amount due on the note and account. Second. Judgment against the defendants named as directors for the said amount. Third. That the corporation be dissolved. Fourth. That the assignment to William D. Sullivan be set aside. Fifth. That the company and its officers be restrained from exercising any of its corporate rights, from collecting any debts due to or paying any debts due by said company, or in any way disposing of the effects of the company. Sixth. That a receiver may be appointed. Seventh. For such other and further relief as may be just. To this complaint separate demurrers, accompanied by separate answers,

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have been filed by *the corporation, by George W. Sullivan, Sr., and by George W. Sullivan, Jr.; all of the demurrers being upon the ground that several causes of action have been improperly united in the complaint. The Circuit judge overruled the demurrers, and from his judgment this appeal has been taken.

It will thus be seen that the only question before us is, whether the demurrers were properly overruled, and, therefore, many of the questions discussed in the argument growing out of the merits of the case, are not properly before us and cannot now be considered.

The sole question raised by the demurrers is, whether several causes of action have been improperly joined in the complaint? and to that question we propose strictly to confine our attention. To determine this question it will be necessary to inquire, first, what are the causes of action in this case? and next, whether they are such as can be properly joined? Pomeroy, in his work on Remedies, after adverting to the difficulty of giving any precise definition of the term "cause of action," proceeds, in Section 453, p. 487, to say: "Every judicial action must, therefore, involve the following elements: A primary

right possessed by the plaintiff and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty. * * * Of these elements the primary right and duty and the delict or wrong combined, constitute the cause of action in the legal sense of the term, as used in the codes of the several states." And again: in Section 519, p. 555, he says: "The cause of action, therefore, must always consist of two facts. First. The plaintiff's primary right and the defendant's corresponding primary duty. * * * Second. The delict or wrongful act or omission of the defendant by which the primary right and duty have been violated. * * * The primary right and duty, by themselves, are not the cause of action, because, when existing by themselves unbroken by the defendant's wrong, they do not give rise to any action. * * * Much less can the delict or wrong by itself be the cause of action, because, without the primary right and duty of the parties to act upon, it does not create any right of action or remedial right."

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*In Bliss on Code Pleading, § 113, it is said: "We have defined an action to be a proceeding for the prevention or redress of a wrong. The cause of action, then, is the wrong. * * * The wrong may be done by the denial or by the refusal to respond to an obligation." And, in Section 126, the same author says: "The cause of action has been described as being a legal wrong committed against, or an infringement of, some legal right of the complaining party." Both of these writers on the code warn us, in considering questions like the one now under consideration, against confounding "the cause of action" with "the object of the action." The latter is confined to the relief sought, and it is very obvious that for a single cause of action different kinds of relief may be obtained. It is especially important, in this case, to keep this distinction in mind; for, as the Circuit judge has well said: "An examination of the grounds of the demurrers will disclose that the objections are not so much to causes of action improperly united as to several but connected modes of relief sought by the plaintiff;" and certainly in the argument here, on behalf of the appellant, this distinction was ignored. The question before us is not whether the plaintiff is entitled to all or any portion of the relief demanded in his complaint, or whether he has stated a case under which he can properly demand all or any of the relief asked for, but our sole inquiry is, whether he has joined several causes of action which cannot properly be united in the same action. What, then, are the causes of action in the case under consideration? What are the primary rights of the plaintiff, which he alleges have been violated, and what are the corresponding primary duties of the defendants which are alleged not to have been performed? What are the legal wrongs which are alleged to have been committed by the defendants against the legal rights of the plaintiff? These are the questions for us to consider, and they must not be confounded with any inquiry into the different kinds of relief demanded by the plaintiff, or whether all or any portion of such relief is inappropriate to the case made by the plaintiff's allegations. Looking at these questions in the light of the principles laid down by the two standard authors upon the subject of pleading under the code, from whose works the above citations

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have *been made, it seems plain that the primary rights asserted by the plaintiff are to have payment of the two debts mentioned in his complaint—the note and the account—and the primary duties which, he alleges, devolve not only upon the corporation, but also upon the other defendants, are to pay those debts, which duties, he alleges, have not been performed. The causes of action are the legal wrongs alleged to have been done in violation of the plaintiff's legal rights by withholding payment of the two debts mentioned in the complaint, and these wrongs are alleged to have been done by the defendants, who are named as directors, as well as by the corporation itself. Practically, therefore, the allegations of the plaintiff amount to this: that he holds two claims against the defendant company, one in the form of a note, and the other in the form of an open account, which the other defendants, who are named as directors, by reason of certain acts and omissions on their part, are also liable to pay. It seems to us clear that there is no improper joinder of different causes of action here, any more than there would be if a creditor holding two notes against the same person, on which there were the same sureties, should bring an action on these notes against the principal debtor and the sureties jointly. Both causes of action, in this case, arise out of contract, and the breaches alleged are that all of the defendants being under obligation to perform the contracts—the corporation by reason of its promises, and the directors by reason of having done and omitted to do the acts alleged against them in the complaint, which, under the charter, makes them also liable for the debts of the company—have failed to perform those obligations.

The plaintiff's cause of action arising out of the note, consists of the two elements: First. His right to receive payment of the amount mentioned therein. Second. The failure of the parties, whose duty it was to make such payment, to perform that duty; and the fact that the duty of the corporation to pay springs from its promise, while that of the directors arises from certain acts and omissions which, under the charter, devolve this duty upon them also, can make no difference. They—both corporation and directors—have violated the same right of

plaintiff to have payment of his debt, and the cause of action against both is, in fact,

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*the same. The legal wrong done to the plaintiff is done alike by the directors as by the corporation. The same remarks will apply to the cause of action growing out of the account.

It is argued, however, that the liability of the directors under the charter does not rest upon contract, but is for a tort, or is in the nature of tort, while that of the corporation confessedly grows out of contract. We cannot concur in this view.

The language of the act is, that on the contingencies named therein, the directors "shall be jointly and severally liable for all debts," &c. This language is not appropriate to the purpose of imposing a penalty, but rather conveys the idea that, on the contingencies mentioned, the directors shall be regarded as having assumed the payment of the debts of the company. It does not declare that they shall forfeit a certain sum of money, or the amount of their stock, or that they shall pay a certain penalty, but that they shall become liable for the payment of the debts—that is, they shall assume the payment of them. When these defendants accepted the position of directors of a company, organized under an act declaring that, in certain contingencies, they should become liable for the debts of the company, they must be regarded as having agreed that, if such contingencies should happen, they would pay the debts of the company. Their liability, therefore, must be regarded as arising ex contractu and not ex delicto. This view is strengthened by the language used in Section 35 of the act under which the defendant company was organized: "When any of the officers of such a company are liable to pay the debts of the company, or any part thereof, any person to whom they are so liable may have an action against any one or more of said officers, and the complaint in such action shall state the claims against the company and the grounds on which the plaintiff expects to charge the defendants personally; and such action may be brought notwithstanding the pendency of an action against the company for the recovery of the same claim or demand, and both of the actions may be prosecuted until the plaintiff obtains payment of his debt and the costs of both actions." This language clearly implies that the action against the officers is an action ex contractu and not an action ex

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delicto, *sounding in damages; that it is brought to recover the amount of the claim or demand, and not a penalty or forfeiture.

Again, it is argued that the provisions of the section just quoted imply that the corporation and the directors cannot be sued in the same action. We think the inference is the other way. The language of the section is permissive merely, not imperative. It does not forbid uniting these parties in the same action, it only permits a separate action to be brought against the officers, while another action is pending against the corporation for the same claim or demand, and the very fact that the legislature thought it necessary to grant such permission implies that, without it, the action would have to be joint.

This section also shows clearly another thing, which meets one of the points made in the argument here, and that is that it is not necessary to establish the debt against the corporation before commencing action against the officers.

It is very true that the liability of the directors may not be co-extensive in amount with that of the corporation. For example, a failure to comply with the provisions of Section 33 does not render the directors liable to pay the whole amount of the debts of the company, but only makes them liable to the extent which such debts exceed double the amount of the capital stock paid in, but this constitutes no objection to their being joined in the same action with the corporation, inasmuch as there is no difficulty under the code in entering separate judgments against several defendants. Trimmier v. Thomson, 10 S. C. 164.

It may be that no judgment should be rendered in this case in favor of the plaintiff until all the creditors of the corporation are called in, and that no judgment can be rendered against the defendants as stockholders (although no such judgment seems to be demanded,) until all the other stockholders are made parties, but there is no demurrer for defect of parties, and these questions are not now properly before us, and need not, therefore, be considered.

The judgment of the Circuit Court overruling the demurrers is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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14 S. C. *502

*(Case No. 983.)

FRIPP v. WILLIAMS, BIRNIE & CO.

(November Term, 1880.)

[1. *Appeal and Error* ⇐798.]

Motion to dismiss appeal not entertained, the proper notice not having been given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3155; Dec. Dig. ⇐798.]

[2. *Evidence* ⇐249.]

The statements made by a partner after dissolution of the partnership, concerning a debt due by the firm, is competent evidence against the other partner, when offered after evidence aliunde has been introduced of the partnership, and of the existence of such debt.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 971; Dec. Dig. ⇐249.]

[3. *Trial* ⟸76.]

Objection to the competency of evidence not taken at the time when the evidence is offered, cannot be afterwards raised.

[Ed. Note.—Cited in Bowen v. Atlantic & F. B. V. R. Co., 17 S. C. 578; Emory v. Hazard Powder Co., 22 S. C. 482, 53 Am. Rep. 730.

For other cases, see Trial, Cent. Dig. § 183; Dec. Dig. ⟸76.]

[4. *Partnership* ⟸217.]

A loan was obtained by a partnership firm from a bank upon the deposit of certain railroad securities, and afterwards, upon the order of the firm written by one of the partners, such securities were surrendered to an agent of the firm in exchange for certain municipal bonds belonging to a third party, fraudulently so applied by such partner, which bonds were subsequently sold by the bank and the proceeds credited upon the indebtedness of the firm. In an action by the owner of these bonds against the firm for their recovery, it is not necessary for the plaintiff to show, in order to fix a liability upon the innocent partner, that the railroad securities went back into the assets of the firm, or in some way were of benefit to the firm after they were released.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 419; Dec. Dig. ⟸217.]

[5. *Trial* ⟸183.]

Article IV., Section 26, of the constitution of this state, which provides that judges shall not charge juries in respect to matters of fact, considered.

[Ed. Note.—Cited in Hay v. Carolina, etc., Railway Co., 41 S. C. 545, 19 S. E. 976; Norris v. Clinkscales, 47 S. C. 517, 25 S. E. 797.

For other cases, see Trial, Dec. Dig. ⟸183.]

Before Pressley, J., Charleston, March, 1880.

This was an action commenced August 7th, 1879, by Florian C. Mey against George W. Williams and William Birnie, copartners, doing business under the firm name of Williams, Birnie & Co., for the recovery of thirty-four bonds of the city of Savannah, new, of the par value of $33,500. F. C. Mey having afterwards died, Harriet A. Fripp and Edward McCrady, Jr., executors of his will, were substituted upon the record as plaintiffs. Williams defended; Birnie was not served.

The defendants were partners, doing a general commission and banking business in the city of New York, from May 1st, 1877, until May 20th, 1879. On April 29th, 1879, F. C.

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Mey sent *to Williams, Birnie & Co., thirty-three bonds of city of Savannah, new, for $1,000 each, and one like bond for $500, with instructions to collect the past-due coupons, and to hire a box in the vault of the safe deposit company, and to put the bonds in the box, and keep the key until he went to New York in the summer. These instructions were carried out, according to the statements in letters received by Mey from Williams, Birnie & Co., one of which enclosed a receipt for $15, for one year's hire of box in the safe deposit company's vault. This receipt was dated May 2d, 1879, and was in the names of "William Birnie and Florian C. Mey." This receipt was sent to Mey, enclosed in a letter signed Williams, Birnie & Co., which stated that they had placed the key in an envelope addressed to him, and put in their safe. Mey made no complaint as to the form of the receipt.

Birnie obtained large loans from the Fourth National Bank of New York, in the name of the firm, upon the credit of collaterals deposited, Greenville and Columbia R. R. bonds and others, without the knowledge of Williams, and without any entries upon their books showing such loans. One loan of August, 1877, for $25,000, and one of March, 1879, for $15,000, were secured by these railroad bonds and others. On May 12th, 1879, a clerk of Williams, Birnie & Co. presented to the bank an order in the handwriting of Birnie, signed with the firm name, directing certain of these deposited bonds to be released, and thirty-four city of Savannah bonds, new, par value $33,500, to be substituted in their stead, which was done. These were Mey's bonds. The evidence does not further trace the surrendered bonds. Upon due notice given, these Savannah bonds were sold by the bank December 10th, 1879, for $23,422, which was credited upon the indebtedness of Williams, Birnie & Co.

In June, 1879, demand was made by Mey upon Birnie for the Savannah bonds, and also for the keys of the box in the safe deposit company's vault. A like demand was made upon Williams in July following. Mey did not recover the bonds so demanded, nor any of them, nor the keys.

At the trial, and after proof of partner-

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ship and debt, as stated *in the opinion, the testimony of John Grimball, Esq., of New York, taken by commission, was offered to prove the demand on Birnie for the bonds and keys, and what Birnie then said about the matter. Upon objection, the court ruled that demand and non-delivery might be proved, but that as this conversation was subsequent to the dissolution of the partnership, the statements and admissions of Birnie were inadmissible against Williams, and Birnie not being before the court disputing the complaint, the testimony could not be introduced at all.

Verdict for defendant. Plaintiffs moved for a new trial which was refused, and they appealed, upon the following grounds:

1. That the plaintiffs were entitled, on the trial, to have read to the jury the testimony of Mr. Grimball as to the declarations and admissions of Birnie, the co-partner of Williams, having relation to a state of facts existing during the co-partnership, although made after the dissolution of the firm, and that his Honor should not have excluded it, and erred in doing so.

2. That the letter of Williams, Birnie & Co., of May 2d, 1879, was not evidence of the fact that the bonds were placed in a

box of the safe deposit company, taken for Mey, as he had instructed them, and that his Honor should so have charged the jury as requested by the plaintiffs, and erred in refusing to do so.

3. That his Honor erred in charging the jury that the plaintiffs must show that the securities upon which the loan to Williams, Birnie & Co. was originally made, actually went back into the assets of the firm, and that the firm received the benefit of them, notwithstanding it was in evidence that they had been withdrawn by the order of the firm and delivered to the agent of the firm.

4. That his Honor erred in that he charged the jury in respect to matters of fact.

On November 22d, 1880, defendant Williams gave notice in writing to plaintiffs that he would move the Supreme Court on Monday, November 29th, 1880, to dismiss the appeal for irregularities in preparing and serving the case. The rule of this court required eight days' notice to be given of

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such motions, and that *the motion should be made on "the day fixed for the call of causes from the Circuit to which it appertains." The day fixed for this Circuit at this term was Tuesday, November 30th.

Messrs. McCrady & Son, for appellants.

Messrs. Henry Buist and A. G. Magrath, contra.

March 5th, 1881. The opinion of the court was delivered by

McIVER, A. J. This was an action originally brought by Florian C. Mey, and after his death continued by his executors, to recover certain bonds of the city of Savannah, or the value thereof, together with the amount collected on the coupons of said bonds, which he sent to Williams, Birnie & Co., in New York, to be deposited in a box in the vault of the safe deposit company of that city, but which, he alleged, were embezzled and fraudulently misapplied by Williams, Birnie & Co. to their own use.

The defence set up by the defendant George W. Williams (the other defendant, William Birnie, having made default,) while admitting that a partnership did exist between himself and Birnie at the time the bonds in question were sent to the firm by Mey, is, that he is not liable for the fraudulent conduct of Birnie, because the transaction in regard to the bonds in question between Mey and Birnie was entirely unknown to him at the time; that it was not a transaction within the scope of the partnership, and that he derived no benefit from it.

At the opening of the case a motion to dismiss the appeal was submitted, but as proper notice of this motion had not been given, it is unnecessary to notice the grounds upon which it was based, as they are not properly before us for consideration, and we will, therefore, proceed at once to consider the case on its merits.

It would be impracticable to give a statement of the facts of this case without extending this opinion to an unwarrantable length. We propose, therefore, to confine our attention to the several questions raised by this appeal, only referring to so much of the evidence as is necessary for a proper

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understanding of those *questions. The first point raised is as to the admissibility of the testimony of John Grimball. He was offered as a witness to prove that, after the partnership between Williams and Birnie had been dissolved, he, as agent of Mey, had made a demand on Birnie for the bonds in question, and for the key of the box in the vault of the safe deposit company which was alleged to have been rented for Mey. Precisely what occurred in the Circuit Court when the testimony of this witness was offered is not very clearly shown in the "case" as submitted here, and is a matter in dispute between the counsel—those on one side contending that they were not permitted to prove even the demand and noncompliance with it, while on the other side it is insisted that the whole of the testimony was not ruled out, but only so much of it as tended to prove what Birnie said as to the disposition which had been made of the bonds and the key of the safe. Taking either view, however, we think there was error in rejecting the testimony. The conversation sought to be proved by this witness took place after the partnership had been dissolved, and while the general rule is that the statements or admissions of one partner, made after the dissolution of the partnership, as to what occurred during the existence of the partnership, are not competent evidence against his co-partner, yet when such evidence is offered after there has been other evidence adduced of the fact of the partnership and of the existence of the debt or liability referred to in such statements or admissions, they then become admissible. In other words, the statement or admission of a third person that he had been in partnership with another will not be sufficient to establish the partnership as against such other person, nor would the statements or admissions of one partner, made after the dissolution, of themselves be competent evidence of the existence of a debt or liability as against his former partner; but after evidence aliunde has been adduced tending to show the existence of the partnership and of the debt or liability referred to, then any statement or admission of one of the partners, even though made after the dissolution of the partnership, relating to such debt or liability, is competent evidence against the other partners. In the first case upon this subject in our books

(Simpson ads. Geddes, 2 Bay 533,) it was
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held that the admission *of a debt contracted during the existence of the partnership, made by one of the partners after dissolution, was, of itself, sufficient to bind the other partner; and this doctrine was expressly approved in the subsequent case of Kendrick v. Campbell, 1 Bail. 522, which case was itself recognized and followed in the case of Allen v. Owens, 2 Speers 170. But in the more recent case of Meggett v. Finney, 4 Strob. 220, this doctrine was qualified as above stated, and the rule there laid down is, that without evidence aliunde of the existence of the debt during the continuance of the partnership, the admission of a partner, made after the dissolution of the partnership, will not be sufficient to establish a debt against a former partner. This case, however, still recognizes the doctrine that where the partnership has been established and there is testimony aliunde tending to show the existence of the debt during the continuance of the partnership, then the statements or admissions of a partner, made after the dissolution, in reference to such debt are competent evidence against the other partner. Now to apply this doctrine to the case under consideration. If it had been proposed to prove the statements or admissions of Birnie, made after the dissolution of the partnership, in regard to the claim made by Mey against Williams, Birnie & Co., before any evidence aliunde had been offered tending to show the existence of such a claim during the continuance of the partnership, then the statements or admissions of Birnie would not have been competent as against Williams. But in this case, as we understand it, the testimony of Grimball was not offered until after the partnership had been established by the admission of Williams in his answer, and evidence had been adduced in the form of a letter from the firm, written while the partnership was in existence, acknowledging the receipt of the bonds in question and undertaking to dispose of them as directed by Mey, together with evidence that the bonds had not been so disposed of, as shown by the failure to comply with the demand for their delivery. There was, therefore, evidence aliunde tending to show the liability of the partnership for the bonds thus traced to their possession, and the testimony of Grimball was offered merely to show what one of the partners said had been done with the bonds, not to originate a liability
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on the part of *the firm, but after evidence of such liability had been adduced aliunde to show what one of the partners said in reference to such liability. We think, therefore, that the testimony of Grimball was competent and should have been received, not merely to show a demand on Birnie for the bonds and his failure to deliver them, but also to show what he said as to the disposition made of the bonds by the partnership while it was in existence.

The next question raised by the appeal is whether the letter of Williams, Birnie & Co., of May 2d, 1879, was any evidence of the fact that the bonds in question had been placed in a box in the vault of the safe deposit company, as directed by Mey. We do not see how any objection to the competency of this letter or any part of it could be raised, inasmuch as no objection was made at the time it was offered in evidence. To enable appellants to raise this question it should have been made to appear that the letter, or such portion of it as is deemed objectionable, was objected to at the time it was offered. As this does not appear, the objection cannot now be made. Burris v. Whitner, 3 S. C. 510.

The third question raised by this appeal is whether the Circuit judge erred in charging the jury that the plaintiff must show that the securities upon which certain loans were alleged to have been originally made by the Fourth National Bank of New York to Williams, Birnie & Co. went back into the assets of that firm, and that the firm received some benefit from them after they were released by the substitution of Mey's bonds.

For a proper understanding of this question a brief statement of facts will be necessary. It appeared that Birnie, without the knowledge of Williams, but while the partnership was in existence, had opened what may be called a demand loan account with the Fourth National Bank of New York, in favor of Williams, Birnie & Co., under which arrangement the bank advanced, from time to time, considerable sums of money, charging the same on their books to Williams, Birnie & Co., but taking no notes or other evidences of indebtedness therefor, which advances or loans were secured by the deposit of bonds as collateral securities. Two of these loans, one made August 28th, 1877, for $25,000, and the other made March 22d,
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1879, for $15,000, were origi*nally secured by a deposit of sundry railroad bonds, but on May 12th, 1879, these railroad bonds were withdrawn and the bonds of the city of Savannah, belonging to Mey, were substituted in their place. This was effected by a written order signed Williams, Birnie & Co., in the handwriting of Birnie, addressed to the cashier of the bank, directing him to substitute the Savannah bonds for the said railroad bonds as collateral security for the two loans above referred to. This order was delivered at the bank by a clerk of Williams, Birnie & Co., to whom the railroad bonds were surrendered. This transaction took place eight days before the partnership of Williams, Birnie & Co. was dissolved.

It thus appears that by the improper use

of Mey's bonds, certain other bonds which had been previously pledged by Williams, Birnie & Co. as collateral security for a debt purporting to be due by them to the bank, were released and restored to the possession of Williams, Birnie & Co., or, at least, were delivered upon their written order to their agent or clerk. Now, if by reason of this transaction Mey lost his bonds, it certainly cannot make any difference whether Williams, Birnie & Co. realized any benefit from the bonds so restored to them. If they had been destroyed or stolen immediately after they were returned to Williams, Birnie & Co., it is difficult to see how that could relieve them from responsibility for Mey's bonds if they were improperly used by and went to pay the debt of that firm to the bank. The railroad bonds which were released by the improper use of Mey's bonds, belonged either to Birnie or to Williams, Birnie & Co., or to some third person. If they belonged to Birnie and had been pledged for a debt of the firm and never redeemed, the firm would have been liable to Birnie for their value. So, too, Birnie would have had the right, with the consent of the bank, to withdraw these bonds and substitute others in their place. But if they belonged to a third person, and had been lost to such third person by being pledged for a debt of the firm, the firm certainly would have been liable for their value, and if the firm was relieved from such liability by the improper use of Mey's bonds, that would be a benefit to the firm, even though there was no evidence as to what was done with the railroad bonds after they were withdrawn from the bank. And, cer-

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*tainly, if these railroad bonds belonged to the firm, and were released and restored to the possession of the firm by the substitution of Mey's bonds, that would be sufficient to fix the liability of the firm, even though the railroad bonds may have afterwards been destroyed or stolen or otherwise improperly disposed of. It seems to us clear that if the debt of $40,000 to the bank was a debt for which the firm was liable, and if it has been partially paid by the improper use of Mey's bonds, the firm would be liable to Mey to the extent of such payment. In the case supposed it would be quite certain that Williams, Birnie & Co. have had their debt partially paid by the wrongful use of funds belonging to Mey, and they would be bound to make restoration to him. We cannot agree, therefore, with the Circuit judge that, in order to fix the liability of the firm, it was necessary to show that the railroad bonds released by the substitution of Mey's bonds, went back into the assets of Williams, Birnie & Co., and that the firm subsequently received some benefit from them.

The last point made by the appeal is, that the Circuit judge erred in charging the jury "in respect to matters of fact." The specifications of the particulars alluded to in this ground of appeal are that the judge stated to the jury that there was no proof that the railroad bonds released by the substitution of Mey's bonds went back into the assets of Williams, Birnie & Co., and that the firm received the benefit of them; that the proof that the firm of Williams, Birnie & Co. received any benefit from the act of Birnie in releasing the railroad bonds by the substitution of Mey's bonds was deficient, and that there was no proof that they did receive any benefit from the release of said bonds.

The object of the section of the constitution referred to in support of this ground, (Section 26, Article IV.,) as we understand it, is to prevent the judge from impressing upon, or even indicating to the jury the conclusions to which the evidence adduced in any case has brought his mind. Hence, if there is any evidence whatever as to a fact in issue, it is error to charge the jury that there is no proof of such fact. Carrier v. Hague, 9 S. C. 454. But if there is no evidence tending to prove a fact in issue, then it is no violation of the constitution to so

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instruct the *jury. Redding v. Railroad Co., 5 S. C. 69, 70. In this case the point in issue, as submitted by the charge, was whether the railroad bonds went back into the assets of Williams, Birnie & Co., and that firm got the benefit of them. It is true that there was some evidence that the bonds went back into the assets of Williams, Birnie & Co., inasmuch as there was evidence that they were delivered to an agent or clerk of that firm upon a written order, signed in the name of the firm, and the inference would be as we have shown that the firm must have received a benefit from the release of these bonds; but there was no evidence whatever as to what became of the bonds after they were delivered to the clerk of Williams, Birnie & Co., or whether they were ever afterwards used in any way for the benefit of that firm, and that, manifestly, was the real point in the mind of the judge when he told the jury that there was no proof upon that subject. But this is not a practical question in this case, and need not be considered further, inasmuch as we have seen that it was not material or necessary to show that the railroad bonds, after they were released by the substitution of Mey's bonds, were used for the benefit of the firm.

The judgment of the Circuit Court is set aside and a new trial is ordered.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

14 S. C. 511

(Case No. 984.)

COLEMAN v. SMITH.

(November Term, 1880.)

[1. *Guardian and Ward* ⟸33.]

A and B administered upon an estate of which C was a distributee, and A became guardian of C. *Held*, that for moneys in A's hands as administrator, due to C, A, as guardian, was liable, but of moneys put into the hands of a stranger by act of both A and B, A, as guardian, was chargeable with one-half, and for the other half B was indebted to the ward.

[Ed. Note.—Cited in Burnside v. Robertson, 28 S. C. 588, 6 S. E. 843; Chick v. Farr, 31 S. C. 473, 478, 10 S. E. 176, 390.

For other cases, see Guardian and Ward, Cent. Dig. §§ 142–161; Dec. Dig. ⟸33.]

[2. *Guardian and Ward* ⟸146.]

To an action by C, after attaining his majority, against A for account and settlement, B was properly made a party upon the petition of A.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 492; Dec. Dig. ⟸146.]

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*Before Pressley, J., Union, June, 1879.

This was an action by Berry Coleman and Emily, his wife, J. Monroe Smith and Sarah, his wife, and Margaret Farr, against James R. Smith and his sureties, commenced in the Court of Common Pleas, April 20th, 1876. Emily, Sarah and Margaret were sisters, daughters of Margaret Farr. Margaret Farr died intestate, and John Brown and James R. Smith administered upon her estate. They made sale of the personalty, and by agreement made the sale-notes payable to B. Johnson, Ordinary, and placed them in his hands for collection. James R. Smith being a purchaser of negro property, made his note for $1006 payable to Johnson, and upon such note afterwards made a payment of $700 to Johnson. Smith became guardian of the three distributees above named. The payment of $700 was made after Smith became guardian. John Brown being dead, his executors were made parties to this action, as stated in the opinion.

All other matters necessary to the points decided are stated in the opinion of this court.

Mr. J. B. Steedman, for appellant.

Mr. I. G. McKissick, contra.

March 8th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The plaintiffs, respondents, on April 20th, 1876, instituted an action against James R. Smith, their guardian, and Daniel Gallman and Hugh B. Smith, his sureties on guardianship bonds, for account and settlement.

These respondents were entitled to shares in several estates, among them that of their deceased mother, Margaret Farr. Of this estate James R. Smith and one John Brown were the administrators. Before the settlement of this estate John Brown, who seems to have been the acting administrator, had died, leaving a will, upon which Sarah Brown and Calvin F. Brown qualified as executors.

After the above action had commenced,

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James R. Smith, in *view of the fact that the settlement of the guardianship matters would involve an accounting of the estate of Margaret Farr, deceased, filed a petition in re, asking that the executors of John Brown, his deceased co-administrator, be made parties. Accordingly, by order of Judge Northrop, the executors of John Brown were brought in. The case was then referred to Robert W. Shand, Esq., to hear and determine all the issues involved. The referee heard the case and made his report. In the estate of Margaret Farr, deceased, he found in the hands of the administrators, undistributed and unaccounted for, the sum of $801.75, of which administrator James R. Smith owed, on account of purchases at sale, balance of note, $532.15, leaving $269.60 in the hands of the two administrators or their agent. The referee recommended that the complaint be dismissed as to Sarah Brown, as executrix of John Brown, with costs to be paid by James R. Smith. James R. Smith excepted to this portion of the report. Judge Pressley sustained this exception and decreed in favor of plaintiffs, against Sarah Brown and Calvin F. Brown, as executors of John Brown, the sum of $134.80, with interest, just one-half of the $269.60, which had been reported by the referee as in the hands of the two administrators of the estate of Margaret Farr, i. e., James R. Smith and John Brown, deceased. From this decree the executors of John Brown have appealed.

The grounds of appeal, although presented in several forms, raise substantially but two questions. First. That the recommendations of the referee that the complaint be dismissed as to the executors of John Brown, because they were improperly made parties, should have been sustained. Second. Because Judge Pressley erred in decreeing against said executors the sum of $134.80, with interest, as, in any event, James R. Smith, should have been held primarily liable for this sum.

The referee gives no reason for his recommendation, nor does the presiding judge, in overruling it, discuss the question, so that we are left in the dark as to the considerations which controlled their judgments respectively.

The grounds taken by the appellant are: First. That the fund in question having been

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reported by the referee as in the hands *of the administrators of Margaret Farr, deceased, and James R. Smith being one of them,

was, by operation of law, transferred to himself as guardian, to the release of the administrator of Margaret Farr. This principle is well understood, and applies in all cases where a party unites the two characters of debtor and creditor, inasmuch as in such cases no suit can be instituted to enforce payment—the law presumes payment. And it has been held in several cases that where an administrator becomes guardian of the distributees of his intestate's estate, his administration bond is at once discharged and liability attaches at once on his guardianship bond. He is presumed, as administrator, to have paid himself as guardian. Johnson v. Johnson, 2 Hill's Eq. 277 [29 Am. Dec, 72]; Simkins v. Cobb, 2 Bail. 60; O'Neall v. Herbert, Dud. Eq. 30; Same v. Same, McM. Eq. 495; Jacobs v. Woodside, 6 S. C. 498.

If, in this case, then, James R. Smith had been the sole administrator of the estate of Margaret Farr, this principle would have applied, and, by operation of law, the funds in his hands as administrator would have been transferred to himself as guardian, to the release of his sureties on his administration bond. But in this case there were two administrators, and the question is, does this principle apply in a case of this kind?

It is established law, supported by many decisions, both with regard to executors and administrators, that they are not liable, as such, for each other's acts. As to administrators, if they give a joint bond, they may be jointly liable as sureties for each other; but the Court of Equity has always discriminated and charged each with his own proper default. The general rule was established first as to the executors, and it was held that one executor was not liable for the assets which came into the hands of his co-executor, unless, under peculiar circumstances, such as having paid them over to him, joining in a receipt, or in a misapplication of the funds. Wms. on Ex'rs 1118, et seq.

As to administrators, however, it was questioned whether one administrator had equal power with that of executors, and the attempt was made to distinguish between them as to this principle, but it was finally established that they stood on the same ground, and that there was no difference in principle

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as to their *powers and liabilities. Jacomb v. Harwood, 2 Ves., Sr., 267; Willand v. Fenn, there cited; and in our own state we find the cases of Gayden v. Gayden, McM. Eq. 444; O'Neall v. Herbert, Id. 498, where this doctrine is discussed and maintained.

Each administrator, then, where there are two or more of the same estate, being responsible as administrator for his own acts alone, in such case, where one of them becomes the guardian of the distributees of the intestate's estate, he would unite the character of debtor and creditor only to such amounts as he himself had received, as administrator, belonging to his wards, because only to such amounts is he a debtor to the estate, and it would be only to such amounts that, by operation of law, he would be held to have paid himself as creditor. The amounts received by his co-administrator would be the debt of such administrator, for which he could be held liable only secondarily, not as administrator, but as surety on the joint administration bond.

The case of O'Neall v. Herbert, supra, was very similar to the case now before the court. In that case the above principle was announced. Herbert was the administrator of the surety of a guardian, J. W. Selby. Selby and one Murray had administered upon the estate of Mrs. McHenry, deceased, after which Selby had become the guardian of Mrs. McHenry's children, her distributees. Selby having died, Judge O'Neall was appointed guardian in his stead. The estate of Selby being regarded insolvent, Judge O'Neall instituted suit against Herbert as administrator of the only solvent surety of Selby to recover the funds of his wards. This required an accounting of the estate of Mrs. McHenry, the mother.

The commissioner reported the case in a two-fold aspect. First, he embraced the amounts which Selby had received himself as administrator; and, second, he embraced also a considerable amount which his co-administrator, Murray, had received in Florida, and no part of which was proved to have ever reached the hands of Selby.

The question was made whether the surety of the guardian, Selby, should be made liable only for that portion of the estate of Mrs. McHenry which he actually received as administrator, or whether he should also be held for the amount received by Murray, his co-administrator, on the principle that he was

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liable *for both as administrator, and, by operation of law, the whole amount had been transferred to him as guardian, and had attached on his guardianship bond.

The court held that this principle applied only to the amount actually received by himself. That as to the amount received by his co-administrator he might be made responsible on the joint administration bond as a surety, but that this was a secondary liability, which did not attach until default of his principal, and, therefore, the sureties on his guardianship bond were not liable for this amount.

Now apply these principles to the facts of the case now before the court.

The referee reports that the balance of the estate of Mrs. Margaret Farr amounts to $801.75; that, of this, James R. Smith, administrator, owes by balance on note $532.15; the remainder, $269.60, he reports is in the hands of the two administrators or their agent, B. Johnson. The amount due by Smith, $532.15, he must be supposed to have

received himself, and as to this the principle above applies, and has carried this sum into his pocket as guardian, and he has been properly charged with that as guardian. The $269.60 being reported in the hands of the two administrators or their agent, B. Johnson, it is fair to presume that each had one-half. This would make Smith, as guardian, liable for $134.80, and the executor of Brown for the same. As between themselves, at least, this would be just. If the estate of Brown was insolvent, and made default, Smith, as surety on the administration bond, would be responsible for this amount to the plaintiffs; but there is no allegation of that kind here, and we suppose the decree can be enforced against the executors of Brown. This conclusion will make it unnecessary to discuss the second question of appellant, which was that in no event should the executors of Brown be made primarily liable.

Inasmuch as one of the prominent features in this case involved an accounting with the estate of Margaret Farr and the liability of the two administrators, Brown being one, we think that his executors were properly made parties.

Judgment below affirmed and appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. *517

*(Case No. 987.)

CLAWSON v. HUTCHINSON.

(November Term, 1880.)

[1. *Judgment* ⇐342.]

The act of 1869 (Gen. Stat. 497, § 2,) authorized a judge at chambers to vacate an erroneous judgment, but since the adoption of the code of procedure, that authority has been taken away under the terms of Section 417.

[Ed. Note.—Cited in State v. Chavis, 34 S. C. 135, 13 S. E. 317; Donly v. Fort, 42 S. C. 200, 201, 202, 20 S. E. 51; Turner v. Foreman, 47 S. C. 33, 24 S. E. 989.

For other cases, see Judgment, Cent. Dig. §§ 668–671; Dec. Dig. ⇐342.]

[2. *New Trial* ⇐155.]

A Circuit judge has now no power at chambers to vacate a judgment as erroneous and order a trial de novo, upon the merits, as in this case, where the motion was based upon the ground that after-discovered evidence showed payment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. ⇐155.]

Before Hudson, J., Sixth Circuit, October, 1880.

This case is sufficiently stated in the opinion. See, too, Clawson v. Hutchinson, 11 S. C. 323.

Messrs. J. H. Rion and G. W. S. Hart, for appellant.

Messrs. J. S. R. Thomson and C. E. Spencer, contra.

March 8th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This was a motion to vacate an alleged erroneous judgment and for a trial de novo. It was made before Judge Hudson at chambers. The judge states that he was satisfied, upon the showing made, that the judgment was erroneous and should be set aside, but that he had no jurisdiction at chambers in such case, referring to Charles v. Jacobs, 5 S. C. 348. He therefore refused the motion.

The case here has been argued in part on both sides as if it involved the question whether or not, in point of fact, the judgment was erroneous. We do not understand that the appeal brings up that question. The motion below was made upon after-discovered evidence.

The Circuit judge seemed to be satisfied with the showing, and, as has already been stated, declined the motion, not upon the

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*ground of failure of proof, but because the motion was made at chambers.

The sole question, then, in the appeal, is this: Can a Circuit judge hear and determine, at chambers, a motion of this kind? We propose to confine ourselves to this legal question.

The practice of granting new trials in cases tried before a jury is of very ancient origin, and is a very important branch of our jurisprudence. As is said by Mr. Blackstone: "In the hearing at a trial the ablest judge may mistake the law and misdirect the jury, and the jury, although composed of the most intelligent and best-intentioned men, may bring in a verdict which they themselves, upon cool deliberation, would wish to reverse." In the absence of the power to grant new trials, much inconvenience would result and much injustice be done. In all countries, therefore, where the law is properly administered, this power is lodged somewhere, and where wisely exercised serves to remedy many defects in the administration of justice. In our state, before the adoption of the constitution of 1868, this power belonged to the Appeal Court, the highest judicial tribunal in the state, and it was always exercised by that court with scrupulous justice to opposing litigants. The constitution of 1868, however, in directing the re-organization of the judicial system of the state, constructed the Supreme Court upon a somewhat different basis, and limiting its powers to some extent, when compared to the old court, confined its jurisdiction, except as to some matters original, to the correction of errors of law in cases at law, and to appeals in cases in chancery: the exercise of its powers within this limit being restricted to reversing, affirming or

modifying orders, decrees and judgments below.

This court, therefore, has no power to grant new trials, except as incidental to the correction of errors. Hence, upon the adoption of the constitution of 1868, it became necessary for some new legislation upon this subject. Accordingly, an act was passed in 1868 upon the subject of new trials. That act invested the Circuit Courts of the state with the power to grant new trials. There is nothing said in the act as to the mode and manner of procedure, but the power is full and complete, and it exists in all cases where a jury trial has been had, and for reasons

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for which *new trials have been usually granted in the courts of law of the United States. In this act, however, the power is conferred upon the Circuit Courts. Such being the fact, it follows that a Circuit judge could derive no authority to exercise this power out of court. In 1869 a second act was passed. This act provides for vacating erroneous judgments and for granting trials de novo by the presiding judge of the Circuit when the proof furnished is satisfactory to him that this should be done. Neither is there anything said in this act as to the mode and manner of procedure, or as to the place where this power is to be exercised, but it is conferred upon the presiding judge of the Circuit. And it would seem, from the language used, that it was intended to be exercised only after judgment or decree rendered, and after the case had been disposed of and ended before some other tribunal.

In these two acts a distinction is drawn between the court and the judge. In the one the power is lodged with the court, in the other in the presiding judge of the Circuit, acting separately and apart from the court.

Now, if there had been no other legislation upon this subject since these acts, there could hardly be a doubt that while a proceeding, instituted under the act of 1868, for a new trial, could only be heard in open court, yet a similar proceeding, under the act of 1869, might be heard by the presiding judge of the Circuit at any point he might designate, and either at chambers or in court, as he might see proper.

The only fact that could throw any doubt around this matter is that the term "presiding" is used in the act of 1869 in reference to the judge. This, by a strained construction, might be interpreted to mean that this power is conferred upon a judge only when presiding in open court. This construction, however, would be too limited and narrow. It is hardly to be supposed that the general assembly meant this, especially as the act of 1868 had already conferred this power upon the Circuit Courts.

But legislation on this subject did not stop with these two acts. In 1872 the revised statutes were enacted, the whole being incorporated in one general statute. In that statute the acts of 1868 and 1869 above were re-enacted and incorporated as Sections

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2 *and 4 of Chapter CV., Revised Statutes, 497. The code was also adopted as a part of that act. And in Sections 288, 289 and 417, certain other provisions are made in reference to new trials, which must now be considered as bearing upon the question involved here.

Sections 288 and 289 seem to have been intended to meet cases after verdict but before judgment, and where the necessity for a new trial grew out of facts and circumstances immediately in connection with the trial, such as misdirection, surprise, insufficiency of evidence, or excessive damages, and such like causes. Under the first section a motion is permitted and authorized to be made upon the minutes of the judge who tried the cause, and at the term when tried; and in Section 289 to be made upon a case or exceptions at some subsequent term as the judge might direct, both to be made in open court. Neither of these sections interfered with or disturbed in any way the powers conferred upon the presiding judge or the Circuit Courts respectively by the acts of 1868 and 1869—they provided for cases untouched by these acts. If legislation had stopped at this point there still would have been no doubt as to the question now before the court, but section 417 of the code presents a new feature. That section provides that motions may be made to a judge or justice out of court, except for a new trial upon the merits. This language, when transposed, means that a motion for a new trial upon the merits, shall not be made before a judge or justice out of court. This is prohibitory, emphatic and imperative. If it applies to the act of 1869, or to the case now under consideration, as being made upon the merits, it settles the question.

Does it limit and control the act of 1869? It follows that act in the order of position in the revised statutes. It occupies an independent place, and is general in its terms, and it would seem that all provisions in conflict with it must give way. More than this, inasmuch as, according to the construction we have given the enactments on this subject, the act of 1869 is the only act which at any time authorized a judge to hear a motion for new trial out of court, either upon the merits or otherwise, this section must have been intended expressly to repeal so much of that act as allowed motions of this kind

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to be heard upon the merits out *of court; otherwise this section would have been unnecessary and useless.

The conclusion of the court is, that while the presiding judge of the Circuit, under the act of 1869, had the power to hear and determine a motion for a new trial, either on

the merits or otherwise, at chambers or in open court, as he saw proper, before the adoption of the code with Section 417, that since that time when the motion is made upon the merits, at chambers, his power has ceased by virtue of that section. Was this motion made upon the merits? These terms are not very definite, and we have been unable to find a case in which they have been distinctly interpreted; but, without this, it is safe to say, in general terms, that they include matters of substance as contra-distinguished from mere forms and irregularities.

The application below was made on the ground of after-discovered evidence, showing, it is claimed, payment. Is payment, as a defence, mere form, or is it substance? Payment goes to the gist of the action, and certainly involves the merits. Besides, Mr. Wait, pp. 396–400, embraces motions on after-discovered evidence among the motions upon the merits.

The case of Charles v. Jacobs, 5 S. C. 348, was a motion to vacate an erroneous judgment and for a trial de novo. The court held that as the motion was substantially a motion for a new trial, the Circuit judge had no power, at chambers, to hear it. In that case the error was apparent on the record; the jury had make a mistake in the computation of the amount and interest due upon the instrument sued on. How far a Circuit judge may grant orders at chambers looking to the correction of mistakes apparent on the record, but still retaining the judgment so far as correct, is not involved here. The motion below was not of that kind.

The order is affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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*(Case No. 988.)

TALMADGE v. OLIVER.

(November Term, 1880.)

[1. *Sales* ⇐469.]

Where there is a conditional sale of personal property, the vendor retaining title until paid, the right of property continues in the vendor, except that since the act of 1843, (11 Stat. 256, § 3; Gen. Stat., ch. XCVIII., § 6,) such a reservation, when verbal, is void.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1357; Dec. Dig. ⇐469.]

[2. *Chattel Mortgages* ⇐6, 152, 153.]

Such conditional sale, reduced to writing, held in this case to be an equitable mortgage; and although not recorded, is of prior claim to a subsequent recorded mortgage, where action for recovery of the property is brought by the vendor against the second mortgagee within the time allowed by law for recording.

[Ed. Note.—Cited in Herring & Co. v. Cannon, 21 S. C. 212, 214, 218, 53 Am. Rep. 661; Perkins v. Loan & Exchange Bank, 43 S. C. 44, 20 S. E. 759; Swancey v. Parrish, 62 S. C. 243, 40 S. E. 554.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 31, 254, 259; Dec. Dig. ⇐6, 152, 153.]

[This case is also cited in Ludden & Bates Southern Music House v. Dusenbury, 27 S. C. 464, 4 S. E. 60, and distinguished therefrom, and in Talbott & Sons v. Padgett, 30 S. C. 170, 8 S. E. 845, without specific application.]

Before Wallace, J., Spartanburg, March, 1880.

Action commenced in trial justice's court by F. P. Talmadge against J. H. Oliver, to recover a horse. The case is fully stated in the opinion of this court.

Mr. J. S. R. Thomson, for appellant.

Mr. C. P. Wofford, contra.

March 8th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. In this case an action was originally brought by the appellant in the trial justice's court to recover a horse from respondent.

Appellant had been the owner of the horse, and, on December 13th, 1879, he placed the horse in the possession of one J. C. Foster, under the following written agreement:

"Received this day of F. P. Talmadge one horse, for which I am to board said F. P. Talmadge and wife from 1st January, 1880, until 15th March, 1880. The horse to remain the property of F. P. Talmadge until this contract is satisfied."

Appellant boarded with Foster only two weeks, when Foster absconded. At the time

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Foster left he was indebted to the re*spondent some $265; and about the time he left he borrowed from respondent $35, his indebtedness then being $300. For this sum, on January 8th, he gave respondent a note secured by mortgage. In the preparation of the mortgage the horse was not at first embraced, but respondent insisted that the horse should be embraced, and he testified that he would not have lent the additional $35 but for the fact that the horse was to be embraced in the mortgage. He had no knowledge of the written agreement referred to.

The mortgage was recorded on the day of its execution. The condition was that upon default of payment respondent should take possession and hold to his own use or sell, refunding the overplus, if any, to Foster. Foster made default, and respondent took possession of the mortgaged property and duly advertised it for sale, including the horse in question.

This action was then brought by appellant to recover the horse.

The remainder of the mortgaged property was duly sold and bought in principally by respondent. The sale, however, failed to

realize a sum sufficient to pay respondent's debt at the prices paid. Appellant claimed that respondent bought the property below its real value, and that a re-sale, at its value, would more than pay respondent his full debt.

Upon these facts the trial justice decreed for the appellant and $20 damages, that sum having been fixed by agreement of parties, with costs.

Respondent appealed to the Circuit Court. Judge Wallace presiding, heard the appeal upon written testimony, in substance, as above. Judge Wallace sustained the appeal of respondent, "holding that no conditional sale by which title is reserved to the vendor, either by verbal or written agreement, could be made which would be good against a subsequent purchaser or mortgagee for valuable consideration without notice," "and that in this case the mortgage of Foster conveyed a title to respondent superior to that of appellant under reservation of title held by him."

From the order sustaining the appeal below, the appellant plaintiff has appealed to

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this court, and the main question pre*sented here is as to the superiority of title of appellant and respondent.

It is admitted that appellant originally owned the horse in question. Has he parted with title? And if not, has he done any act which estops him from enforcing his title as against the claim of respondent? The intent of parties must always govern in contracts when it can be legally ascertained. This is so at least between the parties themselves. This is a fundamental rule, from which there can be no departure. Guided by this rule it is perfectly clear that as between appellant and Foster the title to this horse never passed from the appellant. There is no room for doubt as to this point, because it is expressly stipulated in the agreement that the horse should remain the property of appellant until the contract of board was satisfied. This contract has never been satisfied, certainly not in whole, and scarcely in part. If this suit, then, had been between appellant and Foster the result could not have been doubtful.

Conditional sales of personal property, either with verbal or written reservation of title by the vendor, have often been recognized, both in the English and American decisions. Bishop v. Shellito, 2 Barn. & Ald. 528, n. A voluntary and absolute delivery, under contract of sale, vests the title, but if, says Chancellor Kent, "the delivery be accompanied with a declaration on the part of the seller that he should not consider the goods as sold until security be given, the sale is conditional and the property does not pass by delivery as between the parties." Citing 4 Mass. 405; 17 Mass. 606, "Where there is a condition precedent attached to a contract of sale," he adds, "the property does not vest in the vendee on delivery until he performs the condition, or the seller waives it, and the right continues in the vendor even against the creditors of the vendee." Barrett v. Pritchard, 2 Pick. 512. This principle is endorsed by Chitty, Story and Parsons. See Chitty (11th ed.) 588, and the cases there cited.

In our own state four cases, beginning with the case of Dupree v. Harrington, all decided before the act of 1843—hereafter to be considered—full to the point of the validity of a verbal reservation of title, although the property was delivered, are

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found. *Dupree v. Harrington, Harp. 391; Reeves v. Harris, and Bailey v. Jennings, 1 Bail. 563; Bennett v. Sims, Rice 422.

It seems to have been admitted in the argument of these cases that a written reservation was beyond question. The doubt appeared to be as to verbal reservations, and Judge Earle, in Bennett v. Sims, said: "If there be no difference in principle between a condition in writing and a verbal one, and I have tortured my faculties to conceive a ground of difference, except as to the mode of proof, then the case of Dupree v. Harrington Harp. 391 is direct authority." The reservation in Dupree v. Harrington Harp. 391 was in writing.

In the case of Bennett v. Sims, Judge Earle, delivering the opinion of the court, discussed the question how far a verbal reservation would be good against subsequent creditors, and the question, both as to subsequent creditors and purchasers, was reserved. The inclination of Judge Earle's mind evidently was to hold that such verbal stipulations would be good against subsequent creditors without notice, unless the transaction was impeached by showing some badges of unfairness, such as long-continued possession by the vendee, &c., giving rise to a presumption of gift or absolute transfer. In this unsettled state of that question the act of 1843 was passed. This was an act to amend the law in relation to recording mortgages, and the third section provides "that as to subsequent creditors and purchasers for valuable consideration without notice, where the vendor of personal property who has parted with the possession, reserves to himself any interest by verbal agreement in the same, such reservation shall be void." This, as was said by Judge Wardlaw in Cochran v. Roundtree, 3 Strob. 222, was a legislative declaration of an unsettled point of law, i. e., the effect of verbal reservations as to subsequent creditors and purchasers, and this act settled that question; but the act, it will be observed, is silent as to written reservations.

This certainly could not have been accidental, nor can we believe, as was most ingeniously and forcibly argued by Mr. Wof-

ford, respondent's counsel, that the term verbal includes both spoken and written reservations. The distinction between the two is wide, and was, no doubt, well under-

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stood, and the pur*pose of the act must have been to destroy the one and leave the other standing.

The case of Cochran v. Roundtree, supra, was a case involving a verbal condition. The sale in question was made before the passage of the act of 1843, but the case was heard and decided afterwards. There was a question of fact in the case, whether or not the sale was absolute or conditional, and there was some doubt as to the finding of the jury on this question. The presiding judge, however, charged the jury that even assuming that the sale was conditional, yet if Cochran was a subsequent bona fide purchaser without notice, he was protected.

The appeal involved the correctness of this charge, and the court understood the charge to be that, per se, as matter of law such a condition before the act of 1843 was void as to subsequent purchasers without notice. And, so understanding, the court sustained the charge, saying that they were unwilling to go beyond the case of Bennett v. Sims. And, stopping where that case stopped, the court declared that although the condition was binding upon Williams it did not bind a subsequent purchaser without notice. This case, however, as has been said, involved a verbal condition, and it was decided after the legislative will in the act of 1843 as to such conditions had been declared. How far that act may have influenced the judgment of the court, we do not know. Before the passage of the act, as will be seen in the case of Bennett v. Sims, the mind of an eminent judge, Judge Earle, was altogether the other way. But neither this case nor the act of 1843 touched written reservations. Conditional sales and delivery of property with such reservations remain as before; each case to turn somewhat upon its own facts. There is a reason for this. Written stipulations are more easily proved—more specific and certain, and more carefully made—and they usually amount to a mortgage, and to hold them per se void as to subsequent creditors, as was held in Cochran v. Roundtree, and as the act of 1843 declares as to verbal reservations, would be going beyond the previous decisions.

In the case now before the court, the written agreement by which the appellant hoped to protect himself when he delivered the horse to Foster, was dated December

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13th, 1879. On Jan*uary 8th, 1880, respondent, already holding claims against Foster, advanced to him an additional sum of $35, took mortgage embracing the horse of appellant, and in a few days thereafter the horse was advertised for sale under this mortgage to pay Foster's debt.

On January 15th the suit was commenced before the trial justice. If the doctrine be sound that no conditional sale of personal property, whether by verbal or written agreement, by which title is reserved to the vendor could be made, which would be good against a subsequent purchaser without notice, then great injustice would be done here in this hasty proceeding.

Written reservations having been left untouched by the act of 1843, cannot be regarded as void per se, even as to subsequent creditors and purchasers. They are certainly good between the parties, and unless some equitable or legal estoppel can be interposed to vitiate the contract, they should be good as to others. In this case the respondent seems to have been without notice; but the appellant in no way contributed to his want of knowledge. Foster had not been long in possession—but a few weeks. The parties all lived in the same village. There must have been circumstances occurring calculated to put the respondent on the inquiry. But, at all events, as to this case the agreement held by the appellant may be regarded as an equitable mortgage. It had all the elements of a mortgage; it was to secure a contract; the property was designated and the title reserved to insure the performance of this contract, and it is prior in date to respondent's mortgage. True, it was not recorded, and, being without a witness, there might have been some difficulty in having it recorded; but the action was commenced within the time allowed for recording, so that respondent had actual notice within this time. This was sufficient and supplied the place of recording.

We do not think that appellant has any cause of complaint because respondent bought the mortgaged property below its value. Nor is there any room here for an accounting by respondent. The question here is as to the title to the horse. In that the appellant has the superior claim under the facts of the case, and having done nothing to for-

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feit this title or to estop him *from enforcing his rights, the horse should have been adjudged to him.

The order below is reversed and the appeal sustained. Let the case be remanded.

McIVER and McGOWAN, A. J.'s, concurred.

14 S. C. 528

(Case No. 989.)

BILDERBACK v. BOYCE.

(November Term, 1880.)

[1. *Powers* ⇐33.]

Real property was devised to trustees to permit A to take the income for life, with remainder to such persons as A, by his last will, should appoint, and in default of appointment, to A's children. A, by his will, devised "all the rest and residue of my estate wherever and whatever," but his will did not mention the power nor the trust property, and A had real estate in his own right. *Held*, that there was no execution of the power.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 116; Dec. Dig. ⇐33.]

2. The English and American doctrine stated, and Blagge v. Miles, 1 Story 426, [Fed. Cas. No. 1,479], recognized and followed.

[Ed. Note.—Cited in Dick v. Harby, 48 S. C. 532, 26 S. E. 900; Mims v. Hair, 80 S. C. 464, 61 S. E. 968; Rembert v. Vetoe, 89 S. C. 216, 71 S. E. 959; Barbot v. Thompson, 94 S. C. 5, 6, 7, 9, 10, 77 S. E. 716.]

[3. *Powers* ⇐16.]

[Cited in Manning v. Screven, 56 S. C. 82, 34 S. E. 22, to the point that powers are to be strictly construed.]

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 32–35; Dec. Dig. ⇐16.]

[4. *Powers* ⇐33.]

[Cited in Moody v. Tedder, 16 S. C. 564; Burkett v. Whittemore, 36 S. C. 438, 15 S. E. 616, to the point that it is a question of intention whether the act of the donee of a power is an exercise of the power.]

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110–120; Dec. Dig. ⇐33.]

[5. *Wills* ⇐234.]

[Cited in Ketchin v. Rion, 68 S. C. 275, 47 S. E. 376, to the point that a devise of an estate for life, with remainder to persons to be appointed by tenant for life, and in default of such appointment to persons in esse, the remainder is vested, subject to being divested by the execution of the power.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 563; Dec. Dig. ⇐234.]

[This case is also cited in Humphrey v. Campbell, 59 S. C. 43, 37 S. E. 26, and M. S. Bailey & Sons v. Wood, 71 S. C. 48, 50 S. E. 631, without specific application.]

Before Thomson, J., Charleston, July, 1880.

Action commenced by Joseph A. Bilderback, James Spann Boyce and Latimer Boyce against James P. Boyce, trustee, and Mary E. Boyce, for possession of the "Merchants' Hotel," in Charleston. It was referred to W. D. Porter, master, to hear and determine all the issues in the cause. The report of the master, after stating the facts (which it is unnecessary to repeat, as they are fully set forth in the opinion of this court,) was as follows:

There is no reference in Samuel Boyce's will to the power or the property, and the evidence shows that he died seized and possessed of other real property on which the will might operate. The first and principal question in this case is whether the will of Samuel J. Boyce is to be regarded as a good execution of the power given him by the will of his father, Ker Boyce, in rela-

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*tion to the Merchants' Hotel. The settled rule in relation to wills is that the intention of the testator must be carried into effect. But to ascertain this intention, particularly in relation to the execution of powers, the courts in England adopted, from time to time, certain artificial rules, which they regarded as signs or demonstrations of intent; at one time an express reference to the power was required, but in Bennett v. Aburrow, 8 Ves., Jr. 616, Sir William Grant said, "that is not necessary." But it was in the application of the rules that the greatest difficulty arose. The case of Doe d. Nowell v. Roake, in 1825, 2 Bing. 510, contains a very full review of the English cases. It showed that the judges differed very much as to what should or should not be regarded as the evidence or demonstration of intent. The distinctions and refinements resorted to created great dissatisfaction, which was judicially expressed, from time to time. At last, in the case of Nannock v. Horton, Lord Eldon, speaking of the rule distinguishing power from property, said: "I am not sure it [the rule] does not oblige the court to act against what might probably have been the intention nine times out of ten." 7 Ves., Jr., 398. In Amory v. Meredith, 89 Mass. (7 Allen) 399, it is stated that after the death of Lord Eldon, his successor, as master of the rolls, reversed the decision, accompanying his judgment with the remark, "I fear that the intention of the testatrix may be defeated by my decision." A curious commentary, this, upon the application of arbitrary rules to the ascertainment of intent in a will. Sir Edward Sugden (Lord St. Leonard) has reviewed the cases in his book on Powers. He says it is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property. Sugd. on Powers, vol. I., p. 401, § 76.

It is said that Lord St. Leonard was contemplating a remedy through the courts, but by the statute 1 Victoria, c. 26, in 1837, the rule was changed, and it was declared that a general devise of real or personal estate in a will should operate as an execution of a power of testator over the same, unless a contrary intention should appear in the will. The question now is, how do our courts stand in relation to the doctrine distinguishing power from property in a will? Will, or will

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not, a general de*vise in a will operate as an execution of a power, when a contrary intent does not appear? It is conceded by counsel on both sides that there is no adjudged case in our state settling the question. My own examination has found none. It is

a new question, res integra, and our courts are now, for the first time, to entertain and settle it. It is argued that we are bound by the old rule of construction, inasmuch as the act of 1712 makes the common law a part of the law of the state. Unless there has been a recognition of it in our courts, I do not consider that any old rule of the English Chancery Courts is binding upon our courts, unless it commends itself to our reason, and certainly not where those courts have formally abandoned it. In the case of Ring v. Huntington, 1 Mills' Const. R. 165, Judge Cheves said: "The act of assembly [1712,] as it has been practically construed, contained rather a privilege than a command to adopt the common law except in its great and leading principles, and we, in effect, have only adopted it when we thought it reasonable and just; at least we have not thought it necessary to adopt it when it was clearly unreasonable, absurd and unjust. If this be the spirit in which we are to view the rule under consideration (that a man shall not be allowed to stultify himself by alleging his mental incapacity in avoidance of his own act,) we shall not be much embarrassed with it, and we may declare that, though it may be the law of England, it is no part of our law." This is the unanimous and clear opinion of the court. To the same effect are the cases of State v. Com'rs of Roads, 1 Mills' Const. R. 55 [12 Am. Dec. 596]; State v. Allen, 1 McCord 525 [10 Am. Dec. 687]. Why, then, should our courts feel under any obligation to follow a rule which the English courts have tried and abandoned, on the ground that it tended to defeat, rather than carry out, the intention of the testator, and which the English parliament, doubtless on the recommendation of their Lord Chancellor and the judges, repealed and reversed by statute nearly fifty years ago? The rule of the English statute is certainly simpler and more conformable to reason. The rule of reason is, that when a man makes a general devise he means to include all the property he has the power to dispose of, unless there be something in the will to indicate the contrary. In Massachusetts the rule of the Eng-

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lish statute is adopted. Amory v. *Meredith, 7 Allen 397. See, also, White v. Hicks, 33 N. Y. 380. The rule distinguishing between property and power has not become so firmly established in this state that our courts should feel under obligation to follow and adopt what the English courts have long since abrogated as unjust and unreasonable, and what the American courts are repudiating, either by judicial decision or under the stress of statutory enactment. 4 Kent (12th Ed.) 335, note.

In a note to Blagge v. Miles, 1 Story 458 [Fed. Cas. No. 1,479], Judge Story says: "All these refined and subtle distinctions in relation to the execution of powers are swept away by statute in England, and the doctrine has settled down in that country to what seems to be the dictate of common sense, unaffected by technical niceties." As we are not complicated with any previous decision, and are left free to adopt what shall be considered the most reasonable rule, my conclusion is, that the will of Samuel J. Boyce is a valid execution of the power of appointment vested in him by his father's will in relation to the Merchants' Hotel. My further conclusion is, that if the Merchants' Hotel passes under the will of Samuel J. Boyce, it passes charged with his debts, and that if it does not pass under his will, it goes to his children under the will of Ker Boyce. 4 Kent 340, and cases cited.

To this report the plaintiffs excepted, and the case was heard upon such exceptions. The decree of the Circuit judge was as follows:

It is well to ascertain the interest which Samuel J. Boyce took under the will of his father, Ker Boyce. The devise of the Merchants' Hotel was to certain persons, as trustees, to permit his son, Samuel J. Boyce, to take the income for his own use and maintenance during his natural life, and after his decease, to the use of such person or persons as he, by his last will, may appoint. Is this power of disposal a property, or only a naked power? The court will not imply an absolute estate when the interest of the donee is expressly limited to a life estate. Pulliam v. Byrd, 2 Strob. Eq. 142; Wilson v. Gaines, 9 Rich. Eq. 420. Where an estate is devised to one for life, with the remainder to such persons as the tenant for life, or any

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appointor shall direct and *appoint, and in default of such appointment to a person or a class of persons in esse, the remainder is vested, notwithstanding the interposition of the power. The estate is vested in the remaindermen, subject to be divested by the execution of the power. Williman v. Holmes, 4 Rich. Eq. 475. It appears from the authorities as the law of England, and of this state, that Samuel J. Boyce had no interest in the property but for life, with a power of appointment by his will. 2 Crabb's Law of Real Prop., § 2060. So that unless his will took effect as an appointment, the Merchants' Hotel could not pass thereby. The questions are, 1st, did he execute his power of appointment? and if so, 2d, did he execute it correctly, or was he in excess as to part? The plaintiffs allege there was no execution of the appointing power. It is stated by the master in his report that there is no reference in the will of Samuel J. Boyce to the power conferred by it, nor to the property mentioned in Ker Boyce's will; and it is further stated that Samuel J. Boyce had other real property on which this will might operate. It may be observed here that there are cases, especially where married women have a testamentary power of appointment, where wills will be intended an execution

of the power though it contains no reference to the power or the instrument creating it. Churchill v. Dibben, 9 Sim. 447; Heyer v. Binger, Hoff. 2. And the reason is obvious, that as formerly a married woman could not make a will, her will not expressing the power shall be referred to it. Rose v. Eives, 3 Atk. 156. What do the English cases say is a valid execution of a power by wills? Though a will does not state that it is made in execution of the power, yet if it plainly refers to it, and comprises the subject of the power, it will be deemed a good execution. Weelock v. Gill, 1 Russ. 575; Walker v. Mackie, 4 Russ. 76. A testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devises all his freehold and copyhold estates without reference to the power; held an execution of the power as to the copyhold estates, but not as to the freehold estates, which were subject to the power. Lewis v. Lewellyn, 4 Russ. 81. The principle involved in this case was fully considered in the case of Sarah Trymmer's will. The syllabus of the case, as stated in the

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de*cision of the Court of Common Pleas, is: "A devisor being seized of a moiety of certain lands in Surrey, having, by her own creation, a power of appointment over the other moiety, which she had purchased of her nephew, who succeeded her sister in the possession of it, and having no other real estate, devised all her freehold estate in Surrey to J. R., on condition that out of the rents and profits he should keep the whole in tenantable repair, and under limitations framed, to keep the property as long in her family as possible. Held, that this devise was, under the circumstances, a good execution of the power." Doe d. Nowell v. Roake, 9 E. C. L. 476. The case was carried, by writ of error, to the Court of King's Bench and the judgment reversed. 11 E. C. L. 653. And from the King's Bench the case was carried to the house of lords, and the judgment of the King's Bench was affirmed. 19 E. C. L. 139.

In the house of lords, Alexander, C. B., said: "My lords, there is no difference of opinion among the judges in this cause." I may venture to say, that in no instance has a power or authority been considered as executed unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person entrusted with the power would have been ineffectual. It would be extremely dangerous to depart from these rules in favor of loose speculation respecting intention in the particular case. It is, therefore, that the wisest judges have thought proper to adhere to the rules I have mentioned, in opposition to what they evidently thought the probable intention in the particular case before them. If authorities can settle a principle, these would seem to be sufficient.

So conclusive did they appear to Sir Edward Sugden, that in his work on the Law of Property, he says: "A general devise would not, under the old law, operate as an execution of even an unlimited power of appointment, unless the power or the estate were referred to, or the testator had no other real estate to satisfy the devise." Sugden's Law of Prop. 493. But is the present a proper case for the adoption of the principle that a general devise will carry property held only under a power of appointment? The intention of the donor must govern. The will

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of the devisor, *Ker Boyce, negatives the idea of absolute property vesting in Samuel J. Boyce by the express gift for life, for the use only of the income, the power of appointment to some person or persons precluding the idea of Samuel J. Boyce's appointing to himself, and the gift of the property to others, if no appointment be made. The different uses of the property, and the different modes of enjoyment, are evidence that the testator did not contemplate the entire interest would vest in his son. The appointee takes by authority of the instrument which creates the power, not of the instrument by which it is executed; that is, he takes in the same manner as if his name had been inserted in the power, or as if the power and the instrument executing the power had been incorporated in one instrument, and, consequently, he takes as if all that was in the instrument executing had been expressed in that giving the power. 2 Crabb, §§ 2028, 2029. Would it consist with the supposed intention of Ker Boyce to devise property for the payment of his son's creditors, whom he could not know, and by the execution of a power granted by him, divert the property from his grandchildren, whom he did? Would not such a result probably be as much against the intention of the donor of the power as was supposed to be by Sir William Grant in the case of Jones v. Tucker, 2 Mer. 533, where a woman had a power to appoint £100 by her will, and a few articles of furniture; she made her will, bequeathing £100 to plaintiff, which was held an execution of the power. Sir William Grant said that in his private opinion the intention was to give £100, which the testatrix had the power to dispose of, though he could not have judicially declared it executed. 6 Bing. 478. But if the will of Samuel J. Boyce be a good execution of the power, shall his appointment be extended so as to include his debts? The power of appointment is to the use of such person or persons as he may, by his last will, appoint. This power is not general: it is limited with respect to persons and its mode of execution. The persons are to be designated by the appointor, not generally for such uses and purposes as the ap-

pointor shall declare; but it is to such persons as the appointor may name. Property over which dominion was exercised by virtue of a general power, is considered absolute property as far as to be liable for debts; but

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if it be a particular *power to appoint for third persons named in the power, and not for the benefit of the donor of the power, the conclusion is different. 4 Kent 340. In strictness, how can the creditors of Samuel J. Boyce, not named, come in under a general clause, "I direct that all my just debts be first paid?" How are the debts to be paid; by money? So far from a sale of the "Merchants' Hotel," the will of Ker Boyce intends and declares only the use of the income of the property to his son Samuel for life, and after the use of Samuel, to his appointees, and on failure thereof, then in the same form to his children or their issue. No change of the property is declared. Powers in this state have been construed strictly, and appointments not within their meaning held invalid. Thus, a power in a will to sell such property as may be useless, will not authorize an executor to sell any property as he may choose. McCants v. Bee, 1 McC. Eq. 393 [16 Am. Dec. 610]. So a power to appoint by will is not executed by a mortgage to creditors with foreclosure and sale. Bentham v. Smith, Cheves' Eq. 33 [34 Am. Dec. 599]. In the case of Withers v. Yeadon, a power was given by the will of John Wagner to his son, George Wagner, to give property by his last will and testament to a child or children, or any of them. George Wagner, by his will, attempted to execute this power by giving all the property to his wife, and also delegated his power of appointment to his wife, and son, John Wagner. The court held that no appointment was made, because the children being designated, no appointment could be made to the wife, and that although the property was given to him in terms which would imply ownership, yet there being a power of appointment, and children answering the description of appointees, the appointment should have been made. The result was the court held George Wagner made no appointment, and that all the children of John Wagner were entitled to the slaves given, and realty devised to George Wagner. 1 Rich. Eq. 324.

The court finds as facts, 1st. That Ker Boyce, now deceased, made his will as stated in the pleadings. 2d. Samuel J. Boyce, now deceased, made his will as stated in the pleadings. 3d. That Mary Lane Bilderback, now deceased, made her will as stated in the pleadings. And conclusions of law, 1st. That the will of Samuel J. Boyce is not a valid ex-

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ecution of the power under *the will of Ker Boyce. 2d. That if the will of Samuel J. Boyce be a valid execution of the power as to the devisees, it cannot appoint for payment of Samuel J. Boyce's debts, and that no such appointment is made. 3d. That the children of Samuel J. Boyce are the tenants in fee of the Merchants' Hotel, under the will of Ker Boyce.

It is ordered, adjudged and decreed that the exceptions of the plaintiffs be sustained. The conclusions of law of the master are overruled, wherein they differ from the conclusions of the court, as above declared.

James P. Boyce, trustee, appealed.

Mr. George S. Holmes, for appellant.
Messrs. Lord & Inglesby, contra.

March 8th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. The late Ker Boyce departed this life in 1872, leaving a will whereby he devised the hotel in the city of Charleston, known as the "Merchants' Hotel," to James P. Boyce, J. B. O'Neall, A. G. Rose and J. A. Whitesides, executors, in trust, to permit his son, Samuel J. Boyce, to take the income for his own use and maintenance during his natural life, and after his decease to the use of such person or persons as he, by his last will, might appoint, and in failure of such appointment, to his children or their issue then living, &c. James P. Boyce, alone, accepted the trust, and, soon after the death of the testator, took possession of the premises, collected the rents and paid over the same to the said Samuel J. Boyce.

Samuel J. Boyce died in 1877, leaving surviving him his two sons, James Spann Boyce and Latimer Boyce, and a daughter, Mary Lane, wife of Joseph A. Bilderback, who died after the death of her father, Samuel J., leaving a will, by which she devised her interest in the said hotel to her husband, J. A. Bilderback.

Samuel J. Boyce left a will, by which he provided as follows: 1. "I direct that all my just debts be first paid." 2. "I give

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*and bequeath one moiety of all the rest and residue of my estate whatever and wherever to my beloved wife, Mary E. Boyce, to and for her absolute use and behoof forever." 3. "I give, bequeath and devise the other moiety of all the rest and residue of my estate, whatever and wherever, to my brother, James P. Boyce, to hold in trust for my children, Mary Lane Bilderback, wife of Rev. J. A. Bilderback, Latimer Boyce and James Spann Boyce," upon the terms and conditions therein expressed.

This was a proceeding for possession of the said hotel, instituted by the children of Samuel J. Boyce against James P. Boyce, as trustee, and Mary E. Boyce, widow of Samuel J. Boyce, alleging that the power of appointment given to their father, Samuel J., was never executed, and that his interest for life having ended, they are entitled to

the said premises as remaindermen under the will of their grandfather, Ker Boyce. The defendants resist the claim, alleging that the will of Samuel J. Boyce, although in general terms, without any reference to the power, was a good execution of the power, and that the hotel, in common with his own property, passed under it for the purposes therein declared, and, among others, for the payment of his debts.

It was referred to Master Porter to hear and determine the issue, and he held "that the will of Samuel J. Boyce is a valid execution of the power of appointment vested in him by his father's will in relation to the Merchants' Hotel. That if the Merchants' Hotel passes under the will of Samuel J. Boyce, it passes charged with his debts, and that if it does not pass under his will it goes to his children under the will of Ker Boyce." The plaintiffs filed exceptions, which were argued before Judge Thomson, who sustained the exceptions, and decided that the will of Samuel J. Boyce was not a valid execution of the power under the will of Ker Boyce, and that the children of Samuel J. Boyce are tenants in fee of the Merchants' Hotel under the will of Ker Boyce. To this decree the defendants filed exceptions, and the appeal comes to this court.

The question made has often been before the courts in England and in most of the states of the Union, but it is said that it is now presented for the first time in this state. The precise point is whether a mere power to declare by will uses in a lot of

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land *is duly executed by a will in general terms disposing of the whole estate of the donee of the power without any reference in terms to the power or the property and where the donee's own property satisfies the terms of the will.

All the authorities agree that this is a question of intention. Samuel J. Boyce had the power to appoint by will. He made a will disposing of his whole estate. Did he intend thereby to execute the power as to the hotel? Intention is a matter of fact and must be reached through the will itself. In order to facilitate the inquiry as to the intention in such cases, the Court of Chancery in England, after much division and many efforts, at length settled certain rules to be followed. Without going into the learning involved or attempting to review the numerous cases upon the subject, we content ourselves with a reference to those rules as stated in the case cited in the decree, of Doe d. Nowell v. Roake, 9 E. C. L. 497, which was carried by writ of error to the King's Bench, (11 E. C. L. 653; 5 B. & C. 720); and from the King's Bench to the House of Lords, where the judgment of the King's Bench was affirmed. 19 E. C. L. 139. In that case it was solemnly decided that the court would infer an intent to execute a power only in three cases. First, where there was some reference in the will or other instrument to the power. Second, or reference to the property which is the subject on which it is to be executed. Third, or where the provision in the will would have no operation except as an execution of the power. According to this canon of interpretation, the power in this case was clearly not executed. The Merchants' Hotel is not mentioned in the will of Samuel J. Boyce, nor is the power referred to, and the terms are satisfied by the property which he left, without including that as to which the power existed.

But it is strongly urged upon the court that as the point involved is now for the first time to be decided in South Carolina, we are not complicated by previous decisions, and are at liberty to make a rule of our own —that the old rule of the English chancery should not be followed by us, for the reason that in its operation there it was not entirely satisfactory, resulting often in defeating instead of carrying out the intention. It is true that some eminent English judges have expressed themselves to that

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*effect, and for this or some other reason laws have been passed in England which declare "that a general devise of real or personal estate in wills should operate as an execution of a power of appointment of the testator over the same, unless a contrary intent should appear in the will." 7 Wm. IV.; 1 Vict., c. 26, § 27. These statutes are certainly not of force as law in this state, but the principles and practice of the old English chancery, announced and followed by the great masters of equity, Somers Hardwicke, Eldon and others, have been generally regarded with the greatest respect and as the highest authority, if not absolutely binding upon us. The Court of Chancery was originally established in South Carolina while a province of Great Britain, in 1721, and was "empowered to have and exercise the same jurisdiction in hearing, adjudging and determining all causes and suits in equity in as full and ample a manner as any Chancellor, Court or Courts of Chancery in America can, may or ought to do." While the rigid enforcement of the rule of construction before referred to may have, in some instances, run counter to the actual intention, which sometimes happens in the application of other rules for the construction of wills, we do not appreciate the objection to the full extent urged. Upon such a subject it is necessary to have rules, otherwise we should be absolutely at sea. The execution of a power is not an ordinary matter, but is out of the usual course of things. It is incumbent upon the donee of the power to do the act; if not done, certain consequences of importance follow: and it would seem to be in accordance with the analogies

of the law, that those who claim under the appointment should be held to show satisfactorily that it was made. In a large majority of cases testators dispose only of their own estate. These wills, which embrace also the execution of powers, are exceptions to the rule. When, therefore, a testator having property leaves a will, disposing of it in the usual manner, without any reference to a power, the inference, in the absence of other proof, is that the will is not one of the exceptions, but, as it purports, disposes only of the estate proper of the testator. If the will were intended to refer to and accomplish a matter so remarkable as the execution of a power, the part intended to make the appointment would naturally be separate

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*and distinct from the other parts. "Every instrument executing a power should mention the estate or interest disposed of; and it is best to declare it to be made in exercise of the power, and the formalities required in the execution of the power must appear on the face of the instrument." 4 Kent 329.

In most of the states of the Union which have no legislative enactments on the subject, there has been, as we understand it, a general acceptance, with some modifications, of the rule followed in the English chancery. These modifications, for the most part, are upon the point of allowing proof of the circumstances under which the will was executed, so as to allow it to be read in the light of those circumstances. The cases are not in accord, and we will not encumber this opinion by referring to them. If there can be said to be a distinct American doctrine upon the subject, we do not know that it is anywhere better stated than by Judge Story in Blagge v. Miles, 1 Story 426 [Fed. Cas. No. 1,479], cited in a note to 2 Eq. Jur., § 1062. In that case the rule of construction before referred to was stated, and the judge, in commenting, says: "The authorities on this subject may not all be easily reconcilable with each other, but the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute the power, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it is doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the power."

We are content to take this as the result of all the American authorities, which declare that the intention to execute must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. Taking this as our guide, did Samuel J. Boyce intend, by his will, to execute the power in reference to the Merchants' Hotel? His will makes no reference to the power or the property—it contains no expressions such as are usually employed in executing powers, but only the words of ordinary disposition, providing first for the

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payment of debts, *&c. The testator had property of his own which fully satisfied the terms of the will, which, from anything that appears on its face, might have been prepared by one who had no knowledge of the power or the existence of the hotel. Before deciding the question whether the property as to which the power existed, passed under the will of Samuel J. Boyce as part of his own estate, it is proper to inquire what the power of appointment was—whether it was part of his "estate" in such sense as under that description alone it would pass under the will. Samuel J. Boyce never had any estate in the Merchants' Hotel. It belonged to his father, who gave it to trustees "to permit his son, Samuel J., to take the income for his own use during his natural life, with power of appointment, and in failure of such appointment, to his children." The remaindermen in esse under the will of Ker Boyce took a vested interest, subject to be divested by the execution of the power. Williman v. Holmes, 4 Rich. Eq. 476. The power could be executed only by will, which took effect at the death of Samuel J., when his interest even in the income ended; so that at the time the will took effect the testator had no property interest whatever in the hotel. We do not agree that the distinction taken between property and power is a distinction entirely without a difference. This case affords a good example of a naked power as distinguished from property. "The distinction, although nice, is completely established between a gift to one indefinitely, with a general power of appointment superadded, and a gift to one for life with like power of appointment. In the former case the estate passes absolutely to the donee, and in the latter case an estate only for life to the donee with the power of appointing the inheritance or succession, which must be exercised to be effectual." Scott v. Burt, 9 Rich. Eq. 360; Aaron v. Beck, Id. 412; Wilson v. Gaines, Id. 421; Pulliam v. Byrd, 2 Strob. Eq. 141; Bradly v. Westcott, 13 Ves. 445.

In the case before us, not only was the gift to trustees definite, being for life, but the power of appointment was limited to will. The donee could not appoint to his own use.

The words in the residuary clause are very comprehensive, "whatever and wherever,"

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but they do not reach to the hotel, for *the reason that they refer, in terms to the testator's "estate." The expression "all the rest and residue of my estate, of every nature and kind," in Blagge v. Miles, was said to be

incapable of passing property over which testator had only a power. "These words mean that the testator does not intend to die intestate as to any part of his estate, and they generally mean nothing more." Lupton v. Lupton, 2 Johns. Ch. 623.

Looking at the terms of the will and all the surrounding circumstances, it does not appear that the intention of Samuel J. Boyce to execute the power under his father's will is "apparent and clear," and we think the transaction is fairly susceptible of the interpretation that he meant to dispose of his own estate and not to execute the power as to the Merchants' Hotel.

As this court takes the view that the power under the will of Ker Boyce, was not executed by the will of Samuel J. Boyce so as to dispose of the hotel, it will not be necessary to consider what would have been the result as to the payment of the debts of Samuel J. Boyce under the first clause of his will if the power had been well executed.

The judgment of the Circuit Court is affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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14 S. C. 542

(Case No. 992.)

THOMPSON v. BRANNON.

(November Term, 1880.)

[1. *Appeal and Error* ⇐248.]

Appellant having submitted to a ruling, which admitted testimony against his objections, could not, of right, renew the objections here; but this court declined, of its own motion, to enforce the rule.

[Ed. Note.—Cited in Bowen v. Atlantic & F. B. V. R. Co., 17 S. C. 578; Johns v. Charlotte, C. & A. R. Co., 39 S. C. 169, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709.

For other cases, see Appeal and Error, Cent. Dig. § 1467; Dec. Dig. ⇐248.]

[2. *Trespass* ⇐45.]

In a case involving title to a piece of land of which neither party has had actual possession, private plats in defendant's possession, made for former claimants through whom the defendant claims, are admissible in evidence as part of his muniments of title, to show the extent of his claim.

[Ed. Note.—Cited in Frost v. Frost, 21 S. C. 508.

For other cases, see Trespass, Cent. Dig. § 117; Dec. Dig. ⇐45.]

[3. *Appeal and Error* ⇐970.]

The Circuit judge having, upon inspection and without proof, admitted in evidence a paper purporting to be a grant of over a hun-

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dred years ago, *found in the possession of a present owner of part of the land covered by the grant, this court, without further information upon the subject, cannot disturb his ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849–3851; Dec. Dig. ⇐ 970.]

[4. *Evidence* ⇐372.]

Deeds and other writings over thirty years old may be offered without formal proof of their execution, if the witnesses be dead, when there is no doubt as to their genuineness, and when they come from the proper custody.

[Ed. Note.—Cited in Polson v. Ingram, 22 S. C. 548.

For other cases, see Evidence, Cent. Dig. § 1614; Dec. Dig. ⇐372.]

[5. *Evidence* ⇐372.]

A deed of 1784, without any probate endorsed, and which was not registered, was properly admitted in evidence, the heir of the grantee having made plat covering the land, paid taxes, and cut some wood on it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1613–1627; Dec. Dig. ⇐372.]

[6. *Evidence* ⇐372.]

A deed of 1772, bearing the signature of only one witness, A, but probated by another, B, before a justice of the peace, as duly executed by A, B and C, and the signature of the justice being proven, was properly admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1613–1627; Dec. Dig. ⇐372.]

[7. *Adverse Possession* ⇐104.]

From possession of land, under color of title for twenty-five years, a grant is presumed.

[Ed. Note.—Cited in Trustees v. Jennings, 40 S. C. 179, 18 S. E. 257, 891, 42 Am. St. Rep. 854.

For other cases, see Adverse Possession, Cent. Dig. §§ 595–602; Dec. Dig. ⇐104.]

[8. *Trespass* ⇐20.]

In a contest between two parties, neither of whom had ever been in actual possession of the land in dispute, but both claiming under color of title, the presiding judge properly charged the jury that if there was a joint occupation, the title must prevail.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 34; Dec. Dig. ⇐20.]

[9. *Boundaries*, ⇐3.]

In locating land in dispute, marks and trees should govern in preference to courses and distances.

[Ed. Note.—Cited in Connor v. Johnson, 53 S. C. 91, 30 S. E. 833.

For other cases, see Boundaries, Cent. Dig. §§ 3–41; Dec. Dig. ⇐3.]

[10. *Appeal and Error* ⇐1050.]

Improper testimony was admitted, but as it was not material and could not have affected the result, this court would not disturb the judgment.

[Ed. Note.—Cited in Johns v. Charlotte, C. & A. R. Co., 39 S. C. 169, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709.

For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. ⇐1050.]

[This case is also cited in Anderson v. Lynch, 37 S. C. 578, 16 S. E. 773, and distinguished therefrom.]

Before Wallace, J., Chester, October, 1879.

These two cases involved the title to about twenty-one acres of land in Chester county. The plaintiff, Richard C. Thompson, claimed as sole heir of his father, who purchased from the estate of Richard E. Kennedy, who obtained the same as part of a tract of land covered by a grant from the state, dated

September 26th, 1845. The land was never cleared or occupied. The plaintiff got logs there in 1867; and stocks a few years later, when the defendant objected. He got sills from the land afterwards, and James Brannon, the defendant here, indicted Thompson; but the solicitor dismissed the prosecution, as the land was in dispute. Dr. Thompson, plaintiff's father, got timber from the land more than twice, and a good many rails; William Black, through whom defendant derived title, once saw Dr. T. getting timber on this land.

The defendant offered in evidence a paper

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purporting to be a *grant from King George II., dated in 1755, of four hundred and fifty acres of land in Anson county, North Carolina, granted to Matthew Floyd, described as lying on the north side of Broad river, and one of the boundaries being John Elliott's line.† The paper came from the possession of J. D. Smarr, now the owner of part of this four hundred and fifty acres. [Objected to, because there was no evidence of its ever having been a grant. Objection overruled upon inspection of the paper.]

Defendant offered deed from Matthew Floyd to William Hillhouse, dated December 27th, 1755, for four hundred and fifty acres —one boundary being John Elliott's line, and calls for a line running north 81, east 75, to a white-oak. This deed was regularly proved and recorded in the clerk's office of Anson county, North Carolina, April 27th, 1756.

On the back of this deed appears the following endorsement:

"I do sign over my right and title of the within deed to Archibald Robinson, for value received.

"Witness my hand. William Hillhouse."

There also appears upon the back of this deed another certificate of registration by Robert Harris, public register of Anson county, which is to the right of and lower down on the back of the deed than the assignment of William Hillhouse.

Defendant next offered deed from Archibald Robinson and Sarah, his wife, to John Wilson, for one hundred acres of land in Tryon county, North Carolina, dated March 11th, 1772, which is described in the deed as a part of a tract of four hundred and fifty acres, granted to Matthew Floyd; by him conveyed to William Hillhouse, and by Hillhouse to said Archibald Robinson; it calls for John Elliott's line and the white-oak corner.

This deed bears now the signature of only one witness, John Waterson; was proved before Joseph Brown, a justice of the peace of Craven county, South Carolina, on August

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4th, 1772, *by the oath of Samuel Robinson, who swears that John Waterson and Joseph Scott, with deponent, witnessed its execution and subscribed their names as witnesses thereto, together with this deponent. It was proved that Brown, before whom the execution of the deed was proved in 1772, had died in 1822, and that the signature to this probate seemed to be the same writing as that which was acknowledged to be his handwriting.

[The plaintiff objected to the introduction of this paper purporting to be a deed, because it was executed in the presence of only one witness, and there was no proper probate showing its execution or registration. Objection overruled by the court.]

The defendant next offered in evidence a paper purporting to be a deed from John Wilson and wife, Elizabeth, of Camden District, South Carolina, to Robert Black, dated March 25th, 1784, for one hundred acres, which, the deed says, is a part of a tract of four hundred and fifty acres, granted to Matthew Floyd; by him conveyed to William Hillhouse; by him conveyed to Archibald Robinson; and by him conveyed to the said John Wilson. The deed calls for John Elliott's line and the white-oak corner. It was witnessed by John Clark, Aaron Lockhart and Stewart Brown. There was no probate of any kind endorsed on this deed. The description of the tract of land conveyed in this last-named deed, after giving the courses and distances, was as follows: "A plantation or tract of land, containing one hundred acres, situated on the north side of Broad river, being part of a tract of four hundred and fifty acres granted to Matthew Floyd by the governor of North Carolina, and transferred from him by deed of conveyance to William Hillhouse, and from him to Archibald Robinson; and from Archibald Robinson to the said John Wilson." [The plaintiff objected to the introduction of this deed, on the ground that there was no proof whatever of its execution. Objection overruled by the court.] Mrs. Brannon was sworn at this point and testified that she had seen this deed and the other papers shown her, and which were offered in evidence in this case, except the Floyd grant and deed to Hillhouse, in the possession of Mr. William Black, more than thirty years ago.

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*Defendant offered in evidence a plat of one hundred and forty acres of land, embracing the land in dispute, which had the following remarks:

"Pursuant to the request of Mr. William Black, I have resurveyed a tract of land having such shapes and boundaries as the above plat represents. J. Robinson.

"April 19th, 1844."

[Objected to by plaintiff as merely a private plat, not referred to in any of the deeds. Objection overruled by the court.]

† A large portion of the upper part of South Carolina was, at that time, supposed to belong to North Carolina. In tracing back titles to land lying north of Pacolet river, in Union county, South Carolina, I have found the original grants to be from the State of North Carolina.—REPORTER.

Defendant offered in evidence a receipt dated October 11th, 1758, acknowledging the payment by William Hillhouse of £2 14s. to Robert McClenachall for three years of quit rent of four hundred and fifty acres of land in Anson county, due to his Majesty.

The papers are all old in appearance. The grant to Floyd, and the deed from him to Hillhouse, with the transfer endorsed to Robinson, came from the possession of J. D. Smarr, who owns the largest part of the Floyd grant. The other deeds and papers offered in evidence, the defendant got from Mary C. Hagerty, when he bought the land.

Mrs. Rebecca Brannon, witness for defendant, testified: Became acquainted with William Black in 1844; knew him before, but was not acquainted with him; witness was born in 1820; lived on Turkey creek, in Chester county, in 1844; had seen Black some time in 1830; he was then living at this same place, near the land in dispute; his house was in a few hundred yards of the land in dispute; he was moved off the place during the war, down to Jerry Hagerty's place; he died in June, 1864; William Black paid taxes on the land in dispute, and got what wood he wanted to burn off it; he did this from 1844 on till he moved to Hagerty's; he used it as he did all his other land; witness paid taxes for William Black; part of it had been cultivated—part of it had been fenced; there is on it now the old fence row; part of it has been fenced all the way; it has grown up in pines since that; part of it has gullies; some in woods—some old fields; witness was a cousin of Richard Kennedy's

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wife; *when he sent Hagerty after the titles he told Hagerty that he would give him $10 if he would go and get back that night; Black always claimed the land; in 1842, Kennedy said that old Mrs. Black had died, and all the others were old and would not claim the land and he would get it all; Robert Black lived there before Wiliam Black; he was William Black's father, and William Black inherited this land from his father; William Black died in June, 1864, and Jerry Hagerty in August, 1864; Mary C. Hagerty is still alive—she was the wife of Jerry Hagerty; Jerry had no other relatives but his wife.

Cross-examined.—Is the stepmother of James Brannon, the defendant; never saw Robert Black; Kennedy got Black's papers to run the land; told Black that Robinson claimed some land; afterward he gave Black back his papers; Hagerty carried the chain in 1844; witness stayed with Kennedy's wife; old Mr. Robert Black's children said he cultivated that land.

Re-cross-examined.—Heard William Black and his sister both say that Robert Black, their father, worked the land.

[The plaintiff objected to the declarations of William Black and his sister being admitted. Objection overruled by the court.]

The defendant then introduced the will of William Black, dated July, 1862, in which he gives his whole land to Jerry Hagerty and his wife, Mary C. Hagerty.

The defendant offered office copy of deed from Mary C. Hagerty to James T. Brannon, the defendant, dated February 27th, 1875, calling for two hundred and twenty acres, and covering the land on which the trespass is alleged to have been committed.

Also plat made by Richard Thompson, Sr., plaintiff's grandfather, dated December 29th, 1834, being a survey of the land of Thomas McDaniel, lying along and bounding the land in dispute, in which the surveyor refers to the lands in dispute as the "lands of Black." [Objected to by plaintiff. Objection overruled by the court.]

It was in proof that William Black, in 1857, and Mrs. Hagerty, after the war, got timber from this land.

Plaintiff proved that Jerry Hagerty carried the chain at the survey made by Kennedy's direction.

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*One of the surveyors appointed by the order of the court, reported that the defendant's papers called for a white-oak, which he believed to be at figure 3 (on the plat), and which, to reach, would extend the distance 13.25 chains.

The jury found a verdict for the defendant in both cases.

The plaintiff appealed to this court upon the following grounds:

1. Because his Honor erred in charging the jury that if they found William Black to have been in possession under color of title for twenty years, that they must presume a grant, which permitted the jury to presume a grant senior to the grant from which the plaintiff derived title.

2. That his Honor erred when requested by the plaintiff to charge the jury that if they found the plaintiff's grant, or Richard Kennedy was in possession of a part of the land in dispute under a perfect title, that the possession of part was the possession of the whole, and the plaintiff was entitled to recover. His Honor did charge the jury that if the possession of part was joint, then the title must prevail, when there was no evidence whatever of any joint possession of fourteen acres.

3. That his Honor erred when requested to charge the jury that if the plaintiff was in possession of a part of the premises under his title, his possession of a part was possession of the whole; and if adverse to Mrs. Hagerty's title for ten years, plaintiff must recover; his Honor did charge the jury that if there was a joint occupation of a part of the land the title must prevail, when there was no evidence whatever of a joint occupation of fourteen acres.

4. Because, under the circumstances of this case, it was error in his Honor to charge the jury that, in fixing the location of the land in dispute, they must be governed by the marks and trees, in preference to the courses and distances. Overruled.

Mr. S. P. Hamilton, for appellant.
Mr. J. J. Hemphill, contra.

March 11th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The appeal in this case embraces two cases, between the same parties, which were tried together below: one

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*for claim and delivery of certain pieces of board timber, and the other in the nature of an action of trespass quare clausum fregit —the main question below being a question of title to a certain tract of land described in the complaint.

The verdict in both cases was for the defendant below—respondent here. The plaintiff has appealed, and his appeal is founded upon objections, made during the progress of the trial, to the admission of certain testimony hereafter to be noticed, and on exceptions to the refusal of the judge to grant a new trial upon grounds which will be found below.

The brief fails to show that any exception was taken to the rulings of the Circuit judge on the questions raised during the trial as to the admissibility of evidence. Objection was made, but the appellant seems to have submitted to the rulings of the presiding judge without excepting. According to strict rule the failure thus to except would preclude the raising of these objections here; but the respondent has not claimed the enforcement of the rule, and the court is not disposed, on its own motion, to do so.

Neither of the parties appears to have been in the actual possession of the precise piece of land upon which it is alleged the trespass complained of was committed. Each endeavors to show, however, that it is within the boundary of his claim, and for that purpose respondent introduced two plats, one known as the Enloe plat and the other as the William Black plat, as covering this land. The Enloe plat was made in 1868 for the immediate grantor of respondent, and the Black plat was made in 1844 for William Black, under whom respondent's grantor claimed. These were both private plats.

In Simmons v. Parsons, 2 Hill 492, note, the court said: "That color of title is anything which shows the extent of the occupant's claim." In Slice v. Derrick, 2 Rich. 629, Judge O'Neall said: "That marking of trees on line or making a survey may constitute color of title, although it is true that these in themselves would not constitute such a possession as would bar the owner of legal title." In Turnipseed v. Hawkins, 1 McC. 278, an old survey, made for the party in possession, was admitted. In Gray v. Bates, 3 Strob. 498, it was said that the deed, con-

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*tract or plat under which possession was acquired, constitutes color of title and defines or shows the extent of the occupant's claim.

The purpose of the plats introduced in the case now before the court was to show the extent of the respondent's claim, and while they cannot confer title in themselves, under the above authorities, they were admissible as evidence. One of them, at least, had come into the possession of the respondent through his grantor, Mary Hagerty, and the other from those under whom she claimed. They were a part of his muniments of title, and we think they were properly admitted for what they were worth.

The respondent introduced a paper purporting to be a grant from King George II., dated in 1755, known as the Floyd grant. The admission of this paper was objected to by appellant "because there was no evidence of its being a grant." Upon inspection the judge overruled the objection and admitted the paper. We see no reason to sustain the assignment of error here. Nothing is furnished in the argument upon which the court can found a judgment; and Judge Wallace having been satisfied, upon inspection of the paper, we cannot, in the absence of all information on the subject, disturb his conclusions.

The next objection refers to two deeds offered by respondent and admitted by the court: one deed known as the Robinson deed and the other as the Wilson Black deed, the first dated in March, 1772, and the other in March, 1784. As to the first deed, it is stated in the brief that it bears now the signature of only one witness—John Waterson. But it was proven before a justice of the peace for Craven county, South Carolina, August 4th, 1772, by the oath of Samuel Robinson, who swears that John Waterson and Joseph Scott, with deponent, witnessed the execution and subscribed their names thereto together with this deponent. The signature of the justice of the peace, who died in 1822, was proven to be genuine.

The Wilson Black deed, on its face, showed that it was executed in the presence of three witnesses; but this deed had not been probated, or, at least, there was no probate endorsed, nor had it been registered, and its introduction was objected to on that account.

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*The appellant's counsel has stated the true rule as to the admission of such papers. "Deeds and other writings over thirty years old may be offered without formal proof of their execution, if the witnesses be dead, where there is no doubt as to their genuineness, and when they come from the proper custody." And Mr. Greenleaf says: "Whether, if the deed be a conveyance of real estate,

the party is bound first to show acts of possession under it, is a point not perfectly clear upon the authorities, but the weight of opinion seems in the negative." Greenl., vol. I., § 144, and note, where possession is held not necessary.

In Swygart v. Taylor, where an old deed was admitted without formal proof of its execution, Judge Butler, in delivering the opinion of the court, said: "The deed purports to have been executed seventy-two years ago, and upon inspection it had all the appearance of an ancient paper. Any incontestable fact going to show that a deed was in existence more than thirty years before it is offered in evidence, will authorize its introduction as an ancient muniment of right. Possession is that which seems to be most generally resorted to for this purpose, because it is the most usual mode of asserting a right under legal title. This, however, is not indispensably necessary." 2 Nott & McC. 404.

In Duncan v. Beard, Colcock, J., said: "I take it to be a well-established doctrine that a deed of thirty years may be given in evidence without proof of its execution, if accompanied by possession, and a mere entry for the purpose of survey has been considered as sufficient possession." See, also, Edmonston v. Hughes, Cheves 82; Swygart v. Taylor, 1 Rich. 54; Eubanks v. Harris, 1 Speers 183.

The deed from Wilson to Robert Black was dated in 1784, and William Black, under whom Mary Hagerty claimed, inherited from Robert Black, his father. William Black had plat made in 1844 covering the land, paid taxes, and, in the language of one of the witnesses, got what wood he wanted to burn off of it. We think this deed was properly admitted. The Robinson deed was executed long before the act of 1795, and we think there was no error in the presiding judge permitting it to go to the jury. As to its effect a question might have been raised. Craig v. Pinson, Cheves, 272.

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*Appellant, we think, must fail to take any benefit from his exceptions to the charge of the judge—both as to the charge itself and as to his refusal to charge the propositions requested by appellant.

The judge instructed the jury that if they found that William Black had been in possession under color of title for twenty-five years, they must presume a grant. The judge did not discuss the facts as to whether Black had been in possession long enough to presume a grant; on the contrary, he distinctly left this to the jury. The facts may or not have been sufficient to warrant the jury in finding the necessary possession; this was entirely for them, and the judge in substance so said. Was he in error in this charge? Appellant's counsel extracts from McClure v. Hill, 2 M. Const. R. 420; and Smith v. Asbell, 2 Strob. 141, this rule: "The facts necessary to authorize the presumption of a grant of land are, that the possession was adverse and that it was continuous for twenty years." The charge of the presiding judge was in accordance with this rule, and, therefore, must be sustained.

The appellant requested the judge to charge "that if the jury found that plaintiff was in possession of part of the premises under his title, his possession of a part was possession of the whole; and if adverse to Mrs. Hagerty's title for ten years, plaintiff must recover." This, in substance, was the request found in exceptions of both two and three. The judge, in response, charged that if there was a joint occupation of part of the land, the title must prevail.

Here was a contest between two parties, neither of whom had ever been in actual possession of the precise locus upon which the trespass was committed, but both claiming by virtue of being in possession of part and color of title reaching over the place in dispute. Under such circumstances the charge of the judge, if founded in law, was the exact charge which the case required as fair to both parties. The proposition requested by the appellant might have been, and no doubt was, a correct legal proposition—as an independent statement; but if the judge had simply charged that proposition and stopped, it might have misled the jury to the prejudice of the respondent.

We think, therefore, that there was no er-

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ror on the part of the *judge in the response which he made to appellant's request, if it be that the principle which he laid down was correct. Was it correct? "Where there are interfering claims to land without any actual possession of the disputed parcel, the rule of law is that the possession shall be adjudged to him who has the right." Sims v. Meacham, 2 Bail. 101. "Where there are two possessions in the same body of land—one under a senior and another under a junior grant—the senior title will prevail." Alston v. Collins, 2 Speers 459. Other authorities might be added, but these are sufficient. They fully sustain the charge as to this point.

The charge given to the jury—that, in fixing the location of the land in dispute, marks and trees should control courses and distance—is also made a ground of exception.

In locating lands the following rules are resorted to, and generally in the order stated: 1. Natural boundaries. 2. Artificial marks. 3. Adjacent boundaries; and, 4. Courses and distance. Fulwood v. Graham, 1 Rich. 491. See, also, the cases of Bradford v. Pitts, 2 Mills' Const. R. 115; Starke v. Johnson, 2 Mills' Const. 9. These cases vindicate this last ruling of the presiding judge.

Several other questions were discussed in the argument, but these were not found in the

exceptions, and we have not felt called upon to review them; and, besides, some of them were questions of fact; with these we have nothing to do. In a case like this, the province of this court is to correct errors of law; therefore we have confined ourselves to the legal questions raised. We think the declarations of William Black and of his sister, as detailed by the witness Mary Brown, were inadmissible, as hearsay, and, according to strict rule, they might have been excluded, but they do not seem to have been very material, and their exclusion could not have changed the result.

The appeal is dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. *554

*(Case No. 993.)

WINSMITH v. DEWBERRY.

(November Term, 1880.)

[1. *Costs* ⇐221.]

Appeal was dismissed and order afterwards obtained in the Circuit Court for leave to enter up judgment for costs of appeal; meantime the fee-bill was amended. *Held*, that the costs were properly taxed under the fee-bill in force at the time the appeal was dismissed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 834; Dec. Dig. ⇐221.]

[2. *Witnesses* ⇐32.]

Proof of service and mileage by a witness, certified by a notary public, but not signed by the witness, is sufficient proof for clerk to act upon, in the absence of evidence to the contrary.

[Ed. Note.—Cited in Atherton v. Atlantic Coast Line R. Co., 82 S. C. 478, 64 S. E. 411.

For other cases, see Witnesses, Cent. Dig. § 72; Dec. Dig. ⇐32.]

[3. *Witnesses* ⇐25.]

In action against a sheriff to recover cotton seized as the property of a third person, under an agricultural lien, the lienee is entitled to his costs as a witness against the plaintiff, who failed in his action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 50; Dec. Dig. ⇐25.]

Before Wallace, J., Spartanburg, March, 1880.

John Winsmith against John Dewberry, sheriff. The opinion states the case.

Mr. John Winsmith, for appellant.

Mr. S. J. Simpson, contra.

March 11th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. Appellant, in 1879, brought action in the Court of Common Pleas for Spartanburg county against the respondent, for the recovery of personal property—two bags of cotton—which respondent, as sheriff, had levied upon under an agricultural lien as the property of other parties. Appellant claimed the cotton as his. The jury rendered a verdict for defendant. Upon this verdict judgment was entered for costs—the costs, in the aggregate, amounting to $57.80. Appellant made a motion for a new trial, which was refused. Appellant appealed to this court. This appeal was heard at November Term, 1879, and was dismissed. The remittitur from this court was filed in the clerk's office for Spartanburg, January 10th,

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*1880. At the March Term thereafter the judgment of this court, on motion, was made the judgment of the court below, and an order made granting leave to respondent to enter up judgment for costs and disbursements of appeal. Accordingly, judgment for said costs was entered April 8th, 1880, the aggregate being $44.65. From this taxation of costs, and, also, from the taxation of the previous judgment, appellant excepted and brought the matter before the presiding judge of the July Term, 1880. Judge Mackey, by order, July, 1880, dismissed the appeal and affirmed the taxation by the clerk. From this order appellant has appealed to this court on three grounds:

1. That the costs should have been taxed under act of February 20th, 1880, instead of act of 1878.

2. The subpœnas were taxed without being proven according to law.

3. That the sum of $15 had been taxed for witness J. C. Wallace, who was the principal party.

As to the first ground, it will be seen from the dates hereinabove, that the whole case had been ended except the order for the entry of the last judgment before the passage of the act of February 20th, 1880. The case had been heard on appeal, and the remittitur sent down by January 10th, 1880, more than a month before the act of February. The entire costs had accrued under the previous act, and the order of April, 1880, simply granted leave that the costs which had thus accrued should be reduced to judgment. The appellant has certainly no ground to stand on here.

The objection to the subpœnas is, that the witnesses had not signed their names to the probate. It seems that the notary public before whom they were proven, simply endorsed the ordinary certificate that the witnesses had proven so many days' attendance and mileage before him, signing his name as notary public.

We are not advised of any law which requires more than this. This certificate was satisfactory to the clerk. It was by no means unusual, and, unless impeached by evidence to the contrary, we think the clerk was warranted in founding his taxation upon that mode of probate.

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*In the third exception appellant objects to the costs taxed for the witness, J. C. Wallace. The witness was the party in whose

behalf the agricultural warrant had been issued, under which the respondent, sheriff, had seized the cotton. The action, however, was not against him, but was against the sheriff. He was a necessary witness to the defense of the sheriff; had been regularly subpœnaed; attended and testified; and we are not aware of any legal principle which precludes him from claiming the pay which the fee-bill allowed to witness.

The appeal is dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. 556

(Case No. 994.)

OLIVER v. GRIMBALL.

(November Term, 1880.)

[1. *Husband and Wife* ⟸182.]

In construing acts done by married women prior to 1868, affecting their separate property, the court may look to the constitution of that year to see what is now the policy of the state as to the control of married women over their separate property.

[Ed. Note.—Cited in Wallace v. Craig, 27 S. C. 520, 4 S. E. 74.

For other cases, see Husband and Wife, Cent. Dig. §§ 714, 715, 719; Dec. Dig. ⟸182.]

[2. *Husband and Wife* ⟸48.]

A marriage settlement executed in 1860, gave to the intended wife the right to demand and receive her estate from the trustee, and gave power to the trustee, upon the written request of the wife, to give, transfer, sell or otherwise dispose of the property to any person whomsoever, for such price or consideration as should seem proper to the wife, and when sold for a money consideration, the proceeds to be re-invested, &c. In 1867, in accordance with the written request of the wife, the trustee, for the alleged consideration of $1, conveyed the property to the husband. *Held*, that the deed was a valid transfer under the terms of the settlement, and conveyed a good title. Cases considered.

[Ed. Note.—Cited in Booker v. Wingo, 29 S. C. 122, 7 S. E. 49.

For other cases, see Husband and Wife, Cent. Dig. § 242; Dec. Dig. ⟸48.]

Before Thomson, J., Charleston, June, 1880.

Controversy without action, between Robert C. Oliver and Berkley Grimball. The marriage settlement, omitting the parts immaterial to the opinion in this case, was as follows:

To have and to hold all and singular the

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said stocks, inter*ests and estates, unto the said L. H. Mouzon and his successors, and his and their heirs, executors and assigns forever. In trust, nevertheless, for the uses, intents and purposes following, to wit: To the use of the said F. M. Thompson, her heirs, executors and assigns, until the said marriage; and from and after that event, then in trust the sole and separate use, benefit and behoof of the said F. M. Thompson, notwithstanding her coverture, free from the debts, and not subject to the control or interference of the said R. C. Oliver, for and during the joint lives of the said F. M. Thompson and the said R. C. Oliver, subject, however, to the right of the said F. M. Thompson at any time during the said coverture, to demand and receive from the said L. H. Mouzon and his successors, any part or all of the said interests, estate and property on her sole request, order or receipt in writing, and the same to dispose of according to her own will and pleasure; her sole receipt, request or order being hereby declared a sufficient discharge to the trustees from all liability further to account for the portion of the said estate so paid or delivered to her, the said F. M. Thompson. And in case the said F. M. Thompson shall survive the said R. C. Oliver, then the said L. H. Mouzon and his successors shall deliver up and transfer the said interests, estate and property of every kind to the said F. M. Thompson, to her, her heirs, executors and assigns forever, freed and discharged from all trusts whatsoever. But should the said Frances depart this life during the lifetime of the said Robert, then in trust to hold the said interests, estate and property for such uses, purposes, trusts and limitations as the said F. M. Thompson shall, by her last will and testament, notwithstanding her coverture, duly declare and appoint, concerning the same. But should she depart this life without having executed such will and testament, then, should there be living children of the said marriage, in that case the said interests, property and estate shall be held in trust, to divide the same equally amongst the children of the said marriage, share and share alike, if more than one; and if but one, then to that one absolutely, to him, her, them and his, her and their heirs, executors and assigns forever; the children, if any, of such as may die in the lifetime of the said F. M. Thompson, to represent and take their parents' share. But if there be no issue of the said marriage living at the death of the said F. M. Thompson, then the said estate, interests and property shall be distributed according to the statute of distributions, to her heirs and legal representatives, freed and discharged from all trusts whatsoever. Provided, however, that the said L. H. Mouzon and his successors, shall have power at all times hereafter, upon the written request of

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the said F. M. Thompson, to *give, transfer, sell or otherwise dispose of any or all of the said estate, interest or property to any person whomsoever, for such consideration or such price as may seem proper to the said F. M. Thompson; and when the same shall be sold for a money consideration, the proceeds shall be re-invested as she, the said Frances M., may direct, subject, however, to

the said trusts and limitations as are hereinbefore declared concerning the original property and estate hereby settled.

The deed from L. H. Mouzon to R. C. Oliver, recited the marriage settlement, and the property covered by it and the written request of Frances M. Oliver, formerly Thompson, that this deed should be executed. The deed purported to be "in consideration whereof and for the sum of one dollar, to me paid by the said Robert C. Oliver;" and then continued, "do hereby grant, bargain and sell unto the said Robert C. Oliver all of my right, title and interest of, in and to all the said property, both real and personal, derived through the deed aforesaid: to have and to hold all and singular the said property, real and personal, unto the said Robert C. Oliver, his heirs and assigns forever."

To this was appended this written request:

To L. H. Mouzon.—I do hereby order or request you to execute the annexed deed of conveyance to Robert C. Oliver—all the property secured to me in the marriage settlement of my husband (the said Robert C. Oliver) and referred to by the said annexed deed, without limitation or any reservation whatever: and I do hereby declare that I do this under the power reserved to me in the marriage settlement or deed aforesaid.

Given under my hand and seal this 19th day of January, A. D. 1867.

Frances M. Oliver. [L. S.]

Signed, sealed and delivered in the presence of—

Wm. H. Austin.

W. Bowman.

The controversy involved the title of Oliver to a lot of land in Charleston city, held by him under this deed.

All other matters are stated in the opinion of the court.

The Circuit decree is as follows:

The marriage settlement between Frances M. Thompson and R. C. Oliver and L. H. Mouzon, as trustee, bears date January 4th, 1860. The date of the deed from the trustee

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to R. C. Oli*ver, under order of Frances M. Oliver, is February 12th, 1867. Thus the questions submitted in this case are to be determined without regard to the change made by the constitution of 1868, in relation to the powers of married women over property which they held at the time of marriage or afterwards acquired. Reeder & Davis v. Flinn, 6 S. C. 239; Dunn v. Dunn, 1 S. C. 350.

In framing settlements in pursuance of articles, they must be made not only in conformity with the intention of the parties, so far as the intention is lawful, but they must also be made so as to give effect to that intention. Atherly on Marriage Settlements 57; Porcher v. Daniel, 12 Rich. Eq. 357. And in determining the extent of a power, the intention of the parties in its creation must constitute the guide. Fronty v. Fronty, Bail. Eq. 517. This intention must be gathered from the terms of the instrument and ascertained from the trusts or uses declared under the marriage settlement between these parties.

The first use is for F. M. Thompson, her heirs, executors and assigns, from the time of executing the settlement until her marriage. The second use is for the sole and separate use of F. M. Thompson in the fullest sense from the marriage, during the joint lives of husband and wife. The third use is that in the event the wife survives the husband, the trustee is to deliver up and transfer the property to F. M. Oliver, discharged from all trusts. The fourth use is that in the event the husband survives the wife, she may make her will, notwithstanding coverture. The fifth use is that should the wife die before her husband, leaving no will, her child or children to take with right of representation. The sixth use is that should the wife die before her husband, leaving no will nor child or children, the property to be divided under the statute of distributions.

Could a settlement be made which more studiously excludes the husband from all right to, or benefit in, the property? For only in the last alternative as an heir-at-law, can he have any interest. Some of the powers of the settlement, it is alleged, have been executed, and the questions are, have these powers been executed according to the intention of the parties as expressed in the settlement? It is objected that the spirit and intent of the settlement have been violated,

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because the powers *have been exercised in behalf of the husband, who was expressly excluded, and whom the court never appoints as trustee for the wife. In the case Ex parte Hunter, the court forcibly expresses the character of the relations between husband and wife where there is a marriage settlement. "It is certainly extraordinary that a tribunal, one of whose peculiar functions consists in securing the interests of the wife against the husband, should be asked to become the instrument for delivering the separate property, which it is bound to protect, into the hands of the latter, against whose power and control it is its duty to guard it." Rice's Eq. 295.

Chancellor Harper says: "In general, the appointment of a trustee is for the protection of the rights of the married woman against the husband. By constituting him a trustee he is invested with the legal title, and might convey any property to a purchaser without notice; over money his control would be absolute even if he should give the most satisfactory security to answer for the capital." Robinson v. Dart, Dud. Eq. 131 [31 Am. Dec. 569]. Chancellor Dunkin says: "Almost universally the leading purpose of creating a trust is to exclude the husband, and this object is seriously jeopardized, if

not practically frustrated, by appointing him a trustee, and thus vesting in him the legal title." Dean v. Lanford, 9 Rich. Eq. 427.

The whole property, worth thousands of dollars, is conveyed by the trustee to the husband, for the nominal consideration of $1. The proceeds of the sale of property are to be re-invested. This disposition, in the event of a sale, must be complied with, being directed by the settlement. Could there be a more farcical act? The purchaser from the husband might well pause and ask if this result was in the minds of the parties when the settlement was executed. Surely no deed provides the elements of its own destruction; nor could it have been intended that this deed, professedly made to protect property from marital control, should complete its duty by a total surrender to the husband of the whole estate without even the limited protection afforded by the common law. Here the interests of the children also are destroyed. Though taking as volunteers, these interests are not to be disregarded. In set-

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tlements of the wife's property made *by the court, the interests of the children, as well as those of the wife, are always contemplated. McQueen on Husband and Wife, 82, 83.

But has the wife exercised the powers according to the terms of the marriage settlement—that is, the trustee, by her direction? The Supreme Court says: "It is settled law in this state, that without the aid of a Court of Equity, a married woman cannot dispose of or charge her separate estate except in the execution of powers conferred by the instrument creating such estate. Ewing v. Smith, 3 Desaus. Eq. 457 [5 Am. Dec. 557]; Reid v. Lamar, 1 Strob. Eq. 27," and other cases.

"In the present case the power of the wife must stand on the terms of the order settling the trusts, for the court will not sanction the loan of the wife's separate estate to her husband without security." Dunn v. Dunn, 1 S. C. 354.

Under the use to the wife during the joint lives of her husband and herself, a power is given to her to demand and receive from the said L. H. Mouzon * * * any part or all of the said interest, estate and property on her sole request, order or receipt in writing, and the same to dispose of according to her own will and pleasure; her sole receipt, request or order being declared a sufficient discharge to the trustee * * * for the portion of the said estate so paid or delivered to her.

The plain intent of this power is to enable the wife to resume her right to the property, and the possession thereof, to receive some or all of it and dispose of it as she pleases. That this resumption of right and possession is peculiar to herself, is manifest from the power to dispose according to her will and pleasure. Had the transfer been made according to any power to another, her right in the property would cease when the transfer was made. The power to transfer or dispose of the property, after her receipt of it, negatives the idea of a transfer to another upon her order. The exercise of this power of appointment to herself is equivalent to a resumption of the ownership in fee. This power speaks of the estate so paid or delivered to her. The words of this power are too plain to admit of any construction that would authorize a transfer to another upon her order. The transfer can be only to herself.

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*Besides a recital of the above power, the deed from the trustee to the husband refers to another power for authority. The deed recites that "said L. H. Mouzon shall at all times hereafter, upon written request of cestui que trust, have power to give, transfer, sell or otherwise dispose of any or all the said estate, interest or property to any person whomsoever." Here the recital in the deed ends. But to make the sentence and the sense complete, there must be added, according to the marriage settlement, the following words: "For such consideration or such price as may seem proper to the said F. M. Thompson, and when the same shall be sold for a money consideration, the proceeds shall be re-invested as she, the said Frances M., may direct, subject, however, to the said trusts and limitations as are hereinbefore declared concerning the original property and the estate hereby settled."

This power does not authorize a gift of the property. The disposition made is to be for some consideration or price. The price was left to the good sense and discretion of the wife. She, under this power, could not sell to the husband for a nominal sum. Would she have directed a sale for such a sum to a stranger? And the husband stood in the relation of a stranger to her. Such was the case of Dunn v. Dunn, where money of the wife was lent to the husband by the trustee, with the alleged consent of the wife. The court, besides the objection that the money was lent to the husband, held that surety should have been required from the husband, as it should be from any other person. So the sale should have been made as if to a stranger. But were it urged that some regard should be had to the relations of the parties as husband and wife, then the very influence intervenes which the marriage settlement was intended to exclude. The property, however, may not be sold for a money consideration, still the language is, "when the same shall be sold."

The reasonable intendment is that the trust property may be exchanged for other property, to which the terms of the trust would attach upon exchange. The power contemplates no gift to a third party.

The case of Converse v. Converse, 9 Rich.

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Eq. 535, was cited *as conclusive of the right of the wife having a general power of

appointment to transfer her separate estate to her husband.

An examination of the case discloses that a power was reserved to Mrs. Converse "to revoke the uses declared in the deed creating the trust—to declare new uses, and to convey the property, or any part thereof, to any person or persons as she saw fit, in the same manner as if she were a feme sole." These powers far exceed any that are reserved in the marriage settlement under consideration.

Nor is it to be overlooked when the wife exercises the powers reserved, the court said that "this is not an unreasonable provision for the husband, nor an unjust concession on the part of the wife; similar, and in some respects, better terms being conceded to the husband in the daily practice of the Court of Equity." P. 564.

Both in the character of the powers and in their execution the cases are dissimilar.

The conclusion of the court is that "The act of the trustee in transferring to R. C. Oliver, the husband of his cestui que trust, Frances M. Oliver, at her written request and direction, the whole of her separate estate, for the consideration of one dollar, was not valid and authorized."

And were such conveyance valid and authorized, the said R. C. Oliver, having purchased with full knowledge of the trusts, becomes a trustee for the wife, under the marriage settlement: and that a purchaser from R. C. Oliver, with a knowledge of the trusts, becomes a like trustee, as to the property purchased by him."

From this decree plaintiff appealed, upon the ground that the Circuit judge erred in holding that under the powers contained in the marriage settlement, the deed of Mouzon to Oliver, at the written order and request of F. M. Oliver, was not a valid and authorized act, and did not transfer the fee in the property to the said R. C. Oliver absolutely.

Messrs. Lord & Inglesby, for appellant.

Mr. A. T. Smythe, contra.

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*March 11th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This action was heard upon a case agreed in a controversy submitted. The facts all appear in the "case," and need not be repeated here, except so far as may be necessary to make the judgment intelligible. The plaintiff, R. C. Oliver, claims that the defendant, Berkley Grimball, shall specifically perform his contract for the purchase of a lot, described in the case as 440 King street, and the said Berkley Grimball resists the claim.

Frances M. Thompson, being of full age and possessed of a considerable estate, in contemplation of marriage with the plaintiff, Robert C. Oliver, January 4th, 1860, executed a marriage settlement to L. H. Mouzon, trustee, by which she conveyed her entire property to the uses and trust therein expressed. This deed was recorded and the marriage therein contemplated solemnized. On January 19th, 1867, the said Frances M., by writing, under her hand and seal, directed to her said trustee, ordered and required him to execute to Robert C. Oliver the deed of conveyance, thereto annexed, of all the property covered by the marriage settlement, without limitation or any restrictions whatever, and declared her said order or request to be under the power reserved to her in the said deed of settlement. Pursuant to the order and the terms and provisions of the settlement, the trustee, in consideration thereof, and of the sum of $1, on February 11th, 1867, conveyed the said property, real and personal, to Robert C. Oliver, his heirs and assigns forever. On March 15th, 1880, Berkley Grimball agreed to purchase from R. C. Oliver the lot aforesaid, parcel of the said trust property, for the price of $3500. A title deed from R. C. Oliver to Berkley Grimball, of the aforesaid lot, with renunciation of dower by Mrs. F. M. Oliver, is admitted to have been tendered and refused on the ground that the said Oliver had not good title and the right to convey the same. Robert C. Oliver and Mrs. Frances M. Oliver, his wife, are both still alive and have issue of the marriage living. The questions submitted to the court are as follows:

"First. Under the marriage settlement

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aforesaid was the act *of the trustee in transferring to R. C. Oliver, the husband of the cestui que trust, Frances M. Oliver, at her written request and direction, the whole of her separate estate for the consideration of one dollar, valid and authorized?

"Second. If this question is answered in the affirmative, did the said deed of L. H. Mouzon, trustee, dated February 12th, 1867, convey in fee simple the lot in question to the said R. C. Oliver?

"Third. If these questions be answered in the affirmative, then the said Berkley Grimball is to be decreed to accept the title deed now tendered, pay the purchase money so agreed on, to wit, 'the sum of thirty-five hundred dollars, and twenty-five dollars for papers and the costs of this suit.'

"Fourth. If these questions, or either of them, are answered in the negative, then the defendant, Berkley Grimball, is to be decreed not to accept the title as tendered, and the plaintiff is to pay the costs of suit."

The case was heard by Judge Thomson, who adjudged that Berkley Grimball is not bound to accept the title tendered by the plaintiff Oliver. From this decree the appeal comes to this court.

Before the adoption of the constitution of 1868, the powers connected with the separate estate of a married woman were moulded and limited by the deed which created the estate.

The duties to be performed were generally continuous during the coverture, and it might be interesting to inquire what effect the constitution would have upon acts done after its adoption under a trust created before that event. But in this case not only the marriage settlement, but the alleged execution of the power, were prior to the constitution, which cannot, therefore, in terms, apply to them. But this settlement gives powers as large as the constitution attaches to all separate estates, and surely we may look to the constitution to see what is now the policy of the state as to the control of married women over their separate property. As was said in the case of Witsell v. Charleston, 7 S. C. 101: "Now that the constitution has reversed the rule of the common law and substituted general competence for the former rule of incompetence, as it regards the holding and ac-

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quisition of a sepa*rate estate, it is not for the courts, in nice readings of its texts, to return to a state of things from which the Courts of Equity have long striven to be released."

We will consider the cases according to the law as it was settled at the time the transactions took place. This is well stated by Chancellor Harper in Reid v. Lamar, 1 Strob. Eq. 27: "It is the settled law of this state that when property is given or settled for the separate use of a married woman she has no power to charge, encumber or dispose of it unless in so far as the power to do so has been conferred on her by the instrument creating the estate, which power must be strictly construed in contradiction to many English cases."

What powers are conferred upon the married woman by the marriage settlement in this case? They are very large. It would be difficult to conceive larger. The deed contains, among others, these two provisions:

1. "Subject, however, to the right of the said F. M. Thompson, at any time during the said coverture, to demand and receive from the said L. H. Mouzon and his successor any part or all of the said interests, estate and property on her sole request, order or receipt, in writing, and the same to dispose of according to her own will and pleasure. Her sole receipt, request or order being hereby declared a sufficient discharge to the trustee."

2. "Provided, however, that the said L. H. Mouzon and his successor shall have power at all times hereafter, upon the written request of the said F. M. Thompson, to give, transfer, sell or otherwise dispose of any or all of the said estate, interest or property to any person whomsoever, for such consideration or such price as may seem proper to the said F. M. Thompson; and when the same shall be sold for a money consideration, the proceeds shall be re-invested as the said Frances M. may direct, subject, however, to the same trusts and limitations as hereinbefore declared concerning the original property and estate hereby settled."

Frances M. made the written request to the trustee, L. H. Mouzon, to convey to her husband, Robert C. Oliver, all the property covered by the marriage settlement, and the said trustee accordingly executed deed of the

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same to Robert C. Oliver, *stating the consideration to be the request, in writing, of the cestui que trust, and of $1 paid by the said Robert C. Oliver. Was this a good execution of the powers in the deed?

So far as form is concerned, the transaction is scrupulously in accordance with the terms of the settlement. We regard the conveyance as a gift, the consideration of $1 being merely nominal. The deed expressly authorized a gift. The words are "give," "transfer," "sell," or "otherwise dispose of." The consideration might be good as well as valuable, and in that case there was to be no re-investment, as shown by the expression "when the same shall be sold for a money consideration the proceeds shall be re-invested as the said Frances M. may direct." The meaning of this is, undoubtedly, that the property might be transferred for other than "a money consideration," thus answering to the words "give" and "transfer." But it is urged that while the literal terms of the deed authorized the transaction, which was in exact conformity with the words, it was still not a compliance with the true intent and meaning of the deed. That the whole deed must be taken together and the powers determined by the intention of the parties at the time it was executed; that such intention must necessarily coincide with the relation of the parties and all the provisions of the instrument, which, being a marriage settlement, declaring trusts in favor of the issue of the marriage, &c., could not reasonably or possibly have been intended to bestow the power to "give" and "transfer" the property without any consideration, and, therefore, these words should be regarded as stricken out. That the manifest object of the deed, in contemplation of a marriage, was to protect the property from marital control, and to allow the husband to get that control through means of the deed itself, would be to allow it to provide the elements of its own destruction.

The words of a written instrument are certainly the usual means of expressing the intention of the parties, and when they are clear and unambiguous, and in harmony with the context, it would require very strong inferred general intent to expunge them. This is not a case in which a third person declared trusts for the married woman and the issue of the marriage, &c.; but even if it were so, the well-established rule is that an indefinite

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*gift, with a general power of appointment, properly executed according to the deed, gives absolute right to the property. But Frances M. was the absolute owner of the

property before marriage; she had the right to make the settlement or not, as she saw fit, and having determined to make it, she had the right to shape and mould its provisions precisely as she chose, even to the extent of providing the elements of its own destruction. She chose to declare certain uses in particular events, but at the same time she also chose to declare what rights she retained. One of the most marked features of the whole instrument—that which stands out from every part of it—is the unaltered and absolute control which, in any and all circumstances, she reserves for herself over the property. It was protected amply against marital control, but not against her own. She never parted with the right to do at any moment that which would, in effect, destroy the uses declared. She expressly retained the right at any time during coverture "to demand and secure any part or all of the said property on her sole receipt." It was also provided "that upon her written request the trustee should have power to "give, transfer, sell or otherwise dispose of the said property," &c. We think the conveyance of the property by Mouzon, the trustee, to Robert C. Oliver, the husband, at the request of the wife, was in conformity not only with the terms construed strictly, as required by the decision in Lamar v. Reid, but also the true intent and meaning of the marriage settlement.

Was that conveyance, in execution of the powers, good and valid? It is insisted that the power which permits the wife to give her separate estate to her husband, is against the spirit and principles of the old equity decrees and should not be enforced. There is no doubt, as stated in the Circuit decree, that the leading object in creating this trust was to exclude the marital rights of the husband, and for that reason the Court of Equity was disinclined to appoint the husband trustee for his wife. The rule was as stated by Chancellor Dunkin in Dean v. Lanford, 9 Rich. Eq. 427: "Almost universally the leading purpose of creating a trust is to exclude the husband, and this object is seriously jeopardized, if not practically frustrated, by appointing him a trustee, and thus creating in

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him the legal estate." The object *of this rule was to prevent the control of the husband against the will of the wife. But we know of no principle of equity which excluded the married woman from giving her separate estate to her husband, only provided the deed creating the separate estate contained the power to make such disposition, and there was no proof of fraud, duress or undue influence.

Mr. Perry, in his work on Trusts, Chapter XXII., Section 679, says: "When a married woman holds property to her separate use under a settlement or under these statutes, she may give it to her husband or sell it to him for a valuable consideration." And again, at Chapter XXII., Section 667: "The trustee will be compelled to give legal effect to any such alienation by transferring the property, even if it is a gift, and transfer to the husband or for his benefit, for a direct gift to the husband will be sustained, if not made under the improper or undue influence of the husband."

It is urged that a married woman could not give her inheritance to her husband directly, and that which she could not do directly she ought not to be permitted to do indirectly, and more especially through the operation of a deed, the very object of which was to prevent the control of the husband. But in the case of Garvin v. Ingram, 10 Rich. Eq. 130, it was held that a wife may, under the act of 1795, indirectly convey her inheritance to her husband. That is to say, she may join her husband in conveying to a third person, who, by previous understanding, may immediately re-convey to her husband. Chancellor Wardlaw, in delivering the judgment of the court, says: "The act makes no change of the common law in prohibiting one from conveying to himself, (Fryerson v. Fryerson, 3 Strob. 461,) but it authorizes, or at least does not inhibit, the power of a wife to bestow her estate upon her husband indirectly. In many cases it is politic and dutiful that such power should be exercised. I trust it may never be considered improper for a wife to contribute, by all lawful means, to the success of her husband's enterprises. * * * I loath the notion of imposing upon a wife any restrictions in her desire to aid and cherish her husband which common law and statute have not imposed. It is clear that she may mortgage her estate for his con-

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venience, and on *like reasoning she may surrender her ultimate interest in an estate to which she has a present title in freehold."

In the case of Converse v. Converse, 9 Rich. Eq. 535, which was an action by the wife to set aside a deed to her husband, under powers which, we think, were not more ample than those in the deed of settlement in this case, the power to resume control of the property or to direct the trustee to give it away, are, at least, as large as those given in the Converse deed, which were to revoke the uses declared in the deed, "to declare new uses and to convey the property, or any part thereof, to any person or persons as she saw fit, in the same manner as if she was a feme sole." In that case the law was announced by the Court of Errors in these clear and unequivocal terms: "That a married woman having a separate estate, with a general power to dispose of the same as if she were a feme sole, may bestow it upon her husband, is so well established at this day as not to admit of debate or doubt. Whether we refer to English authorities or to the decisions of the courts of the different states of this Union, including those of South Carolina, the result is the same, the principle is clearly settled, and nothing can be consid-

ered as settled by judicial decisions if the principle can be brought into question or be shaken."

The first two questions submitted to the court are decided in the affirmative.

1. The act of the trustee in transferring to Robert C. Oliver, husband of his cestui que trust, Frances M. Oliver, at her written request and direction, the whole of her separate estate for the consideration of $1, was valid and authorized.

2. The deed of L. H. Mouzon, trustee, bearing date February 12th, 1867, did convey in fee simple the lot in question to the said R. C. Oliver, and the said Berkley Grimball is bound to accept the said title deed, pay the purchase money and for papers and costs, as stipulated in the case.

The decree of the Circuit judge is reversed, and the case remanded for such orders as may be necessary to carry the judgment into effect.

SIMPSON, C. J., and McIVER, A. J., concurred.

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14 S. C. *571

*(Case No. 998.)

FIRST NATIONAL BANK OF CHARLESTON v. GARY.

(November Term, 1880.)

[1. *Appeal and Error* ⇐425.]

Verdict for defendant, and within ten days after the rising of the court, plaintiff gave verbal notice of his intention to appeal; and within ten days after the entry of judgment gave written notice of appeal, based upon exceptions taken at the trial and purporting to be in accordance with the verbal notice of appeal previously given. Motion to dismiss the appeal for failure to serve notice of intention within time, refused.

[Ed. Note.—Cited in Molair v. R. Co., 31 S. C. 517, 10 S. E. 243.

For other cases, see Appeal and Error, Cent. Dig. § 2157; Dec. Dig. ⇐425.]

[2. *Appeal and Error* ⇐123.]

No appeal lies to this court from the verdict of a jury.

[Ed. Note.—Cited in Whitesides v. Barber, 22 S. C. 50; Molair v. Railway Co., 31 S. C. 516, 10 S. E. 243.

For other cases, see Appeal and Error, Cent. Dig. §§ 875–881; Dec. Dig. ⇐123.]

[3. *Appeal and Error* ⇐417.]

The notice of intention to appeal is not required to be in writing.

[Ed. Note.—Cited in Molair v. Port Royal & A. Ry. Co., 31 S. C. 515, 10 S. E. 243; Mitchell v. Bates, 57 S. C. 51, 53, 35 S. E. 420.

For other cases, see Appeal and Error, Cent. Dig. § 2141; Dec. Dig. ⇐417.]

[This case is also cited in Archer v. Long, 46 S. C. 295, 24 S. E. 83, as to when a judgment becomes effective.]

Motion by M. W. Gary, the defendant and respondent, to dismiss the appeal. The case is fully stated in the opinion.

Mr. Ernest Gary, for motion.

Messrs. C. L. Woodward and Buist & Buist, contra.

March 15th, 1881. The opinion of the court was delivered by

McIVER, A. J. This is a motion to dismiss an appeal, upon the ground that notice of intention to appeal was not given within the time required by law. The facts upon which the decision of this question depends are agreed upon, and, in substance, are as follows:

The action, which was brought against the defendant as endorser of a promissory note, was tried on October 12th, 1880, and a verdict for defendant rendered. At the trial various exceptions were taken and noted. The court adjourned on October 23d, 1880; but no judgment or order for judgment on the verdict was taken or entered during the term, and not until November 24th, 1880, was the judgment entered on the verdict, after the defendant had been served with a notice requiring him to enter such judgment in order that the plaintiff might take an appeal therefrom. Within ten days after the rising

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of the court *the plaintiff's attorney gave verbal notice to the defendant's attorney of his intention to appeal. On November 30th, 1880, within less than ten days after the entry of the judgment, the plaintiff's attorney gave a written notice of appeal, with the grounds therefor, which was stated to be in accordance with the verbal notice previously given, which grounds were based upon the exceptions taken at the trial.

Under this state of facts we do not see how the appellant can be regarded as being in any default. Until the judgment was entered there was nothing to appeal from. There was no order or judgment—nothing but a verdict, and no appeal lies to this court from the verdict of a jury. It was not like the case where, during term time, an order has been made involving the merits of an action, or an order affecting a substantial right, which, in effect, determines the action and prevents a judgment from which an appeal might be taken, as, for example, an order sustaining a demurrer to a complaint, because it does not state facts sufficient to constitute a cause of action; for here it is admitted that there was not even an order for judgment, but simply a verdict of the jury.

There is another view which would be fatal to this motion. The act of 1878, (16 Stat. 698), the rigid requirements of which are invoked to sustain this motion, does not require that the notice of intention to appeal shall be in writing. It simply requires that "the appellant or his attorney shall * * * give notice to the opposite party or his attorney * * * of his intention to appeal,"

and it is admitted that such notice was given, verbally, within ten days after the rising of the Circuit Court at which the case was tried. Now, while it it is far better that such notice should be in writing, so as to avoid any possible controversy as to the fact, yet when it is admitted, as in this case, that the notice has been given verbally, we would not be disposed to say that the appellant has incurred the forfeiture of so valuable a right as that of appeal, because he has failed to give written notice of his intention to appeal, when the act does not, in terms, require the notice to be in writing.

The motion to dismiss the appeal is refused.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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14 S. C. *573

*(Case No. 999.)

DIAL v. GARY.

DIAL v. TAPPAN.

(November Term, 1880.)

[1. *Executors and Administrators* ⟸519.]

A citizen of Massachusetts died at his home, having in possession a bond and mortgage for money owing to him by a citizen and resident of South Carolina. The administrator cum testamento annexo of the deceased, for value assigned this bond and mortgage to another citizen of South Carolina, who brought in the proper court of this state an action against the mortgagor for foreclosure. *Held*, on demurrer, that such assignee had not the right or legal capacity here to bring the action.

[Ed. Note.—Cited in Dial v. Gary & Tappan, 24 S. C. 579; Stevenson v. Dunlap, 33 S. C. 352, 11 S. E. 1017; Martin v. Fowler, 51 S. C. 174, 28 S. E. 312; Heyward v. Williams, 57 S. C. 241, 242, 35 S. E. 503; In re Mayo's Estate, 60 S. C. 415, 38 S. E. 634, 54 L. R. A. 660.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2310–2322; Dec. Dig. ⟸519.]

[2. *Executors and Administrators* ⟸171.]

A grant of administration vests in the administrator only such movable property as may be found within the territorial limits of the government which grants it; but choses in action are bona notabilia of the state where the debtor resides, and are the subject of administration there.

[Ed. Note.—Cited in Patterson v. Pagan, 18 S. C. 589; Cochran v. Fillans, 20 S. C. 245; Graveley v. Graveley, 25 S. C. 19, 60 Am. Rep. 478; Stevenson v. Dunlap, 33 S. C. 353, 11 S. E. 1017; Jones v. Jones, 39 S. C. 256, 17 S. E. 287, 802; Pollock v. B. & L. Ass'n, 48 S. C. 74, 25 S. E. 977, 59 Am. St. Rep. 695; State v. Hughes, 56 S. C. 548, 35 S. E. 214; Stoddard v. Aiken, 57 S. C. 137, 35 S. E. 501; H. J. Baker & Bro. v. Doe, 88 S. C. 76, 70 S. E. 431, 34 L. R. A. (N. S.) 510.

For other cases, see Executors and Administrators, Cent. Dig. § 650; Dec. Dig. ⟸171.]

[3. *Executors and Administrators* ⟸519.]

[Cited in Jones v. Jones, 39 S. C. 257, 17 S. E. 287, 802, to the point that where no administration has been taken out in the state of the debtor, and no creditor is there, a payment by the debtor to a foreign administrator is good as against the domiciliary executor.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2310–2322; Dec. Dig. ⟸519.]

[This case is also cited in Dial v. Gary & Tappan, 27 S. C. 142, 3 S. E. 84, as to the facts.]

Before HUDSON, J., Richland, August, 1880.

These were five actions heard together, George L. Dial being plaintiff in all of them. One was against Edward F. Gary, Henry L. Tappan, Sarah B. King and others; two were against E. F. Gary and H. L. Tappan; and two were against H. L. Tappan. All of these cases involved the same question. The Circuit decree is as follows:

The foregoing actions were all heard together on demurrer to the complaints. The pleadings in the first aforesaid action were alone read—counsel on both sides uniting and stating that the same issues were raised by the pleadings in all the actions, and that, therefore, the decision of one would conclude all. As the argument was made upon the pleadings in the first of these cases, we will address ourselves specially to that one.

The complaint alleges that on December 1st, 1874, the defendants executed and delivered to Asa Burke, a resident of the county of Suffolk, in the State of Massachusetts, their bond, bearing date of that day, in the

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penal sum of $8000, conditioned to *pay the sum of $4000 on December 1st, 1876, with interest at the rate of ten per cent. from date, payable annually. Second. That on the same day, to secure the payment of the said bond, the defendants executed and delivered to the said Asa Burke their deed, and thereby conveyed, by way of mortgage, a certain piece or parcel of real estate, situate in the county of Richland, in the State of South Carolina, therein fully described. Third. That on December 3d, 1874, this mortgage deed was duly recorded in the proper office. Fourth. That in the year 1879 the said Asa Burke died, leaving of force a last will and testament, in which, no executor being nominated, one Philip Sowden was, by the Probate Court of Suffolk, Massachusetts, duly appointed administrator of the estate of Asa Burke, with the will annexed, and qualified as such. Sixth. That on February 27th, A. D. 1880, the said administrator, for value, assigned to the plaintiff, Dial, resident in South Carolina, the said bond and mortgage, due by defendants, residents of South Carolina, constituting a lien on real estate here situated. Seventh. That the condition of the bond is broken, the mortgage forfeited, &c., and judgment of foreclosure and sale is demanded and execution for balance of debt after the application of proceeds of sale.

To this complaint the defendants demur upon the grounds—

First. That the plaintiff has not legal capacity to sue.

1. Because it does not appear that the administrator was vested with the right to transfer the legal title of said bond and mortgage to the plaintiff.

2. Because it does not appear that the said administrator had license to sell and assign said bond and mortgage.

3. Because it does not appear that letters of administration on the estate of Asa Burke, in South Carolina, have been granted, without which plaintiff, as assignee of the foreign administrator, cannot sue in the courts of South Carolina for the recovery of this debt.

Second. That there is a defect of parties, because the heirs-at-law and legatees of Asa Burke should be joined in the action.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

Upon the issues raised by this demurrer

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the arguments of *counsel were very full and characterized by much research and ability on both sides. We do not propose to follow the learned counsel through their exhaustive arguments, as we are wanting in time to do so, nor do we deem it necessary to encumber this decree with numerous citations of authorities or lengthy extracts from decided cases. In our opinion the fundamental inquiry is, whether the administrator of the domicile can transfer and assign bonds of the decedent, secured by mortgage of the realty in a foreign jurisdiction or other choses in action, against debtors abroad, so as to enable such assignee to enforce said claim in the courts of such foreign jurisdiction without suing out letters of administration there upon the estate of the deceased.

We have no hesitation in saying that the estate of the decedent, situate in a foreign jurisdiction, cannot be administered in this way; and whether the plaintiff, Dial, be a real purchaser of these choses in action, or a purchaser only nominally, and for the purpose of collecting and accounting for these assets, does not alter the case. In either case it is clear that it is an attempt by the administrator of the domicile to administer the estate of Burke, in South Carolina, without the grant of letters of administration from the courts; it is an effort to accomplish indirectly what he could not do directly, to wit, to authorize and empower an assignee to bring suit on choses in action in this state, when, in his own name, he could not do so by his letters in Massachusetts. It is well established that the authority of an administrator is confined to the limits of the state in which he is appointed, and extends only to the personal estate therein situated. No title vests in him to that part of the personal estate which lies in another state. If it consists of debts due by residents of that other state, the evidences of which happen to fall into the hands of the administrator of the domicile, he cannot himself go into the foreign jurisdiction and sue for them without a new grant of administration, because, without such new grant of administration, he has no title to nor authority over the assets; it is very clear that he cannot, therefore, confer upon an assignee a right which he does not himself possess. If this could be done, an ancillary administration would rarely ever become necessary, and the estates of deceased testators or

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intestates, in a large *majority of cases, would be fully administered by the domiciliary administrator, whilst the bulk of said estates might be in a foreign jurisdiction, and the majority of creditors likewise there. Great inconvenience and great detriment to creditors would often result from such a rule. In each state must be administered that portion of a decedent's estate within its borders, and must be administered according to the lex rei sitæ and not the lex domicilii. Whatever there be of the estate of Asa Burke situated in South Carolina, can only be collected through our courts by an administrator appointed here, and must be administered under and by our laws, without reference to the laws of Massachusetts, until all debts here are fully paid, when the surplus will be transmitted to the administrator in Massachusetts and administered there according to her laws. This course cannot be defeated by an attempted sale of these choses in action by the administrator in that state. The assignee thereby acquires no right to bring suit upon them in our courts. It has been held that negotiable paper, to bearer, is not subject to this rule, and that an administrator, coming in possession of such, acquires such a title as will enable him to sue thereon, in his own name, without styling himself administrator, wherefore he can transfer the same to a stranger, who can likewise sue in another jurisdiction in his own name; but the weight of evidence, we think, is against this doctrine, which seems to us to be untenable on both reason and authority. Certainly if the facts were to appear on the face of the complaint on such a note, I think it would be obnoxious to the demurrer in this case.

None of the authorities have gone so far as to hold that the assignee of a bond and mortgage holding by the title set up by the plaintiff in this action, can maintain this suit. Before he can acquire a status in the courts of this state, either at law or in equity, it is necessary that he sue out letters of administration upon the estate of Asa Burke, here situate. That being done, the entire form of these actions would be radically changed, so much so that the change could

not be effected by amendments. A new action in each case would be necessary.

The authority upon which I chiefly rely for these views, above expressed, is to be found in Story on Conflict of Laws, Sections

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*512 to 524, inclusive, et seq. Numerous other and more recent authorities were cited by counsel for the defendants, in argument, but all in harmony with the doctrine of Judge Story, and to cite them here is unnecessary.

It is therefore ordered and adjudged that in each of the above cases the demurrers be sustained, and that the defendants have leave to enter up judgment thereon against the plaintiff for the dismissal of the complaints, and for costs.

To this decree the plaintiff filed eighteen exceptions, which, in substance, were, that the administrator of the domicile had authority to sell, and, having sold, assigned and transferred the choses in action, the subject of this suit, to Dial; that Dial was authorized and alone authorized, as the real party in interest, to bring these actions in his own name; and that the demurrer should have been overruled. Upon these exceptions plaintiff appealed to this court.

[For subsequent opinions, see Ex parte Dial, 14 S. C. 584; Dial v. Tappan, 20 S. C. 167.]

Messrs. Bauskett & Lynch, for appellant, cited 3 Mass. 518; 9 Id. 337; 16 Id. 18; 115 Id. 510; 10 Pick. 468; 14 Id. 399; Rev. Stat. (Mass.), ch. XCVIII., §§ 1–5; 6 S. C. 184; 27 How. Pr. 474; 32 N. Y. 1; 2 Pet. 239; 26 Mass. 577; 6 Jones' L. 94; 3 Ind. 309; 4 Mason 16; 9 Whart. 856; 3 S. C. 70; 20 N. Y. 112; 25 Id. 584; Story's Confl. of L., §§ 359, 383, 384, 465–468, 516–518; 2 Brev. 307; 1 McC. Ch. 506; 2 Id. 168; 3 McC. 371; 1 McC. Ch. 191, 318; 1 Rich. 116; 10 S. C. 182; 13 S. C. 409; 7 Johns. Ch. 45; 10 Paige 549; 56 Ala. 312; 12 Metc. 422; 4 Id. 252; 2 Sandf. Ch. 173; 1 Barb. Ch. 189; 9 Serg. & R. 258; 4 Id. 392; 7 Paige 239; 11 Wend. 363; Com. Dig., "Chancery," 3 G 1, and "Administration," B 11, 12; 1 Ves. 49; 1 Atk. 463; 3 Atk. 237; Co. Lit. 223, a; Wms. on Ex'rs 796; 17 E. L. & Eq. 582.

Messrs. Melton & Clark, contra, cited 1 Rich. 116; 3 Mass. 514; 10 Cush. 172; 16 Mass. 314; 9 Cr. 151; 5 Rawle 264; Pot. Dwar. 97; 110 Mass. 373; 8 Bligh 44; 4 M. & W. 171; Story's Confl. of L., §§ 512–515; 8 Cl. & F. 306; 10 Rich. L. 109; 2 Vt. 333; 6 Hill (N. Y.) 554; 1 Am. Law Rev.

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359; 2 *Metc. 114; 4 Id. 255; 1 Pick. 81; 1 Mills' Const. R. 292; 10 Rich. Eq. 12; 7 S. C. 60; 5 Greenl. 261.

March 15th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. These cases were heard together below on demurrer to the complaints. The facts were the same in each. It appears that respondents, in December, 1874, executed to Asa Burke, a resident of the State of Massachusetts, their bond in the penal sum of $8000, conditioned to pay $4000 on December 1st, 1876. This bond was secured by mortgage of real estate situate in Richland county of this state. Asa Burke died in 1879, in Massachusetts, and one Philip Snowden, of that state, was appointed his administrator there by the Probate Court of Suffolk county, Massachusetts. Whereupon this administrator, for value, assigned to the appellant, Dial, a resident of this state, the said bond and mortgage due by respondents, also residents of this state.

Upon this bond and mortgage these actions were instituted by Dial. Respondents demurred to the complaint, and upon the hearing below the actions were dismissed.

The leading questions raised in the appeal, in fact we might say the single question, because, although there are numerous exceptions, they all hinge upon this, is: Whether the plaintiff (appellant,) being the holder of a bond, purchased by him from a domiciliary administrator abroad, has the right and legal capacity to sue said bond in this state, where the debtor resides, and where he, the appellant, resides.

"The owner of personal property, while alive, has always the possession or the right of possession to such property in whatever part of the civilized world it may be situated." Says Judge Butler in Carmichael v. Ray, 1 Rich. 116: "His possession follows his title, and, while alive, he may transfer and assign it to whomsoever he may see proper. And he needs no special authority for this purpose from the laws of the place where the property is situated. He can act in reference to it as any citizen of the place can act as to his property. But it is a mistake to suppose that, upon his death, his legal representatives, appointed under the laws of his domicile, are invested with like title and

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*power as to all such property: while the owner, when alive is, clothed with this authority, yet his death is an event which changes the character of the title, and invests new parties with power over his estate."

It is the duty of every government to protect its own citizens, and especially the rights of creditors, as the material and commercial prosperity of a country depends greatly on this protection and security. If a government fails in this, it fails in one of its most important functions and duties. To this end, therefore, it is well understood that the different governments in which the movable property of a deceased may be left, upon his death, are authorized to intervene and take control. Hence, in every state, we find laws declaring in whom such property, within its limits, shall vest, and in what manner it

shall be administered. True, if the decedent has left a will or testament, upon such testament being established under the lex domicilii, it will usually be confirmed under the jurisdiction where the property is found. And the title of the executor, as well as the disposition of the property therein appointed and directed will be recognized there. But this confirmation must take place and be had in accordance with the laws of the rei sitæ before even an executor under such testament can intermeddle with the property. But in cases of intestacy there must be a grant of administration in such jurisdiction where property is found; it being well settled that the grant of no state, not even the grant of the state of the domicile, can extend beyond the territory of the government which grants it. Nor can it invest the administrator with title to any movable property, except to such as may be found within its limits.

These are the general principles applicable to executors and administrators in cases like this. Wms. on Ex'rs. vol. I., p. 320, and cases there cited, notes 321, 322; Story's Confl. of L., §§ 512, 524.

It has been held in several cases in this state that a foreign administrator has no legal capacity to sue here. He cannot sue, because his appointment stops at the boundary of the state which appointed him, and because the title of the decedent's property, found here, under our laws, can only vest in

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an administrator *appointed here. Carmichael v. Ray, supra; Tillman v. Walkup, 7 S. C. 60; Richardson v. Gower, 10 Rich. 109.

Now if the administrator of Asa Burke, appointed in Massachusetts, his domicile, had brought these actions, can there be a doubt that a demurrer would have been fatal? Or, if the property in question was movable, tangible property, such as horses, cattle, wares and merchandise, located in this state at the time of the death of Burke in Massachusetts, could his administrator, appointed there, institute suit for the recovery of such property? The right to sue for the recovery of property springs from title. Without title no right of action can exist under the authorities referred to above. No title to such property could vest in a foreign administrator. Neither would a foreign administrator have the power to sell or transfer such property, and for the same reason—the want of title.

It may be said, however, that while the principles announced above may be admitted, yet, on the other hand, it will also be admitted that if such property had been found in Massachusetts, the place of Asa Burke's death, that his administrator there would have the power to sell, and that the title of his vendee in such sale would be recognized, not only in Massachusetts but in every state, and wherever it might become necessary for him to enforce it. And it is contended that the bond and mortgage in this case being in the possession of Burke at his death, in Massachusetts, constituted a part of his effects and personal property in that state, to which administration there attached, giving the right to his administrator, Philip Snowden, to sell and transfer, and, therefore, that his assignment to appellant was valid.

This brings up the real question in the case. The bond sued on is, technically, a chose in action. Is a chose in action property, or merely the representative of property? Is it the substance or shadow? And where the obligor and obligee reside in different states, is the property involved in the bond to be regarded as situated in the domicile of the debtor or that of the creditor? If the bond followed the person of the debtor, and is to be considered as bona notabilia in the state where he resides, then the demurrer was properly sustained. If, however, it followed the person of the creditor, and is to be

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considered property *in Massachusetts, then, if the laws of that state have been complied with, the appellant's title would be good. The term chose signifies thing or property. In law it is applied to personal property, as choses in possession are such personal things of which one has possession. Choses in action are such as the owner has not possession, but merely a right of action for their possession. 2 Bl. Com. 389, 397; 1 Chit. Pr. 99.

A chose in action, then, embraces two ideas; first, a visible, tangible thing, and, second, the right to sue for and recover that thing. These are separate and distinct elements, and the one may be situated in one locality and the other in another.

In the case now before the court the chose or thing is situated in South Carolina, and the evidence of the right to sue, at the death of Burke, was in Massachusetts, but that right could not be exercised in that state even by Burke himself, at least so long as the debtor continued in this state. In this view both the thing and the right to sue for it belonged to South Carolina, and, according to strict law, ought to be subject to administration here. Otherwise the great object of each state or government, retaining control over the property of an absent decedent, would be defeated entirely. If a foreign administrator, by virtue of finding choses in action in the possession of his intestate at the time of his death abroad on persons in other states, is so far invested with title as to enable him to assign such choses in action to a third party, the rights of domestic creditors might be wholly destroyed, and all of the laws providing local administration under local authorities for the protection of such creditors eluded and overthrown. It would seem then, upon principle, that the appellant took nothing by the assignment to him of the bond and mortgage in question.

It is true, however, that the decisions in the different American states and in England are not uniform upon this subject, and they leave the question presented here in considerable doubt.

In Leake v. Gilchrist, 2 Dev. 75, it was broadly and distinctly held that debts due by specialty follow the person of the obligee and are assets of the domicile. In that case an assignment by the administrator of the

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domicile in South Carolina of a bond *on a citizen in North Carolina was recognized as valid, and suit brought by the assignee in North Carolina was sustained.

In the case of Harper v. Butler, 2 Pet. 239 [7 L. Ed. 410], the Supreme Court of the United States sustained an assignment of a promissory note due the estate from a citizen of Mississippi by an executor in Kentucky, without probate of the will in the former state, but in that case the debt was contracted in Kentucky, where the testator lived and died, and the assignment was made by an executor.

In Doolittle v. Lewis, 7 Johns. Ch. 46, an administrator of a creditor, who died in Vermont, having in his possession a bond and mortgage of real estate from a citizen of New York, sold said real estate in payment of the bond, but in that case the mortgage contained a power to the mortgagee, his executors, administrators, or assigns, to sell and convey, and the Chancellor, in pronouncing judgment, based the right to sell on this power, saying that the whole proceeding was extrajudicial and founded on private agreement. He did not recognize the administrator as such, or that he had any power by virtue of his foreign appointment, but he recognized the agreement of the parties. * * *

In this case it was said that a payment by a debtor to a foreign administrator would acquit the debtor. This, no doubt, is good law where no administration has been taken out in the state of the debtor, and especially where the intestate has no creditor there.

In Peterson v. Chemical Bank, 32 N. Y. 22, the right of assignee to sue was sustained, but there was full evidence offered that the intestate owed no debts in New York, and, therefore, the rights of creditors were not in the way.

On the other side, in the case of Stevens v. Gaylord, 11 Mass. 267, Judge Jackson said: "If a foreigner or a citizen of any other of the United States dies, leaving debts and effects in this state, these can never be collected by an administrator appointed in the place of the domicile."

In that case an absent debtor, who lived in Connecticut, had come within the jurisdiction of the courts of the State of Massachusetts, and the administrator of the cred-

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itor brought suit on *notes which he had possession of by virtue of his administration in that state.

The court held that the circumstance of the defendant having come into that state, so as to expose himself to action, could not affect the general principle, and that the debtor could not be compelled to pay to any one but to an administrator duly authorized in Connecticut, where the debtor lived.

This must have been upon the ground that the administration in Massachusetts does not give title, even in that state, to notes or other choses in action of deceased parties dying there, on persons in other states. Under this case, if the debtors here had gone into Massachusetts, the administrator of Burke could not have maintained action against them in the courts there. This seems decisive of the question, especially as to the bond sued on in this case. For, if the administrator, by the laws of Massachusetts, has never been invested with sufficient title to sue this bond, even in that state, and is without capacity to sue here, how could he transfer the bond to the appellant so as to invest him with power to sue?

See the case of Cutter v. Davenport, 1 Pick. 81.

In Stearns v. Barnham, 5 Greenl. 261, it was held that "an executor appointed under the laws of another state cannot endorse a promissory note payable to his testator by a citizen of this state [Maine], so as to give the endorsee a right of action here in his own name."

In Pond v. Makepeace, 2 Metc. 114, it was held that an administrator in the State of Massachusetts of one who lived and died in Rhode Island, may sue for and recover a debt due by his intestate from a citizen of Massachusetts, although the administrator of such intestate, appointed in Rhode Island, had already recovered judgment in Massachusetts upon the same claim, it being undefended.

We have found no case in our own reports directly in point. But we think, upon principle and the weight of decisions elsewhere, that the order of the Circuit judge holding that the assignee had no legal capacity to sue in this case should be sustained.

The order below is affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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*[In the cases last above reported, No. 999, Dial v. Gary et al., the plaintiff, Dial, after the opinion was rendered and the remittitur sent to the court below, filed a petition for a re-hearing; which case should properly be inserted here, as follows:]

14 S. C. 584

(Case No. 1035.)

Ex parte DIAL.

(November Term, 1880.)

[1. *Appeal and Error* ⇐1219.]

After the remittitur has been sent to the court below, this court has no jurisdiction of a petition for a re-hearing of the appeal.

[Ed. Note.—Cited in Ex parte Dunovant, 16 S. C. 300; Empire Mining Co. v. Propeller Towboat Co. of Savannah, 59 S. C. 552, 38 S. E. 156; Carpenter v. Lewis, 65 S. C. 403, 43 S. E. 881; Jones v. Charleston & W. C. Ry. Co., 65 S. C. 418, 43 S. E. 884; State v. Adams, 83 S. C. 152, 65 S. E. 220.

For other cases, see Appeal and Error, Cent. Dig. § 4720; Dec. Dig. ⇐1219.]

[2. *Appeal and Error* ⇐1190.]

The reasoning of this court constitutes no part of the judgment itself, which, in every case, is simply an order of affirmance, modification or reversal; and, therefore, when the judgment appealed from is affirmed, a remittitur, which states that the judgment of the Circuit Court is affirmed, is a correct transcript of the judgment of this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4645; Dec. Dig. ⇐1190.]

[3. *Appeal and Error* ⇐832.]

A judgment rendered by this court after full argument, should not be disturbed under petition for re-hearing, except for the strongest reasons.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215–3228; Dec. Dig. ⇐ 832.]

4. Dial v. Gary, ante p. 573 [37 Am. Rep. 737], affirmed.

Petition for a re-hearing of appeal.

This was a petition Ex parte George L. Dial for a hearing of the five cases (ante p. 573 [37 Am. Rep. 737]), in which he was plaintiff and the unsuccessful appellant. The motion was not upon notice to the defendants. It was heard April 25th, 1881.

[For subsequent opinion, see Dial v. Tappan, 20 S. C. 167.]

Mr. R. A. Lynch, for petitioner. Mr. L. F. Youmans, attorney-general, of counsel.

April 30th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. At the November Term, 1880, of this court, the appeal in the cases in which this petition has been filed in re, was heard. On March 15th, 1881, the opinion of the court was filed, and, after the lapse of ten days thereafter, to wit, on March 26th, a transcript of the judgment of the court, a

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copy of which *will be found appended,† was sent by the clerk of this court to the court below, as the remittitur provided for in the code and the rule of the court.

George L. Dial, the appellant in these cases, has now filed this petition, based upon the position that the transcript referred to is not such a remittitur as the law requires in such cases; and that such being the fact, no remittitur has, in fact, been sent down, and he now seeks by his petition to stay the remittitur, as provided in Rule XX. of this court, until the third day of the ensuing term, so as to enable him to move the court for a re-hearing of the appeal in the original cases.

It is well understood, and this was admitted in the argument of counsel, that after the remittitur has been transmitted to the court below in any case, this court thereby loses jurisdiction of the cause, and can afterwards entertain no motion whatever in reference thereto. It has passed from the docket of the court and has gone beyond its reach. Such being the fact, with the view that parties litigant shall not be prejudiced by a too hasty transmission of the remittitur to the Circuit Court, thus cutting off all opportunity for re-examination and review of the judgment of the court when necessary, this court has provided, by rule, that the remittitur shall, in no case, be sent to the court below until after the expiration of ten days from the final determination by this court; and that in the meantime, on application showing sufficient cause, either of the justices, at chambers, may, by order, require the remittitur to be further delayed for such time as he may deem proper, not beyond the ensuing term, subject to the order of the court. Rule XX.

The question, then, in this petition is simply this: Is the transcript sent down in these cases a remittitur in, the legal sense of that term?

Following the provisions of the constitution, the code, Section 12, title "Supreme Court," provides that the Supreme Court may reverse, affirm or modify the judgment,

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decree or order appealed *from, in whole or in part, and as to all of the parties; and its judgment shall be remitted to the court below to be enforced according to law.

The remittitur, then, is the judgment of this court sent to the court below, and this court having no power to render any other judgment than one of reversal, affirmance or modification, the final determination of the

† The remittitur simply states the case, gives the date of the filing of the opinion and by whom written, and adds: "Judgment affirmed and appeal dismissed." This is certified to by the clerk, signed by him, and the official seal of the court is affixed.—REPORTER.

court or order declaring the judgment below reversed, affirmed or modified, must constitute the judgment of this court.

The constitution, Section 8, Article IV., requires that every point made and distinctly stated in the cause and fairly arising upon the record, shall be considered and decided, and the reason therefore shall be concisely and briefly stated, in writing, and preserved among the records of the case.

In pursuance of this provision of the constitution, this court, in pronouncing judgment, either of reversal, affirmance or modification, has uniformly filed an opinion setting forth the reasons for the judgment, to be preserved among the records of the case, as required by this section. It is true that the final determination or judgment has been usually incorporated as a part or conclusion of the opinion, but it has never been understood that this reasoning, upon which the judgment is founded, constitutes any part of the judgment itself. While the practice has been to embrace the two in the same paper, the one as the logical result of the other, yet they might be separate, and contained in distinct papers.

The remittitur sent down in these cases, embracing, as it does, the final determination of the court, i. e., a judgment of affirmance of the order below, in the opinion of the court was a full compliance with the law upon this subject.

The court, therefore, has no jurisdiction of the question raised.

We announce this result with less reluctance, for the reason that we do not think the matters suggested in the petition are sufficient, according to the principles and practice which should govern in such cases, to authorize this court to order the case reheard.

It concerns the welfare of the country that

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there should be an *end of litigation. A judgment rendered after full argument should not be disturbed, except for the strongest reasons.

We may be permitted to say that while the question is not properly before us for adjudication, yet we have looked into the petition and we are unable to discover any sufficient reasons for a change of the opinion already pronounced; that administration in this state is necessary to enable the party to foreclose the mortgage set forth in the complaint, and that we see no insuperable difficulty in the way of foreclosing the same, after the will of Asa Burke, deceased, shall have been admitted to probate, and letters of administration, with the will annexed, shall have been properly granted in this state.

The petition is dismissed.

McIVER and McGOWAN, A. J.'s concurred.

14 S. C. 587

(Case No. 1000.)

CONGDON v. MORGAN.

(November Term, 1880.)

[1. *Evidence* ⇐178.]

Defendant, claiming the land in dispute by adverse possession under color of title, traced a deed under which he held to the custody of a master of the court, and proved the death of the master and an unsuccessful search for it in the office of the master's successor; and then to show, by such deed, the extent of his claim, defendant offered secondary evidence of its contents, which was admitted by the trial judge. *Held*, that it was within the judge's discretion so to do.

[Ed. Note.—Cited in Woody v. Dean, 24 S. C. 502.

For other cases, see Evidence, Cent. Dig. § 584; Dec. Dig. ⇐178.]

[2. *Lost Instruments* ⇐23.]

When it is not known who were the subscribing witnesses to an alleged lost deed, other evidence may be received to prove that the lost instrument was a deed of conveyance.

[Ed. Note.—Cited in Merck v. Merck, 89 S. C. 351, 71 S. E. 969, Ann. Cas. 1913A, 937.

For other cases, see Lost Instruments, Cent. Dig. §§ 51–57; Dec. Dig. ⇐23.]

[3. *Adverse Possession* ⇐16.]

Purchasers made entry upon the land under their deed, marked out their claim by survey and stakes, and upon the portion here in litigation built a wharf on which to land lightwood, &c., and erected a boat-shed, and used both wharf and shed. *Held*, to be such acts of possession under color of title as would ripen into title by possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 83; Dec. Dig. ⇐16.]

[4. *Adverse Possession* ⇐44.]

Such purchasers were joint tenants and one died, and under order of court the property was sold and purchased by the survivor, who paid his bid in full, but took no deed. *Held*, that the survivor did not hold under a different legal title or by a disconnected right.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 226–231; Dec. Dig. ⇐ 44.]

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[5. *Bankruptcy* ⇐259.]

*Quere. May not an assignee in bankruptcy, without any order of the court, sell the bankrupt's interest in lands held adversely by another?

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356–358; Dec. Dig. ⇐259.]

[6. *Adverse Possession* ⇐50; *Bankruptcy* ⇐ 263.]

A party in possession of lands which were sold as the estate of a bankrupt by the assignee in bankruptcy, gave no notice of an adverse claim and bid for the property; neither he, nor those claiming under him, can afterwards object that the sale was unauthorized, because that he was an adverse claimant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 256; Dec. Dig. ⇐50; Bankruptcy, Cent. Dig. § 366; Dec. Dig. ⇐ 263.]

[7. *Adverse Possession* ⇐43.]

Action was brought against A for the possession of land held adversely by him for less than ten years, but before trial he died. The plaintiffs in such action, having matured title by possession (as the verdict here shows), made

their entry upon the land, and, subsequently, were ousted by the heirs-at-law of A. *Held*, that such heirs could not claim that their possession thus acquired was a continuation of A's possession cast upon them by descent.

[Ed. Note.—Cited in Duren v. Kee, 26 S. C. 227, 2 S. E. 4; Johnson v. Cobb, 29 S. C. 380, 7 S. E. 601; Garrett v. Weinberg, 48 S. C. 45, 26 S. E. 3.

For other cases, see Adverse Possession, Cent. Dig. §§ 213-224; Dec. Dig. ⟸43.]

[8. *Adverse Possession* ⟸43.]

[Where one of two joint tenants, after the death of the other, purchased the land at partition sale under order of court, and paid the amount of his bid, but took no deed, *held*, that the time of his possession thereafter might be added to the time of the joint possession of him and his co-tenant, to make up an adverse possession of the necessary length to bar an action.]

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 222; Dec. Dig. ⟸43.]

[This case is also cited in Busby v. Florida &c. R. R. Co., 45 S. C. 316, 23 S. E. 50, as to the operation of the statute of limitations, and in Norris v. Clinkscales, 47 S. C. 496, 25 S. E. 797, and distinguished therefrom.]

Before Hudson, J., Georgetown, November, 1879.

This was an action for the recovery of land and for damages, commenced January 16th, 1879, by George R. Congdon and Benjamin J. Hazard, plaintiffs, against Louisa Morgan, Joseph L. Morgan, Kate L. Garber and her husband, James R. Garber. The defendants, except James R. Garber, were the heirs of Arthur Morgan, deceased. Verdict was for plaintiffs for the land in dispute.

This land was on a peninsula, just opposite the town of Georgetown, included in a grant to Robert Screven in 1711. The plaintiffs claimed by adverse possession under color of title. They purchased from R. E. Fraser, assignee in bankruptcy of W. W. Shackelford, on November 26th, 1874; Fraser sold without any order from the United States District Court. The land was included in Shackelford's schedule in bankruptcy. Shackelford purchased in September, 1856, at a sale made by order of the Court of Equity for partition between said Shackelford and Arthur Magee, deceased, and paid his bid in full, but took no deed from the master. Shackelford and Magee purchased from R. F. W. Allston in 1853.

The Allston deed was not produced. Shackelford testified that it went into the possession of James Tupper, master in equity, in 1856, as a part of the evidence in the partition proceedings then pending between himself and the estate of Arthur Magee. Magrath & Magrath were the attorneys through

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whose *hands it passed; that he had called on such attorneys and had searched the master's office but could not find it, and that Mr. Tupper was now dead. Defendant objected to secondary evidence of the contents of this deed, without better proof of its loss; but the Circuit judge admitted the evidence. Shackelford then testified that he knew the deed was signed, sealed and delivered by R. F. W. Allston in the presence of two witnesses, but he could not now remember who the witnesses were. The partition proceedings were also introduced, which stated the deed and the boundaries of the land by it conveyed. Shackelford testified that soon after the purchase from Allston they had the land surveyed, put stakes at the four corners, and upon one corner (the part here in dispute) built a wharf for landing lightwood, &c.; and in 1856 the present plaintiffs, by permission of Shackelford, erected a boat-shed at the same corner. Wharf and shed were used off and on from the time they were built.

Defendants proved that Arthur Morgan contracted with one Myers, March 26th, 1866, to purchase this lot of land, and immediately entered upon it, erected turpentine works and continued to use it until the works were burned in January, 1877. He received deed November 2d, 1874. Action was brought by these plaintiffs against Morgan, October 6th, 1875, for the possession of this land. Morgan died in August, 1878. These plaintiffs then took possession and erected a building, but were afterwards ejected by the agent of the defendants, who tore down the building and carried it off. This action was then instituted.

Arthur Morgan gave no notice to R. E. Fraser, the assignee of Shackelford's bankrupt estate, that he (Morgan) made claim to this land or any part of it; but, on the contrary, authorized Fraser to bid $100 for him. Congdon and Hazard purchased for $115.

At the close of plaintiffs' testimony defendants moved for a non-suit, which was refused.

The judge was requested by the defendants, in writing, to charge as follows:

1. If you believe, from the testimony, that at the time of the assignment of Shackelford in bankruptcy to R. E. Fraser, Arthur Morgan was in possession of the land in

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question, using it *as his own, and claiming to be the owner thereof, then the sale by the said R. E. Fraser, as assignee in bankruptcy, was without authority and conferred no title upon the plaintiffs, unless he had previously demanded the possession and held it in his hands at the time of such sale.

2. If you believe, from the testimony, that Arthur Morgan was in possession of this land at the time of the sale by the assignee, Fraser, to plaintiffs, claiming the land, the said assignee had no authority, without an order of the court, to sell the land, and such sale is a nullity, conferring no title on the plaintiffs to the same.

The judge refused so to charge, but qualified the requests as follows. As to the first: "Held, that possession alone was not notice to assignee of an encumbrance, and the as-

signee had a right to sell, unless he had other knowledge of an encumbrance." As to the second request: "If the adverse claim were made known to the assignee, he had no authority to sell without an order of court." The judge also charged the jury, inter alia: That the entry by Shackelford and Magee, under the deed from Allston in 1853, the marking out of their claim under said deed by the survey then made, the putting of a stake at each corner of their claim, the building of the wharf on one corner of the same, and that corner being on the part of the land in dispute in this action, the erection of a shed on said wharf in 1856, and the use of said wharf and shed or house (as described by the witnesses) by Shackelford and Magee and their tenants—were such acts of possession, under color of title, as would ripen into a title by possession to the land in dispute, and to all the land embraced within the four stakes before the entry of Morgan in 1866. That Morgan, the ancestor, therefore, entered after the grantor of the plaintiffs had acquired title, and plaintiffs brought their action before his possession had ripened into a title by possession, viz., on October 6th, 1875.

That the sale of the land for partition under the equity proceedings and the purchase thereof by Shackelford, but who got no title deed therefor from the master, did not affect his previous right, as he was already in by his previous title as a co-tenant with Magee—not to any particular part of it, but to

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a moiety of *each and every part. His Honor further charged and instructed the jury that the possession of A. Morgan of the disputed land from March, 1866, to the time of his death, in August, 1878, would not constitute title under the statute of limitations, because the plaintiffs had asserted their claim to the land by their action against Arthur Morgan, commenced October 6th, 1875, before the bar was complete; and when this action abated by his death in August 1878, they, within a reasonable time, commenced the present action for the same land against his devisees—that the statute stopped running on October 6th, 1875, in favor of A. Morgan.

To these charges and refusals to charge, defendants excepted; and from the judgment rendered appealed to this court upon the several exceptions taken in the court below.

The appeal was heard in this court January 16th, 1880, and, being ordered for reargument was again heard December 10th, 1880.

Mr. R. Dozier, for appellants.
Mr. Joseph T. Walsh, contra.

March 15th, 1881. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover possession of a tract of land to which neither party could show a paper title—both claiming by possession. The land was originally granted to Robert Screven on August 11th, 1711. The plaintiffs relied, as color of title, upon a deed from Allston to Shackelford & Magee, alleged to have been executed in 1853, but which was lost. After introducing some evidence of the existence and loss of the deed, the plaintiffs proposed to introduce evidence of its contents, which was objected to, but the objection was overruled and an exception was duly taken by the defendants. Under this deed Shackelford & Magee had a survey of the land in dispute made; placed stakes at each corner of their claim; built a wharf upon it; permitted tenants to erect a shed on the wharf, and made such use of it as is described in the tes-

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timony set out in *the "case." In 1856 the land in question was sold by the master in equity under an order of the court passed upon the hearing of a petition, which is likewise set out in the "case" filed by the administrator of Magee, who had died in the meantime, with the concurrence and assent of Shackelford. At this sale, which was made on September 11th, 1856, Shackelford bid off the land and paid the purchase money, but took no titles from the master, and continued to use the land as before. Things remained in this condition until March 26th, 1866, when Arthur Morgan, under whom the defendants claim as heirs-at-law and devisees, took possession of the land, claiming to have bought and paid for it at that time, though the deed made by the attorney in fact of his vendor was not executed until November 2d, 1874, and he remained in possession up to the time of his death in August, 1878. On February 28th, 1874, Shackelford, having been adjudicated a bankrupt, made an assignment of his estate, including the land in dispute, which was afterwards sold by the assignee, without an order from the Bankrupt Court, and bought by the plaintiffs. It appears that Arthur Morgan was aware of this sale, and not only interposed no objection to it but authorized an agent to bid for him nearly the amount at which it was knocked down to the plaintiffs. Arthur Morgan continuing in possession, the plaintiffs commenced an action against him on October 6th, 1875, to recover the possession of the land, which was pending at the time of his death, when it abated. After his death the plaintiffs took possession of the land and erected a building on it, when they were ousted by the act of the agent of the defendants, and this action was commenced against them on January 16th, 1879. The jury found a verdict for the plaintiffs, and judgment being entered thereon, the defendants have appealed; and we propose now to consider the several questions raised by the appeal.

The first question is whether the Circuit judge erred in admitting secondary evidence of the contents of the alleged lost deed from Allston to Shackelford & Magee. Appellants contend: 1st. That there was not sufficient

evidence of the loss of the deed. 2d. That there was no competent evidence of the existence of the deed as a genuine instrument.

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*In Floyd v. Mintsey, 5 Rich. 372, 373, it is said: "No uniform rule can define the requisite evidence to establish the loss. This must depend on the circumstances of each case." And in Berry v. Jourdan, 11 Rich. 75, Whitner, J., in delivering the opinion of the court, upon a question similar to the one now under consideration, uses this language: "There are certain general propositions bearing on the question sufficiently familiar to the profession, and to be found collected by most of the text writers on evidence. Their proper application will so much depend on the peculiar circumstances of each case, that but little instruction would be derived from any attempt to embody them in an opinion." Neither shall we undertake, on this occasion, to lay down any absolute rule upon the subject, for, as is said in 1 Greenl. on Ev., § 558, "it should be recollected that the object of the proof is merely to establish a reasonable presumption as to the loss of the instrument, and that this is a preliminary inquiry addressed to the discretion of the judge." Hence, where the case, as presented to us, does not show that the judge has violated any of the established rules of evidence in the conduct and determination of this preliminary inquiry, we cannot say that there was any error on his part in admitting the secondary evidence. In this case we are unable to perceive any such violation of the rules of evidence. The deed was traced to the possession of the master in equity, which is the last heard of it, by whom it is mentioned as being before him at the time he made his report on the petition filed for the sale of the land said to be conveyed by it, the record of that petition and the proceedings under it having been received in evidence without objection from appellants; and then there was evidence of an unsuccessful search in the office of the master, who was dead at the time of the trial below. We do not see that there was any error on the part of the Circuit judge in holding that the proof of loss was sufficient to let in the secondary evidence, especially when it is remembered that this deed was relied upon not as a link in a chain of title, but merely to give color of title to support the plaintiff's claim by possession, for there was no effort to connect Allston, the grantor, in the alleged lost deed, with the original grant. The preliminary evidence of-

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fered here was certainly *much stronger than that which was held to be sufficient in Edwards v. Edwards, 11 Rich. 537.

The second objection is that there was no legal evidence of the genuineness of the alleged lost deed. This objection rests, as we understand it, upon the proposition that in order to prove a deed it is necessary to introduce one of the subscribing witnesses, or, if they be dead, to prove their handwriting, and that this applies as well to a lost deed as to one produced in court. As a general proposition this is undoubtedly true, but in 1 Greenl. on Ev., § 572, among the exceptions to this rule is the following: "If the instrument is lost and the name of the subscribing witness is unknown," citing Keeling v. Ball, Peake on Ev., Appendix, p. 78, which, on examination, will be found fully to sustain the text. To same effect see Jackson v. Vail, 7 Wend. 125, and our own case of Barton v. Keith, 2 Hill 537. When, therefore, it is made to appear, as in this case, that the subscribing witnesses to a lost deed are unknown, other evidence may be resorted to for the purpose of establishing the existence of the lost instrument as a deed.

The next question raised by the appeal is as to the correctness of the charge of the Circuit judge as to the character of Shackelford's possession. There can be no doubt but that the cases of White ads. Reid, 2 N. & McC. 534; McBeth v. Donnelly, Dud. 177, and Slice v. Derrick, 2 Rich. 627, cited by the counsel for appellant, do establish the doctrine that mere fugitive, disconnected trespasses, such as cutting trees, stripping bark, &c., however long continued, will not constitute such a possession as will ripen into a title under the statute of limitations; but that was not the character of the possession which the jury, in this case, were instructed would be sufficient. The charge was: "That the entry by Shackelford & Magee, under the deed from Allston, in 1853, the marking out of their claim under said deed by a survey then made, the putting of a stake at each corner of their claim, the building of the wharf on one corner of the same, and that corner being on the part of the land in dispute in this action, the erection of a shed on said wharf in 1856, and the use of said wharf and shed or house [as described by the witness,] by Shackelford & Magee and their

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tenants were such acts of possession, *under color of title, as would ripen into a title by possession." In this instruction there was clearly no error. Turpin v. Brannon, 3 McC. 261; Allen v. Johnson, 2 McM. 495.

It is argued, however, that after the sale by the master, Shackelford's possession was in a different right and cannot be connected with that of Shackelford & Magee prior to the sale. But Shackelford took no deed from the master, and so far as his legal title was concerned it was the same after as before the sale, and, therefore, there was no change in the character of his possession, which would have enured to the benefit of his cotenant as well as of himself, though such co-tenant would be estopped from claiming any such benefit by the equitable right of Shackelford arising from his having bid off the land and paid the purchase money, and the whole benefit would, in fact, enure to Shackelford.

Appellants next contend that the sale by the assignee in bankruptcy was a nullity, inasmuch as Morgan was then in possession, claiming adversely to the bankrupt, and that when such is the case the bankrupt act confers upon the assignee no power to sell without an order of the Bankrupt Court. According to the view which we take of this case, it will not be necessary to consider what is the proper construction of the bankrupt act in this respect. But we may remark, in passing, that while we can very well understand why a sale by an assignee in bankruptcy of property in the possession of, and claimed by, another should not have any effect in concluding the rights of such claimant unless he is brought before the court and afforded an opportunity to litigate his rights, we do not see any reason why the assignee may not sell the interest of the bankrupt, whatever it may be, leaving the purchaser to litigate with the adverse claimant. As we have said, however, we do not propose to discuss this question, not regarding it as necessary to the decision of this case, because there is no evidence that there was any adverse claimant of the land in question, known to the assignee, at the time the sale was made. On the contrary the evidence is that Morgan, who was then in possession, not only gave no notice to the assignee of any adverse claim, but stood by making no objection to the sale, and actually authorized the assignee to bid for him very nearly the amount for which it was sold to

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the plaintiffs. We do not think, therefore, that either Morgan or those who claim under him are in a position to make the question as to the validity of the sale raised in the grounds of appeal.

The next question is whether the defendants have made out their claim by possession. The possession of Arthur Morgan, under whom the defendants claim, had not ripened into right at the time of his death, inasmuch as an action had been brought against him by the plaintiffs within the ten years, which was pending at the time of his death, when it abated. After his death the plaintiffs, having previously acquired title by possession, as we must assume after the verdict of the jury, took possession, as they had a right to do; for the possession of Arthur Morgan could not, as it would at common law, by descent, be cast on his heirs, so as to bar the plaintiff's right of entry and put them to the necessity of bringing an action. Code, § 110. When, therefore, the defendants, by their agent, McQuaid, subsequently took possession and ousted the plaintiffs, that was a new trespass, for which they became liable to suit, and their possession must be regarded as originating in such trespass, and not as a continuation of the possession of Arthur Morgan cast upon them by descent, because such possession had not only been interrupted but put an end to by the possession rightfully taken by the plaintiffs, after the death of Arthur Morgan, by an entry on the land, from which they were subsequently ousted by the illegal act of the agent of the defendants. It is clear, therefore, that the defendants have failed to make out their title by possession.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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*(Case No. 1002.)

WITHERS v. JENKINS.

(November Term, 1880.)

Deed in 1867 to A., in trust for B., the wife of grantor, during her natural life, and then to M., the daughter of grantor, for her sole and separate use, benefit and behoof, and the lawful heirs of her body, share and share alike, not liable for the debts or contracts, and free of the control of any husband with whom she may intermarry, and should M. die before B., leaving children, then in trust for such children, and in case M. remains unmarried, or being childless, then to such person as she may appoint as her heir by her last will. B. died in August, 1868. M. married in January, 1869, and died in November following, leaving issue a son, who died soon afterwards. M. lived with her father until a short time before her marriage, when she removed to another house upon the same premises, occupied by her half-brother, and remained there until her death, but received from the premises no rents or profits. The trustee refused to accept. M. and her husband brought action in 1869 against the grantor for the land embraced in his deed, and alleged that he had been in possession, and in receipt of rents and profits. The grantor then answered, denying the execution of the deed. *Held*,

[1. *Deeds* ⇐126.]

That B. took a life estate with an equitable estate in fee conditional in remainder to M., with a power to M. to dispose by will of the whole estate if she never married, or died childless.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 356½, 357, 445, 449; Dec. Dig. ⇐ 126.]

[2. *Curtesy* ⇐9.]

That a husband is entitled to hold, as tenant by the curtesy, lands in which his deceased wife was seized of a fee conditional.

[Ed. Note.—Cited in Gaffney v. Peeler, 21 S. C. 69; Odom v. Beverly, 32 S. C. 112, 10 S. E. 835.

For other cases, see Curtesy, Cent. Dig. § 25; Dec. Dig. ⇐9.]

[3. *Curtesy* ⇐7, 9.]

That when curtesy would attach to a legal estate, it should also attach to an equitable one of the same quantity and character, but in both four things are requisite—marriage, actual seizin of the wife, birth of issue and death of the wife; and curtesy may be defeated by the terms of the deed, or by any circum-

stance which would have determined the wife's estate, if she were living.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. §§ 5, 20–30; Dec. Dig. ⟸7, 9.]

[4. *Curtesy* ⟸11.]

That the husband of M. was not entitled to an estate by curtesy in this case, because M. had no seizin of the land here granted, as she was never in actual possession, nor ever received any rents and profits.

[Ed. Note.—Cited in Withers v. Jenkins, 21 S. C. 368.

For other cases, see Curtesy, Cent. Dig. § 22; Dec. Dig. ⟸11.]

[5. *Curtesy* ⟸11.]

And further, his curtesy was excluded by a necessary implication arising from the terms of the deed.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 22; Dec. Dig. ⟸11.]

[6. *Constitutional Law* ⟸93.]

The constitution of 1868 does not affect the questions here arising under this deed, which was executed in 1867.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 183; Dec. Dig. ⟸93.]

7. Wright v. Herron, 6 Rich. Eq. 407, approved.

Before Pressley, J., Richland, November, 1878.

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*On November 6th, 1867, Samuel Jenkins conveyed to Francis Lopez, his executors and administrators, a half-acre lot in the city of Columbia, upon the following trusts:

In trust, nevertheless, to and for the following uses and purposes, that is to say, for the sole and separate use, benefit and behoof of my said wife, Mary Jenkins, for and during the term of her natural life, provided she remain a widow in the event of the death of me, the said Samuel Jenkins; and after the death or marriage of my said wife, Mary, then, in trust, for the sole and separate use, benefit and behoof of my daughter, Mary Jenkins, and the lawful heirs of her body, share and share alike, not liable for the debts or contracts, and free of the control of any husband with whom she may intermarry. And should my said daughter, Mary, die before my said wife, Mary, leaving a child or children, then in trust for such child or children, share and share alike; and in case of my daughter remaining unmarried or being childless, then in trust to such person as she may appoint as her heir by her will and testament duly executed, notwithstanding any future coverture.

Samuel, with his wife and daughter, resided upon this land until the wife's death on August 16th, 1868. Mary, the daughter, remained with her father for some time afterwards, when, to make room for boarders, she moved into a house on the same land occupied by her half brother, Mott. There she married Thomas Withers in January, 1869, and lived there with her husband until her death in November, 1869. Samuel has continued to live in the dwelling-house on the land. Mary left issue a son, who died in March, 1870. Lopez refused to accept the trust or to act as trustee. Neither Lopez, Mary Withers or Thomas Withers ever received any rents or profits from the land, upon which were several houses.

In April, 1869, Withers and wife filed their bill of complaint against Samuel Jenkins and Francis Lopez, claiming that Mary Withers, upon the death of her mother, "became entitled to the use and enjoyment" of the said lot of land; and that the said Samuel Jenkins, since that time, had been in the possession of the principal part of the said lot, and in the receipt of the rents and profits of the same; and praying, in substance, that her rights and interests in and to the said lot of land might be protected and enforced.

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*The answer of Samuel Jenkins to the said bill of complaint denied the legal execution of the said deed, and contested all the rights and interests under it claimed by the said Mary Withers. Lopez was never served with process. Mary Withers having died, Thomas Withers filed a supplemental complaint against Samuel Jenkins, setting out the facts here stated, and claiming to be tenant of this land for life by the curtesy of England; that Samuel Jenkins had had possession since the death of Mary Withers, and demanding possession and rents and profits. The defendant answered; his defences are stated in the referee's report.

All issues of law and fact were referred to F. W. Fickling, Esq., who made the following report:

The issues of law and fact in this action have been referred to me.

The issues of fact are—

1. Whether the alleged deed referred to in the pleadings herein, dated November 6th, 1867, and purporting to have been made by the defendant, Samuel Jenkins, to one Francis Lopez, upon certain trusts therein mentioned, was duly executed and delivered by the said Samuel Jenkins.

2. Whether Mary Jenkins, the daughter of the said Samuel Jenkins, at the date of her marriage with the plaintiff, Thomas Withers, was above the age of twelve and under the age of sixteen years.

3. Whether the said plaintiff, Thomas Withers, did contract matrimony with Mary Jenkins, the daughter of the defendant, Samuel Jenkins, against the will of the said Samuel Jenkins.

I find—

1. That the said deed was executed and delivered by the said Samuel Jenkins.

2. That the said Mary Jenkins was, at the date of her marriage with the plaintiff, Thomas Withers, above the age of twelve and under the age of sixteen years.

3. That the said plaintiff, Thomas Withers,

did not contract matrimony with Mary Jenkins against the will of her father, Samuel Jenkins.

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*The evidence upon which these findings are based is herewith submitted and made part of this report.

The only issues of law involved in the action are: First. What estate Mary Jenkins took in the property under the deed; and, Second. What estate her husband took upon her death. And I determine these issues of law as follows:

First. That Mary Jenkins took under the deed in question an estate in fee simple conditional. Second. That having had issue born, who could have inherited the estate according to the form of the deed, and having died, leaving surviving her her husband, Thomas Withers, that the said Thomas Withers takes an estate for life, in the premises described in the deed, as tenant by the curtesy of England, of his deceased wife, Mary.

It was proved to my satisfaction that the annual value of the premises was $200 per annum. I therefore order and adjudge that the possession of the said premises be delivered to the plaintiff Thomas Withers, and if the same be refused, that the plaintiff have a writ of habere facias possessionem, which the sheriff of Richland county is hereby required to execute. Second. That the plaintiff, Thomas Withers, do recover from the defendant, Samuel Jenkins, the sum of $1841.66, for mesne profits from August 16th, 1868. Third. That the costs and disbursements of the proceedings be, as agreed by the parties, made a charge and lien upon the property involved in the action.

And I direct that the plaintiff have judgment accordingly.

The case came to trial at the Circuit Court upon exceptions by defendant to the referee's report. The Circuit decree is as follows:

On November 6th, 1867, defendant conveyed his lot in Columbia to Francis Lopez, in trust for defendant's wife, Mary, and after her death in trust for the sole and separate use of his daughter Mary and the lawful heirs of her body, with other provisions hereafter stated.

The daughter surviving her mother married the plaintiff and bore a child, which, surviving her, died before this action was commenced. Plaintiff claims curtesy in said lot, alleging seizin thereof by his wife in her

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lifetime. Of such seizin the only *proof is that she remained there after her mother's death in the house with her father, and afterwards in an out-house with her half brother. The trustee did not take or demand possession of the premises, and no rent for the same was ever paid to her. As the referee has not reported any finding of the fact of her seizin, it would be necessary to recommit the case to him, if, under the deed, it be held that such seizin would entitle the plaintiff to curtesy.

Defendant claims that his daughter was not sixteen years old at the time of her marriage, and alleges that he did not consent to the same. If this were so, then, under the statute of Philip and Mary, the husband, by such marriage, could acquire no interest in his wife's estate. But the referee finds that the marriage was not without the consent of the defendant, and I sustain that finding.

The remaining question is one of law, not yet decided in this state. Before the case of Wright v. Herron, many of us agreed with Chancellor Kent that our act of 1791 abolished curtesy in this state. On that point the Court of Errors, in the case of Wright v. Herron, was equally divided, a majority of the law judges holding that curtesy was so abolished. But the case being in equity, was decided by a majority of the Chancellors in favor of the curtesy, and so the old rule was then reversed, and "the law must follow equity." That decision is binding to the extent of allowing curtesy to the husband where the wife held a legal estate, but Chancellor Dargan, in his decree, indicates that it would be otherwise in the case of a trust estate, and the Appeal Court does not dissent from his decree on this or any other point.

As the case now before me relates to a trust estate, nothing in any of our decisions compels me to follow the irrational precedent of the English chancery, which allows curtesy but refuses dower in such case. That precedent was the creature of a stern necessity. In England, frequent forfeitures of estates for treason during her civil wars, had compelled a very general resort to settlements in trust, which were not subject to forfeiture. Thereby it became very important that the English courts, in perfecting such settlements, should attach to them every possible incident of legal estates. They, there-

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fore, allowed curtesy in trust estates, *and would also have allowed dower therein, but could not do it, because thereby too many estates would have been unsettled.

But, we, in this state, were entirely free in that respect: without danger or injury to any vested interest, we might have allowed dower in trust estates, and yet we decided not to do so. Why, then, should we now adopt a different rule in the matter of curtesy, and thus voluntarily expose ourselves to inconsistency, to which the English chancery unwillingly submitted under pressure of necessity? We have not heretofore hesitated to depart from its rulings whenever the genius of our institutions required it, and now, under our new constitution, it would be a shameful step backward to adopt, for the first time, that rule of the English courts which, in a trust estate, allows to the husband what it refuses to the wife.

Further: even if we adopt the English

precedent, yet, in my opinion, the special provisions of the deed in this case very clearly express the grantor's intention to exclude the husband from all interest therein and thus bars his curtesy. The settlement is to the sole and separate use of the wife—not liable for the debts or contracts and free from the control of any husband; if she die before her mother, her children take the whole estate, excluding the husband; if she die childless, leaving a husband, she could not appoint her heirs, and the estate must, in that case, revert to the grantor: but if she remain unmarried, she is authorized in that case to appoint her heir by will, and thus to defeat the reverter. The invalidity of these limitations is not now in question. Whether valid or not, they clearly express the intent of the grantor to exclude the husband from all interest in the said estate, and the cases are conclusive that under such deed the husband has no right of curtesy. In Roberts v. Dixwell, 1 Atk. 606, Lord Hardwicke then admitting that the husband might have curtesy in land settled to the sole and separate use of the wife, yet refused it under the settlement, because other terms therein excluded it.

In Herle v. Greenbank, 3 Atk. 715, he went still further, and held that even without other words of exclusion, that settlement to the sole and separate use of the wife did not allow curtesy to the husband. Sir John Leach,

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in the case of Morgan v. Mor*gan, 5 & 6 Mad. 248, expresses dissent from Herle v. Greenbank. Such dissent was not necessary to the case before him. That was a settlement to the sole and separate use of the wife for life, with unlimited power to appoint by deed or will, and for want of appointment the estate to become hers and her heirs forever. In such case the Vice-Chancellor very rightly held that by the words "sole and separate use," the husband was excluded only during the life of the wife, and that not being wholly excluded he was entitled to curtesy in the said estate. That decision is, therefore, not authority to limit the force of the words "sole and separate use," when they are not confined, as in that case, to the life estate; much less can it be authority to render useless and unmeaning other provisions of a deed which clearly show its intent to exclude the husband. Whatever be the rule in England, I hold—

1. That in this state the case of Wright v. Herron is not to be extended so as to allow curtesy in a trust estate.

2. That even if such allowance be permitted in some trust estates, a settlement for the sole and separate use of the wife would exclude that allowance.

3. If the words "sole and separate use" do not, of themselves, exclude the curtesy, it is, nevertheless, excluded by the deed in this case, which, in its other provisions, clearly manifests that intent.

It is therefore adjudged and decreed that defendant, as grantor of the said lot in fee conditional, is now entitled to hold the same as his estate in reversion.

It is further adjudged and decreed that plaintiff is entitled to such rent of the premises as accrued after the death of defendant's wife in August, 1868, until the time of the death of plaintiff's son.

It is further ordered that the case be recommitted to the referee to take testimony and report the time of the death of plaintiff's son, and the amount of the rent then due to him; that upon the filing said report, plaintiff have leave to move at chambers to confirm the same, with further leave to enter judgment and issue execution against the defendant for the amount of the said rent, with costs.

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*Plaintiff appealed to this court, and the appeal was argued May 20th, 1880.

Mr. J. D. Pope, for appellant.

Proposition I.—That the question of seizin is not a question of fact, but a conclusion of law, which is derived from the facts found. A feoffment has its foundation in the facts of the ceremony of livery, but the seizin is the legal result of the ceremony. The same is the result of conveyances deriving their effect under the statute of uses; for there, without actual entry or livery of seizin, the bargainer has a complete seizin in deed. Com. Dig., "Uses," B. 1; 1 Cruise's Dig. 12; Shep. Touch. 223; 2 Bl. Com. 209; Co. Lit. 11 b. Hence we have the several modes of seizin. First. Seizin in deed. Second. Seizin in law. Third. Constructive seizin in deed. The latter, for all legal purposes, equivalent to an actual seizin. See 1 Rich. L. 165; 8 Cranch 244–249; 1 Bay 107; 4 McC. 253. Is not, then, the referee right when he uses the words, "Mary, having had issue born who could have inherited the estate according to the form of the deed," &c.? That is to say, there was seizin in Mary by deed.

1. Was not Lopez seized in fee as trustee under the deed? The deed conveys to the trustee by the words "grant," &c., to his "executors and administrators." The trustee takes the legal estate (notwithstanding the want of the technical words) as governed by the object and scope of the trust. Vide Lewin on Trusts, 249–250; Hill on Trustees. But, says the Circuit decree, "the trustee did not take or demand possession of the premises and no rent for the same was ever paid to her." We reply, a trust never fails for the want of a trustee. Withers v. Jenkins, 6 S. C. 125.

2. Was not Mary seized of the equitable estate? That no rent was ever paid to Mary, can, in no way, affect the question of her

seizin. 4 Hare 413; Lewin on Trusts 622, 623; 8 Cranch 246. Mary was a minor and lived upon the land, as is admitted by the decree. The confusion of the decree arises from applying good doctrine in the wrong way. Had Mary, the mother and life tenant, been in possession, there could have been no seizin in Mary, the daughter. But the pos-

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session of Samuel, *the father, could have no such effect. With the death of the life tenant no estate interposed to prevent seizin in law and in fact meeting in Mary, the daughter.

Proposition II.—The next proposition we advance is, that Mary, the daughter, took under the deed in question an estate in fee simple conditional. This is the legal conclusion of the referee. The Circuit decree does not express any dissent from this proposition, but seems to take it for granted. It will be well, however, to fortify it. Vide 4 Kent 221, et seq. For the collected authorities, see foot-note of Chancellor Wardlaw in 5 Rich. Eq. 441; 2 Jarm. on Wills, 277, 280, 284, 286, 291.

Proposition III.—Our third proposition is, that curtesy is allowed in estates in fee conditional at the common law. The pre-requisites are: First. Seizin. Second. Marriage. Third. Death of wife. Fourth. Birth of issue capable of taking the inheritance. The conditions are here all present. Bacon's Ab., tit. "Curtesy;" Chancellor Johnstone in 3 Rich. Eq. 564, 568. In that case it was held there was no "curtesy," because there was no fee conditional. 5 Rich. Eq. 441, 446; 6 Rich. Eq. 406. The Circuit decree does not quite undertake to overrule Wright v. Herron. But in Wright v. Herron the law did not follow equity, but equity still followed the law. While sitting in the Court of Errors the judges of that court were, in fact, all law judges. "Curtesy" was the recognized law of the state as a part of its jurisprudence from the earliest times. It was attempted in Wright v. Herron to establish that the old recognized law was abolished by the act of 1791. The Court of Errors refused so to declare. The law of "curtesy" still stood and equity followed it. Since that decision curtesy has been considered in South Carolina a rule of property. The Circuit decree seems reluctantly to so admit, but refuses to permit equity to follow the law.

Proposition IV.—Our fourth proposition is, that curtesy to the husband is allowed in trust estates, and is not confined to legal seizin only.

Chancellor Dargan, in Wright v. Herron, does say, by a slip of the pen, (for it could be nothing else,) and not a part of the case, that dower and curtesy "attach upon legal,

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not upon trust *estates." Chancellor Dargan must be deemed to have intended to say that curtesy did not attach to the ancient use. It is elementary (4 Kent 30, 31, 32,) that dower did not attach to a trust estate, and that curtesy did so attach. Vide Lewin on Trusts 621. This was the recognized distinction; and in England, instead of bringing curtesy down to the status of dower in the legal estates, dower was lifted up to the status of curtesy in trust estates. 3 and 4 Wm. IV., ch. CV.

See 3 Atk. 715; 1 Atk. 666; Lewin on Trusts 621; 5 Mad. 408; 2 Vern. 536; 4 Hare 400; 1 P. Wms. 108; 3 Atk. 469; 7 Viner, tit. "Curtesy;" 14 Sim. 125; 4 Kent 28–34; 8 Paige 643; 4 Day 298.

In Virginia, by statute, husband has curtesy in trust estate. 1 Sumn. 128; 17 Mo. 228; 7 Md. 26; 23 Penna. St. 231; 1 Cald. 641; Wright v. Herron, supra. In the light of the cases, read the words of the deed in connection with the language of the Circuit decree, that "the provisions of the deed in this case very clearly express the grantor's intention to exclude the husband from all interest therein, and thus bar his curtesy." See Lewin on Trusts 623; 2 P. Wms. 316; 3 Eq. Cas. Ab. 730, cited by Kent in 8 Paige 643, and note to this last case. So far, from the words of the deed excluding curtesy, it is just the other way.

In Conclusion.—If there ever was a reason why curtesy should have been deemed not to exist in South Carolina, that reason has ceased. First. The wife now holds absolutely her own estate, and may strip the husband to the last penny of her estate. Second. Curtesy becomes but a precarious compensation to the husband out of the wife's estate for her absolute right of dower in his.

Mr. D. B. De Saussure, contra.

Mr. J. P. Carroll, in reply.

A re-argument was ordered by this court, and the attention of counsel was asked to this point:

What effect has the late constitutional pro-

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vision (as to the con*trol given to a married woman over her own property,) upon the rights of her husband as tenant by the curtesy?

The case was re-argued in full by the same counsel, January 12th, 1881.

March 18th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. On November 6th, 1867, the defendant made a deed of trust. [See provisions in the "case."] Mary Jenkins, the wife of defendant, died in lifetime of defendant, and before Mary, the daughter, and disappears entirely from the case. Mary, the daughter, married the plaintiff in January, 1869. Mary, the daughter, died in November, 1869. She left a male child at her death. This child died in March, 1870, leaving the plaintiff, his father, surviving, who now claims an estate of curtesy under the deed.

Is the plaintiff (appellant) entitled to an estate, by the curtesy, in the real property mentioned in the pleadings? is the main question in this case.

An estate by the curtesy, or as it is more commonly called, by curtesy, is defined by Mr. Washburne as succinctly and as clearly, perhaps, as by any other writer upon this intricate subject. He says that "it is the estate to which a husband is entitled, upon the death of his wife, in lands and tenements of which she was seized in fee simple or in fee tail during coverture, provided they have lawful issue, born alive, which might have been capable of inheriting the estate. It is a freehold estate for the term of his natural life." Book I., ch. VI., p. 148. He says, further, that "equity, following the law, holds that where the wife is cestui que trust in fee simple or fee tail, the husband is entitled to curtesy in the trust estate in the same manner as in the legal estate." Watts v. Ball, 1 P. Wms. 109; Co. Lit. 29 a, n. 165.

This estate is of very ancient origin, and it has prevailed from an early period, with well-defined qualities and incidents, not only in England but in other countries. It came to us with the common law, and before the act of 1791, it no doubt would have been enforced here as to all estates to which it was an incident, as a part of the common law.

The act of 1791, however, in abolishing

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primogeniture and *providing for the distribution of intestate estates, enacted certain provisions in conflict with this right as to fee simple estates. It declares in the sixth section "that on the death of any married woman, the husband shall be entitled to the same share of her real estate as is herein given to the widow out of the estate of the husband." Upon the construction of this act it has been held that the husband is not entitled to his curtesy in the fee simple estates of his wife, or, at least, that he is put to his election. Gray v. Givens, 2 Hill's Eq. 511. This is upon the ground that the interest which the husband takes under the act is more important than the curtesy, and, besides, the two could not be enjoyed together. They are in conflict, and the curtesy has practically given way since the passage of this act. If, then, the wife of the appellant here had taken under the deed an absolute fee simple, either at law or in equity, we would have but little difficulty in deciding this question. In fact, we suppose the question would not have been made.

The estate of the wife, however, is not a fee simple. As we construe the deed it is a fee conditional at common law—that estate out of which, in England, the statute de donis constructed fee tails; but the statute de donis has never been adopted in this state, therefore the common law estate of fee conditional stands untouched with us, and it has been often recognized by our courts.

Chancellor Wardlaw, in Wright v. Herron, said: "Whatever diversity there may be among judges of this state concerning the implication of a fee conditional, and as to some of the incidents of the estate, the existence of the estate itself, with most of its attributes, according to the common law, has been recognized by many decisions in our own courts." He refers to numerous cases in a note. 5 Rich. Eq. 449.

There is no doubt, either, as to the fact that this estate may exist in equity as a trust or use as well as in law, and, when thus existing in equity, is subject to all the rules of descent and otherwise, and is accompanied with most of the incidents and attributes applicable to such estates at law.

We think that in this case the wife of Samuel Jenkins took a life estate under the deed, with an equitable fee conditional in

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*remainder to his daughter Mary (afterwards the wife of the appellant,) with a power in her to dispose by will of the whole estate in the event that she never married or died childless. This is the plain language of the deed, and it needs the application of no abstruse rules of interpretation or construction to reach that conclusion.

The deed in the first instance declares the estate to the wife of the grantor for and during the term of her natural life. This gave her a life estate. After her death or marriage, then to his daughter Mary and the lawful heirs of her body. This is strictly a fee conditional at common law. But should she die, remaining unmarried or childless, then to such persons as she might appoint by will as her heirs. This conveys a power of appointment.

The full text of the deed will be seen in the "case," but enough is referred to here to determine the quantity of the estate given to the different parties mentioned. And we do not suppose that, had this deed conveyed legal estates simply, without the intervention of a trustee, that there could have been any difference of opinion as to the estates granted, i. e., a life estate to the wife and a fee conditional in remainder to the daughter, with the power, under certain contingencies, to the daughter to appoint by will such person or persons, as she might see proper, to take after her death.

The power of appointment given to Mary did not enlarge the fee conditional to an absolute fee simple in her. This power was not an absolute power, but one which was to be exercised only upon the happening of certain contingencies. These contingencies never happened, and, therefore, the fee conditional was never defeated by the exercise of the power. Nor was it enlarged in Mary by the grant of this power, because such enlargement never takes place where the first estate is distinctly marked out and defined, such as a life estate or other estate less

than a fee simple; and where the exercise of the power is limited and restricted to the happening of contingencies, to have the effect of enlarging the first estate, it must be indefinite and the power must be absolute and unconditional. Pulliam v. Byrd, 2 Strob. Eq. 134.

The conclusion of the court is, that Mary

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took a fee condi*tional in equity. It is elementary that the term "heirs of the body" are precisely the terms required to be used to describe and measure this estate, while the word "heirs," without qualification, creates a fee simple.

The curtesy of the husband, as a general rule, will attach to a fee conditional in the wife, whether his estate be an estate in law or a trust in equity. This is the general rule in England and many of the states of the Union.

In our state, in the case of Wright v. Herron, 6 Rich. Eq. 407, it was held to attach to a fee conditional at law. True, the Court of Errors failed to agree in that case; but when it was returned to the Court of Chancery three of the learned Chancellors—Wardlaw, Johnstone and Dargan—to one, sustained this estate. This was upon the ground that the act of 1791, as to distributions, did not touch fee conditionals. That act applied to fee simple estates, and fee conditionals were left as they existed at common law—certainly as to their descendible quality. And it followed as a necessary consequence, that the other incidents to such estates had not been disturbed by that act. We think that the case of Wright v. Herron is authority, not only as a decision, but upon principle.

We have already seen that there is no difference between legal and equitable estates as to their general incidents and qualities, and, consequently, it would seem, that where the curtesy would attach to a legal estate, it should also attach to an equitable one of the same quantity and character. And it has been so held frequently, as will be seen from cases hereinafter cited.

These are the general rules applicable to this subject; but before the curtesy can attach in any case, either legal or equitable, fee simple or fee conditional, all the authorities agree that four things are requisite, viz., marriage, actual seizin of the wife, issue and death of the wife. A failure in any one of these will prevent the curtesy from attaching, but when they all occur, the law vests the estate in the husband immediately on the death of the wife, without entry. This estate is said to be initiate on issue had, and consummate on the death of the wife.

Seizin of the wife is one of the essential requisites. Seizin was formerly understood to be a corporeal investiture by actual

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*livery of seizin. How this was effected it is not now necessary to explain, as it passed away after written muniments of title came to be used. The delivery of a deed, where there is no adverse possession or claimant, has been generally regarded as a sufficient seizin, on the ground that the possession follows the title. Green v. Liter, 8 Cranch 229 [3 L. Ed. 545]. This has been considered sufficient as to legal estates to authorize the attaching of the husband's curtesy. And as to equitable estates, the receipt of the rents and profits by the cestui que trust has been held to constitute an equitable seizin for the same purpose.

There is another important qualification affecting the right of the husband to his curtesy, especially as to the equitable estates of his wife, and that is: This right may be excluded by the grantor, and this will take place where the terms of the deed clearly show that such was the intention of the grantor, either by express declaration of such intent or by necessary implication from the language employed.

It has been held, also, as another important incident or qualification of estates of curtesy, that any circumstance which would have defeated or determined the estate of the wife, if living, will, of course, put an end to the curtesy, as this right will fall and be defeated with the estate out of which it was to be derived. And this applies to both legal and equitable estates of the wife. The derivative estate will fall with the estate which gives it its birth.

The principles laid down above will be found in 4 Kent, ch. LXXX., p. 28, et seq.; 1 Greenl. Cruise, ch. II., p. 136, et seq.; 1 Washburn *130, et seq., and numerous cases referred to in the notes.

The difficulty in all the cases like this is not so much in establishing the general principles, as these are found fully discussed and plainly set forth by the learned authors mentioned, and others, as well as in the decisions of able judges in the different states; but it consists in the application of these principles to the special facts and circumstances which may surround and attend a case under consideration.

This is the difficulty here. We have seen that the estate of the wife of the appellant was a fee conditional trust estate. There

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*was coverture, and birth of issue capable of inheriting this estate. This issue has since died while an infant, thus ending the fee conditional which was created by the deed of Samuel Jenkins, and, under the law, reverting the whole estate to him. Wright v. Herron, 5 Rich. Eq. 443.

Now, was the wife of the appellant ever seized? If so, does the deed or not clearly indicate an intent and purpose on the part of the grantor that the curtesy of the husband should be excluded? And, lastly, if the curtesy did attach, what effect has the subsequent death of the issue had upon it? Is

that such a termination of the primal estate as to have destroyed the derivative? These are the questions which must now be considered.

The wife, according to the old English law, must be seized in fact and in deed, and not merely a seizin in law, of an estate of inheritance, to entitle the husband to his curtesy, says Chancellor Kent, 4 Com. 30, citing Co. Lit. 29 a; Mercer v. Selden, 1 How. (U. S.) 37 [11 L. Ed. 38]. He adds: "This is still the general rule at law, though in equity the letter of it has been relaxed by a free and liberal construction."

The circumstances of this curtesy have justly required some qualification of the strict letter of the rule relative to a seizin in fact by the wife. And if she be the owner of waste, uncultivated lands, not held adversely, she is deemed seized in fact, so as to entitle her husband to his right of curtesy.

At common law the husband could not be the tenant by the curtesy of a use: but it is now settled otherwise in equity, and the husband may be tenant by curtesy, if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during coverture. 1 Atk. 607; 4 Kent 30.

The receipts of the rents and profits, it is stated, is a sufficient seizin of the wife. Morgan v. Morgan, 5 Madd. 408. Mr. Washburn, vol. I., *130, says: "In respect to the seizin of the wife, it must, in general terms, be of an estate of inheritance; but this must be either a legal or equitable one. In giving effect to the estates under the statute of uses, Courts of Equity intended to follow the law, and in most respects have followed it in regard to the nature and incidents of such

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estates. Among these was *the right of curtesy, and husbands of cestuis que trust were allowed to take their estates by curtesy if they were estates of inheritance of which the wife had what answered in equity to a seizin at law of legal estates in possession. And the receipt of rents and profits by the wife as such cestui que trust, during coverture, is ordinarily sufficient seizin in equity to give the husband curtesy." Morgan v. Morgan, 5 Madd., supra. But, he adds, "it does not seem to be sufficient seizin of a trust estate to give her husband curtesy thereof." That the wife had the rents and profits by the terms of the trust deed to her own and separate use, her seizin, in such case, not enuring to the benefit of the husband, he cites Hearle v. Greenback, 3 Atk.; Sweetapple v. Bedon, 2 Vern. 537, n. It seems, then, that nothing less than the receipt of the rents and profits by the wife, during coverture, will constitute an equitable seizin in a trust estate.

Did the appellant's wife ever receive any portion of the rents and profits of this property? It appears from the record that the original proceeding in this case was instituted to recover the lot and the rents and profits, it being charged in the complaint that Jenkins was in possession of the lot and had received all the rents and profits.

Jenkins is an adverse claimant, denying the validity of the deed, and contesting all the claims of appellant. If the wife's estate was a legal estate, these facts, under the decisions, would negative seizin, because where there is an adverse claimant, and especially where he is in possession, the possession does not follow the title to such extent as to constitute a seizin in the wife, and under such circumstances the curtesy of the husband could not attach even to a legal estate, much less could it attach in a trust estate like this, where the adverse claimant is in possession, denying the trust and refusing to accord his rents and profits. Parker v. Carter, 4 Hare *414; De Gray v. Richardson, 3 Atk. 469. It seems that the cestui que trust has never received any portion of the rents and profits. She may have been entitled to them, but her failure to receive them prevents seizin, and a failure of seizin prevents curtesy.

Did the grantor intend to exclude the curtesy? We have seen from the authorities that a grantor has the right to do this, and

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*that when the question is raised it is a question of intention. In one case, where he expressly excluded the husband from the right of curtesy, this exclusion was enforced. Bennet v. Davis, 2 P. Wms. 310, and Clark v. Clark, 24 Barb. 582. It has been held in several English cases that simply declaring that the trust is for the sole and separate use and benefit of the wife does not necessarily raise the implication that it was the intention of the grantor to cut off the curtesy, and in such cases the equitable seizin of the wife, by the receipt of the rents and profits, would enure to the benefit of the husband and save his curtesy.

Lord Hardwick, in the case of Roberts v. Dexwell, 1 Atk. 607, held that the husband might lose his curtesy in an estate devised to the wife for her separate use. His opinion in Hearle v. Greenback, 1 Ves. 303, is somewhat in conflict with this, and the two can scarcely be reconciled; but the doctrine seems to be well settled in accordance with the decision of Roberts v. Dexwell, and if there was nothing more in this deed than that the estate was settled to the sole and separate use of the wife of respondent, that would not be an insuperable barrier in his way—in fact, it would present no objection to his claim; but the deed goes further, and in very emphatic terms declares that the estate given to his daughter Mary shall not be liable for the debts or contracts of any husband with whom she may intermarry and shall be free from his control. Now, can this express inhibition be limited only to the estate existing during the life of the wife? In endeavoring

to reach the intention of the grantor, is that a fair interpretation of the terms he used in his deed? He had not only the welfare of his daughter in his mind, as it appears, but he went beyond her and was looking to the issue of her body—his grandchildren—his own descendants—and his deed was as much for their benefit as for hers, and he expressly excluded any husband which she might have from all control of the property conveyed. We think this was about as strong as the case of Bennet v. Davis, supra, where the curtesy in terms was denied.

Mary died in November, 1869, leaving one son living, who died in March thereafter, while an infant. The fee conditional terminated with the death of this son, and, under the law, the whole estate has reverted to the

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respondent—the grantor—who *now is invested with the legal title in fee simple, and is in possession.

As a general rule, where the primal estate determines the derivative estate, whether it be dower or curtesy, also ceases, upon the maxim cessante statu primitivo cessat derivativus. This has been held to apply generally to determinable deeds and not to limitations over. In this last class of cases it is said the limitation merely shifts the estate from one person to another, and leaves the prior seizin undisturbed. The limitation over takes effect and the estate next in expectancy vests without entry, and the entry is preserved. 4 Kent *34. But the cases of estate tail, determining by failure of issue, and of a fee determining by executory devise or shifting use, are exceptions to the general rule denying curtesy or dower after the determination of the principal estate.

These distinctions are quite abstruse and subtle, and it seems anomalous that in this case, after the primitive estate, out of which, but for the other facts already discussed, the appellant might claim by curtesy, has, by the death of his son, ceased and is gone forever, and the fee has returned to grantor, who is now and has ever been in possession, yet that he should be still entitled to hold the property during his life as tenant by curtesy; but such appears to be the law, and if there was nothing else in the way but this, the appellant would be entitled to have the decree below reversed and his tenancy by curtesy enforced.

But we think there was no seizin of the wife in this case: and we further think that there is a necessary implication arising from the terms of the deed, that it was the intention of the grantor to exclude the curtesy of any husband that might intermarry with his daughter; and upon these grounds we sustain the result of the decree of the Circuit judge.

The deed in this case was executed before the adoption of the constitution of 1868, and before the passage of any act on the subject of the rights of married women. The rights of the parties, if any, had vested, and we do not see how the constitution of 1868 or the acts referred to could affect this question. If the estate of Mary became executed in her, because after the adoption of the constitution a trustee was no longer necessary, and

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*the trust estate became a legal one, yet Samuel Jenkins has been at all times in possession; and even in this case there would be no legal seizin in the wife, and the intent to exclude the curtesy would still exist in the deed.

While we cannot agree to the reasoning by which the Circuit judge reaches his conclusion, we think his conclusion is right. The decree is affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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14 S. C. 616

(Case No. 1003.)

DETHERIDGE v. GILREATH.

(November Term, 1880.)

[*Appeal and Error* ⇨764.]

The service of three manuscript copies of the brief upon respondent's attorney, was a sufficient compliance with the rule of court, which, at the time of appeal taken, only required that three copies should be served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3099; Dec. Dig. ⇨764.]

Motion to restore to the docket of this court a case which had been dismissed by the clerk. At the time of appeal taken, Rule VII. of the Supreme Court required the appellant to serve "three copies of the case, or brief as prepared for argument," on the attorney of the adverse party within twenty days after the return of the Circuit Court had been filed in this court. If he failed to do so the respondent might, by notice in writing, require the service of such copies within ten days after the service of such notice, &c.

Mr. E. F. Stokes, for motion.

Mr. M. F. Ansel, contra.

March 18th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. In this case the appeal was dismissed by the clerk of the court, on

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affidavits submitted by attorney of re*spondents, that Rule VII. of this court had not been complied with, in that appellants failing to have served copies of the brief or case within twenty days after the return from the Circuit Court, had still failed, upon notice and demand by respondents, to have said copies served within the time prescribed by the rule.

It appears from the affidavits, both of respondents and appellants, that while it is

true that printed copies of the case were not served, yet that manuscript copies were tendered by the appellants within proper time.

Was the tender of manuscript copies a sufficient compliance with the rule? The rule at that time simply required that three copies should be served. It was silent as to whether they should be in writing or printed.

It would be much better that all papers connected with appeals should be printed, and, by recent amendment of Rule VII., this is required as to the papers therein referred to. In the absence, however, of such requirement at the time this appeal was taken, we think appellants substantially complied with the then existing rule, and that this appeal should not have been dismissed.

It is therefore ordered that the appeal in this case be restored to the docket.

McIVER and McGOWAN, A. J.'s, concurred.

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NOTES OF CAUSES

Decided during the Period Comprised in this Volume, and not Reported in full.

14 S. C. *619

*At the last session of the general assembly of South Carolina, an act was passed entitled "An act to amend Section eleven, Chapter CIV., Title I., Part III., of the general statutes, so as to provide for the publication of all the decisions of the Supreme Court in the state reports," approved December 24th, 1880, (17 Stat. 397), whereby it was enacted that "from and after the passage of this act, it shall be the duty of the state reporter, in addition to the report of the cases which he may be instructed to publish under the order of the Supreme Court, to append the title of all the cases decided by the Supreme Court, during the period covered by each volume published by him, stating, in a short note, the principle or principles decided in each case; and also adding what cases previously decided have been overruled, modified or confirmed during said period."

Under the requirements of this act, the following "Notes of causes not reported in full," is published. Cases "overruled, modified or confirmed," will be found in the index, under the head of Cases Criticised.—Reporter.

No. 943. STATE v. DODSON. November Term, 1880.

Motion to dismiss appeal, because that the brief did not contain any report of the Circuit judge, nor any agreed statement of counsel. This court approved the practice prescribed in State v. Pitts, 12 S. C. 180 [32 Am. Rep. 508], and held the brief insufficient for a hearing; but as human life was involved, the rule of practice would not be rigidly enforced; and for the purpose of permitting the appellants to amend their brief, the cause was ordered to stand over until a future day named. Opinion per curiam, November 26th,

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*1880. Solicitor Cothran, for motion. E. F. Stokes and J. T. Nix, contra.

No. 945. TARRANT v. GILLETSON. November Term, 1880.

[*Appeal and Error* ⇨819.]

Hearing of appeal suspended until the next term, to enable defendant, appellant, to make application to the Circuit Court, (notwithstanding the pendency of the appeal,) for a re-hearing of the case, upon the ground of after-discovered evidence.

[Ed. Note.—Cited in State v. Turner, 39 S. C. 425, 17 S. E. 885.

For other cases, see Appeal and Error, Cent. Dig. § 3200; Dec. Dig. ⇨819.]

Opinion per curiam, November 29th, 1880.

[For subsequent opinion, see Tarrant v. Gittelson, 16 S. C. 233.]

No. 953. BIGGS & CO. v. HUBERT & CO. November Term, 1880.

Defendants, A and B, entered into articles of co-partnership to do a general commission business, with an express stipulation against speculations. After a time A entered into cotton speculations in the firm name, and, on account of such speculations, a large sum of money became due to plaintiffs in Liverpool, for which they brought this action. Plaintiffs knew nothing of the terms of the partnership agreement. A testified that B knew of these speculations, and drew her share of the profits, knowing whence they came; B denied all knowledge, and testified that she had always opposed all suggestions of speculating. Verdict was for defendants. Hudson, J., Charleston.

Plaintiffs appealed to this court upon exceptions to the judge's charge. The following principles were decided:

[1. *Partnership* ⇨160.]

Defendant B did not render herself liable because of failure to give notice "to the plaintiffs of any limitations or conditions imposed on either of the partners defendants." The rule as laid down in 1 Coll. on Part. 645, approved.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 190–300; Dec. Dig. ⇨160.]

[2. *Partnership* ⇨218.]

Whether these transactions were inconsistent with the general scope of the business of the partnership of defendants, was a question of fact properly submitted to the jury. Galloway v. Hughes, 1 Bail. 553.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 49, 426–428; Dec. Dig. ⇨218.]

[3. *Partnership* ⇨157.]

The judge properly charged the jury that B did not bind herself to plaintiffs by a receipt

of profits arising from these speculations, unless she knew how the moneys so received were derived. 1 Coll. on Part. 646.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 282–291; Dec. Dig. ⟸157.]

[4. *Partnership* ⟸128.]

An act by one member of a firm inconsistent with the practice and usage of the business of the co-partnership, would be outside the scope of the co-partnership as matter of fact, and, according to the principles of law

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governing and controlling *partnerships, well understood and long since settled, would not bind the firm: and a party thus acting with the firm in an outside transaction could not plead ignorance.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 193; Dec. Dig. ⟸128.]

Judgment below affirmed. Opinion by SIMPSON, C. J., December 14th, 1880. A. G. Magrath, Jr., for appellants. S. Lord, contra.

No. 966. WILLIAMS, BLACK & CO. v. CONNOR. November Term, 1880.

[1. *Costs* ⟸119.]

When a Circuit judge orders security for costs to be given by an absent plaintiff on or before the first day of the next ensuing term, but imposes no penalty for non-compliance, it is within the discretion of the next succeeding judge to permit the security to be filed after the expiration of the time fixed in the first order. Code, § 197; McMillan v. McCall, 2 S. C. 393.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 542; Dec. Dig. ⟸119.]

[2. *Partnership* ⟸32, 218.]

Where two parties associate themselves together for the purchase of one hundred bales of cotton futures (a single transaction), they constitute a partnership as to that matter; and, the facts being undisputed, the trial judge had a clear right to instruct the jury that it was a partnership. 1 Parsons on Cont. 207; Terrill v. Richards, 1 N. & McC. 20.

[Ed. Note.—Cited in Edwards v. Johnson, 90 S. C. 95, 72 S. E. 638.

For other cases, see Partnership, Cent. Dig. §§ 34, 49, 426–428; Dec. Dig. ⟸32, 218.]

[3. *Trial* ⟸204.]

The presiding judge may instruct the jury that there is no proof of an alleged fact, when there is none.

[Ed. Note.—Cited in Norris v. Clinkscales, 47 S. C. 517, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. §§ 495, 497; Dec. Dig. ⟸204.]

[4. *Partnership* ⟸296.]

Defendants' attorney requested the presiding judge to charge the jury that "notice of a dissolution of the partnership may be inferred from the nature and purposes of the transaction at the time the partnership was entered into." This the presiding judge refused to do without the addition of the words, "if the transaction be ended and closed." *Held*, no error.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666–678; Dec. Dig. ⟸296.]

[5. *Partnership* ⟸146.]

If a partnership exists, it is bound by a note given by one of the partners in settlement of a partnership transaction, without proof of any authority given such parties to bind the firm by note.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 242–251, 253–255; Dec. Dig. ⟸146.]

[6. *Gaming* ⟸12.]

This court cannot assume that a purchase of cotton futures is a gaming contract, when there is no evidence in the case which shows it to have been so.

[Ed. Note.—Cited in Gist v. Telegraph Co., 45 S. C. 369, 23 S. E. 143, 55 Am. St. Rep. 763.

For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. ⟸12.]

[This case is also cited in Brown v. Easterling, 59 S. C. 472, 38 S. E. 1187, and distinguished therefrom.]

Appeal dismissed. Opinion by McIVER, A. J., January 10th, 1881. E. G. Graydon, for appellant. J. C. Haskell, contra.

No. 967. SULLIVAN v. BLYTHE. November Term, 1880.

[1. *Trial* ⟸194.]

When the Circuit judge, in his charge to

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the jury, makes general re*marks which have no special application to the case then before the court, he cannot be said to have commented on the facts of the case in violation of Article IV., Section 26, of the constitution of this state.

[Ed. Note.—Cited in Norris v. Clinkscales, 47 S. C. 519, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. § 441; Dec. Dig. ⟸194.]

[2. *Pleading* ⟸142.]

Action by assignee of a sealed note against the maker. Defendant set up debt due him by assignor before notice of assignment, and called it a counter-claim, but demanded no relief against plaintiff. Evidence offered at the trial to prove this equitable defence was objected to, because pleaded only as a counter-claim. Objection overruled and evidence admitted. *Held*, no error. Bliss' Code Pl., § 389; Pom. on Rem., § 92; Code, § 135.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300; Dec. Dig. ⟸142.]

[3. *Attorney and Client* ⟸105.]

Defendant failed to serve itemized statement of his account within ten days after demand, but plaintiff did not return it, nor

object until trial. The items were set out in the answer, except amounts. *Held*, that there was no error in permitting this account to be proved at the trial.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 365–367; Dec. Dig. ⇦ 165.]

[4. *Pleading* ⇦330.]

It would seem that an allegation in the answer that defendant "was attorney of the said assignor, and so continued up to the commencement of this action," would support a charge of "fee as general attorney for three years, at $100 a year."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 996–1002; Dec. Dig. ⇦330.]

Appeal dismissed. Opinion by SIMPSON, C. J., January 10th, 1881. G. G. Wells, for appellant. J. C. C. Featherston, contra.

No. 968. EDMONDSTON v. COUNTY OF AIKEN. November Term, 1880.

[*Counties* ⇦113.]

Action to recover $750 for work done in the clerk's office of Aiken county, under the recommendation of the grand jury and the order of the Circuit judge. The value of the services was fixed by special referees appointed for that purpose, and confirmed by the court; but the county was no party to these proceedings. Case submitted, and the Circuit judge (Aldrich) gave judgment for plaintiff. Defendant appealed. This court following the case of Ostendorff v. County Commissioners, ante, p. 403, *held* that only the county commissioners could make a contract binding on the county; and reversed the judgment of the court below.

[Ed. Note.—Cited in Wheeler v. County of Newberry, 18 S. C. 135.

For other cases, see Counties, Cent. Dig. § 178; Dec. Dig. ⇦113.]

Opinion by McGOWAN, A. J., January 10th, 1881. O. C. Jordan and G. W. Croft, for appellant. Henderson Bros., contra.

No. 970. STEEDMAN v. WEEKS. November Term, 1880.

[*Vendor and Purchaser* ⇦153.]

S. purchased a tract of land from W. and

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received a deed of bar*gain and sale, with general warranty. S. then agreed to sell this land to J., giving "such title as received from W., and from no one else." Question was submitted to the court, whether S. was bound to include in his deed to J., under this agreement, a general warranty against the claims of all persons whomsoever. The Circuit judge (Aldrich) held that such was the meaning of the instrument; and this court affirmed the judgment of the court below.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 306, 307; Dec. Dig. ⇦153.]

Opinion by SIMPSON, C. J., January 10th, 1881. G. W. Croft and James Aldrich, Jr., for appellant. Henderson Bros., contra.

No. 972. MORROW v. ODOM. November Term, 1880.

[*Trusts* ⇦158.]

Deed conveying land in this state to W., in trust for E., a daughter of grantor, for life, with limitations over. W. died, and upon the ex parte petition of E. and her husband, who had removed to Arkansas, M. was appointed by the Court of Chancery in Arkansas, trustee in the place of W., deceased; but no certificate of appointment and substitution was endorsed upon the deed, nor recorded. Action brought by M. in this state to recover the possession of this land and for rents and damages. The Circuit judge (Kershaw) granted a non-suit on defendant's motion. An appeal from this judgment was dismissed, this court holding that the plaintiff could not be invested with title to lands in this state by the action had in the courts of Arkansas; and, moreover, that the requirements of the act of 1796, (5 Stat. 277; Gen. Stat., ch. XCIII., § 10,) had not been complied with.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 205; Dec. Dig. ⇦158.]

Opinion by ALDRICH, A. A. J., January 13th, 1881. B. W. Edwards, for appellant. R. W. Boyd, contra.

No. 973. McELWEE v. McELWEE. November Term, 1880.

[*Appeal and Error* ⇦425, 627.]

Motion to dismiss appeal. Decree being filed in vacation, defendant procured from plaintiff's attorneys their admission in writing on the back of the original decree, of "notice of filing of the within decree." No notice of appeal was given by plaintiff within ten days after such admission, nor case served within thirty days thereafter. Motion to dismiss granted. Rogers v. Nash, 12 S. C. 560, followed, and Lake v. Moore, 12 S. C. 563, distinguished.

[Ed. Note.—Cited in Bowers v. Watts, 40 S. C. 548, 18 S. E. 888.

For other cases, see Appeal and Error, Cent. Dig. §§ 2155, 2744; Dec. Dig. ⇦425, 627.]

Opinion per curiam, January 21st, 1881.

No. 974. STATE, ex rel. McLENDON, v.

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MORRIS. November *Term, 1880.

This was simply an order granting a writ of mandamus in the matter of a municipal election. No opinion was filed, and the reporter has no papers in the case.

No. 975. FEATHERSTON v. NORRIS. November Term, 1880.

This is the same case reported in 7 S. C. 472. Upon its return to the Circuit Court the case was submitted upon the same evidence, and Judge Mackey dismissed the complaint—holding that the bank-book of A. O. Norris, commissioner in equity, was a proper voucher, and that it discharged him from liability for the funds of the Featherston estate. On appeal this judgment was affirmed by this court.

[Cited in State ex rel. Van Wyck v. Norris, 15 S. C. 255.]

Opinion by FRASER, A. A. J., January 26th, 1881. W. E. Earle and J. S. Murray, for appellants. B. F. Whitner, contra.

No. 977. GOLDSMITH v. JACOBS. November Term, 1880.

Edward O. Jacobs and Richard H. Jacobs were joint tenants of a tract of land, and upon Edward's interest rested the lien of a judgment in favor of William Jacobs. In 1860 Richard purchased Edward's interest. William died, leaving Edward his executor; then Edward died. In December, 1860, Richard became administrator de bonis non with will annexed of William, and, as such, assigned this judgment to W. B. Charles, trustee. In March, 1872, Richard became administrator de bonis non of Edward. In August, 1872, Charles brought his action against Richard, administrator of Edward, to renew the judgment in favor of William Jacobs—Richard resisted; the history of this litigation will be found in 5 S. C. 348; 6 S. C. 69, and 9 S. C. 295. After this judgment was renewed, and, in 1879, the interest of Edward was sold thereunder to Goldsmith, the plaintiff here, who brought this action to recover possession. Defendant pleaded the bar of the statute of limitations and adverse possession. His plea was sustained on Circuit by Judge Pressley, under whose instruction the jury found for defendant. An appeal by plaintiff to this court was dismissed. McRaa v. Smith, 2 Bay 339; Lamar v. Raysor, 7 Rich. 509; Pegues v. Warley, ante p. 180; Faysoux v. Prayther, 1 N. & McC. 296 [9 Am. Dec. 691].

Opinion by McGOWAN, A. J., February 26th, 1881. J. C. C. Featherston and W. E. Earle, for appellants. G. G. Wells, contra.

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*No. 979. VERMILLION v. MATTISON. November Term, 1880.

[*Homestead* ⇐200.]

Homestead being assigned to a judgment debtor under execution, he excepted to the return of the appraisers (which was sworn to) upon the ground that the homestead was laid off to him in his wife's lands and not in his own. Judge Thomson, on Circuit, confirmed the return of the appraisers, and the debtor appealed. This court dismissed the appeal, refusing to accept the unsworn assertion of defendant as evidence; and, moreover, not assured that the defendant had no interest in the lands assigned, even if his wife's, as it did not appear that the coverture commenced and the wife's title was acquired after the adoption of our present constitution.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 376; Dec. Dig. ⇐200.]

Opinion by McIVER, A. J., February 26th, 1881. J. S. Murray, for appellant. B. F. Whitner, contra.

No. 985. ROE v. HARRISON. November Term, 1880.

See this case in 9 S. C. 279. Action by Roe, a judgment creditor of Thomas Harrison, to set aside a confession of judgment of prior date, given by Thomas to his son, William Harrison. Both Thomas and William were dead, and the action is against the administrators, respectively. Verdict for plaintiff. Defendants appealed to this court upon exceptions to the judge's charge. In this court, Mary Harrison, administratrix of William, raised in argument the point that, having been discharged as administratrix before action brought, that the action could not be maintained. *Held*—

[1. *Appeal and Error* ⇐757.]

That in the absence of all information in the brief as to the nature of the judgment, if any, against Mary, this court would not disturb such judgment, or dismiss the action generally, although, possibly, she was free from suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. ⇐757.]

[2. *Fraudulent Conveyances* ⇐115.]

That the Circuit judge properly refused to charge that a debtor had a legal right to prefer one creditor to another, and that if Thomas was indebted to William, and gave William a confession of judgment for the purpose of securing him in advance of Roe, he had a right to do so, and it is valid, unless the jury find, by a preponderance of testimony, that the note of Thomas to William was without consideration.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 370, 375–377; Dec. Dig. ⇐115.]

[3. *Fraudulent Conveyances* ⇐309.]

The jury were correctly charged: If you find that T. E. Harrison owed W. H. Harrison the note on which the judgment is confessed, you will then go one step further and

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inquire *whether the confession of judgment, made by Thomas to William, was made to secure William or to defeat, hinder and delay Roe. If it was given to defeat, hinder and delay Roe, your verdict should be for the plaintiff.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 941, 944–958; Dec. Dig. ⟸309.]

[4. *Executors and Administrators* ⟸438.]

The administrator of Thomas, being a party defendant, the court could not be called upon, by order, to make the heirs-at-law of Thomas parties defendant; certainly it was not proper to instruct the jury that they were proper parties, even if plaintiff had agreed to relinquish to the estate the interest on the debt.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765–1785, 1790; Dec. Dig. ⟸438.]

Opinion by SIMPSON, C. J., March 8th, 1881.

No. 986. GIBBES v. GREENVILLE AND COLUMBIA RAILROAD COMPANY. November Term, 1880.

Consent order dismissing the appeal of Clark, trustee, in this case. Per curiam, March 8th, 1881.

No. 990. KAIRSON v. PUCKHABER. November Term, 1880.

This was an action tried before Thomson, J., to recover possession of a lot of land which, it was admitted, originally belonged to the city council of Charleston. The plaintiffs claimed as purchasers from one Ford, who, it was alleged, bought the land at sheriff's sale on June 3d, 1872, under an execution issued to enforce a judgment recovered by one Whiting against the city council of Charleston. Upon this execution is the following endorsement by the sheriff: "Received 2d January, 1872," with the word "January" erased and the word "April" substituted. The defendant claimed under a deed made by the commissioners of the sinking fund of the city of Charleston, together with the city council of Charleston, bearing date November 20th, 1879, alleging that the lot of land in dispute, along with several others, had been specially appropriated by the city council of Charleston to the payment of certain stocks of the city, issued in 1818, 1824, 1838 and 1839, by virtue of a certain declaration of trust, executed by the city council of Charleston on August 22d, 1842, and duly recorded.

When the plaintiffs closed their case a motion for a non-suit was made upon three grounds: First, Because there was no legal proof of a levy and sale. Second, That if a levy had been made, it was not made until after the execution had lost its active energy, and was, therefore, void. Third, Be-

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cause the evidence *was not sufficient to authorize a verdict. The counsel for the plaintiffs then asked and obtained leave to introduce further evidence to show that there was a levy. To this counsel for defendant objected, contending that after a motion for a non-suit had been made, the Circuit judge had no right to open the case and permit the introduction of further evidence.

There were also exceptions by defendant to the judge's charge and refusals to charge. Verdict was for plaintiff. Defendant appealed. This court *held*—

[1. *Trial* ⟸69.]

That it was within the discretion of the Circuit judge to admit the additional testimony. Browning v. Huff, 2 Bail. 179; Poole v. Mitchell, 1 Hill 404; Mathews v. Heyward, 2 S. C. 247.

[Ed. Note.—Cited in State v. Clyburn, 16 S. C. 378; Cantey v. Whitaker, 17 S. C. 529; Woody v. Dean, 24 S. C. 502; Hornsby v. South Carolina Ry. Co., 26 S. C. 190, 1 S. E. 594; Rembert v. Same, 31 S. C. 313, 9 S. E. 968; Dobson v. Cothran, 34 S. C. 532, 13 S. E. 679; State v. Symmes, 40 S. C. 388, 19 S. E. 16.

For other cases, see Trial, Cent. Dig. §§ 164, 165; Dec. Dig. ⟸69.]

[2. *Pleading* ⟸374.]

Judgment, execution, levy and sale were alleged in the complaint, and the levy and sale were admitted in the answer; it was necessary for plaintiff to prove the judgment and execution, but not the levy and sale.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1217–1223; Dec. Dig. ⟸374.]

[3. *Execution* ⟸101.]

The Circuit judge was correct in holding, as a matter of fact, that the proper date of the sheriff's entry was April 2d, there being no evidence of misconduct by the sheriff in making the erasure of the earlier date.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 205; Dec. Dig. ⟸101.]

4. There was sufficient evidence of title to submit the question to the jury.

[5. *Vendor and Purchaser* ⟸232.]

The deed to Ford was not recorded, Ford's deed to plaintiffs was; the Circuit judge did not err in charging the jury that express notice, or such facts as should put a party upon inquiry which would lead to notice, would answer the same purpose as recording, and that possession was notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540–545, 548–562; Dec. Dig. ⟸232.]

[6. *Trial* ⟸31.]

Misstatements or misconstructions of the testimony by the judge, should properly be

brought to his attention at the time, or submitted to him on motion for new trial.

[Ed. Note.—Cited in Rumph v. Hiott, 35 S. C. 459, 15 S. E. 235.

For other cases, see Trial, Cent. Dig. §§ 55, 84; Dec. Dig. ⇐31.]

7. The Circuit judge erred in charging the jury that stock substituted in place of the original stock would not be covered by the declaration of trust. Whether there had been such substitution should have been submitted to the jury: the judge would not have been justified in charging that the outstanding stocks were in substitution of the original issue.

8. Such declaration of trust was not an ordinary mortgage, but rather in the nature of a mortgage with power of sale, "which, when properly executed, confers good title even against intervening liens."

New trial granted. Opinion by McIVER,

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*A. J., March 9th, 1881. Hayne & Ficken, for appellants. Campbell & Whaley, contra.

No. 991. STATE v. DODSON. November Term, 1880.

Defendants in this case were convicted of arson before Thomson, J., Greenville, and sentenced to be hung. Dodson, Adams, Burton and Bates appealed, Maddox having pleaded guilty. The appeal is based upon exceptions to the rulings and charges of the presiding judge. *Held* by this court—

[1. *Criminal Law* ⇐622.]

A severance upon trial on the application of defendants, is not a matter of right, but it is within the discretion of the Circuit judge to grant or refuse it. Therefore, his refusal in this case is no ground for new trial. State v. Wise and Johnson, 7 Rich. 412.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380–1383, 1385, 1386, 1388–1390; Dec. Dig. ⇐622.]

[2. *Criminal Law* ⇐519.]

Confessions made to persons in authority, although admitted under more stringent rules than when made to private persons, were properly received in this case, it appearing that these confessions were free and voluntary.

[Ed. Note.—Cited in State v. Henderson, 74 S. C. 478, 55 S. E. 117.

For other cases, see Criminal Law, Cent. Dig. §§ 1152, 1163–1174; Dec. Dig. ⇐519.]

[3. *Criminal Law* ⇐528.]

Maddox having been convicted of grand larceny, and Dodson twice of petit larceny, their confessions, even if a conspiracy had been established, were incompetent as against any of the parties, except that each confession was admissible against the party making it.

[Ed. Note.—Cited in State v. Green, 40 S. C. 330, 18 S. E. 933, 42 Am. St. Rep. 872.

For other cases, see Criminal Law, Cent. Dig. §§ 1002–1010; Dec. Dig. ⇐528.]

4. *Criminal Law* ⇐424, 528.]

The common enterprise being ended, confessions made by one of the parties to the conspiracy are not admissible in evidence against the others. 1 Greenl. Ev., § 283.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002–1010; Dec. Dig. ⇐424, 528.]

[5. *Witnesses* ⇐48.]

One who has been convicted of receiving stolen goods, is an incompetent witness.

[Ed. Note.—Cited in State v. James, 15 S. C. 233, 235.

For other cases, see Witnesses, Cent. Dig. §§ 109–115; Dec. Dig. ⇐48.]

[6. *Criminal Law* ⇐874.]

The matter of polling the jury is within the discretion of the presiding judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2085–2088; Dec. Dig. ⇐874.]

New trial granted appellants. Opinion by SIMPSON, C. J., March 11th, 1881. E. F. Stokes and J. T. Nix, for appellants. Solicitor Cothran, contra.

[For subsequent opinion, see 16 S. C. 453.]

No. 995. DOUGHERTY v. CRAWFORD. November Term, 1880.

Action to recover possession of a tract of land, the title to which was shown to have been, at one time, in B. K. Henegan. The land was devised by will of B. K. Henegan to Robert Y. Henegan. The testator, in a later clause, directed that the crops made on his lands should be used to pay his debts, with power to executors, if necessary, or if "they think best," to sell a part

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or *any portion of his lands given to Robert. R. Y. Henegan became administrator with will annexed of B. K. Henegan, and in payment of debts contracted in planting operations, partly as administrator and partly for himself, conveyed this land, in March, 1868, as administrator of the will, to E. H. Williams, "in trust to and for such uses and trusts, and for such person or persons, as said Williams shall appoint by deed duly executed in his lifetime in the presence of two witnesses; and in default thereof, then in trust for Baggett & Co." Williams, by instrument under his hand and seal, executed in presence of two witnesses, reciting the deed to him, and in pursuance of the power there given, did "limit and appoint" this land "to the use of John Dougherty (plaintiff here,) to the use of him, the said J. D., his heirs and assigns forever." Defendants claimed

under tax title, the land having been sold as delinquent on September 16th, 1874 (the time of sale being extended by order of the comptroller-general,) for taxes assessed against it as the property of Baggett, for fiscal year 1873–74. Verdict for plaintiff. Appeal by defendant, upon exceptions to the judge's (Hudson) charge, and refusals to charge. *Held*—

[1. *Trusts* ⇐21.]

That the deed from R. Y. Henegan to Williams was a valid conveyance of this land, and transferred the title.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 29, 30; Dec. Dig. ⇐21.]

[2. *Trusts* ⇐191.]

That under the instrument executed by Williams, the title vested in plaintiff.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. ⇐191.]

[3. *Taxation* ⇐356.]

That the tax sale was made on a day other than that fixed by the statute of 1874, then of force (15 Stat. 731,) and was, therefore, invalid. Roddy v. Purdy, 10 S. C. 137.

[Ed. Note.—Cited in Shell v. Duncan, 31 S. C. 560, 571, 10 S. E. 330, 5 L. R. A. 821.

For other cases, see Taxation, Cent. Dig. § 596; Dec. Dig. ⇐356.]

Appeal dismissed. Opinion by McIVER, A. J., March 15th, 1881. C. P. Townsend, for appellant. Johnson & Johnson, contra.

No. 996. STOKES v. GREENVILLE. November Term, 1880.

[*Appeal and Error* ⇐807.]

Motion by appellant, under Rule XIX., to restore to docket appeal dismissed by the clerk of this court, under Rule VII., for failure, after notice, to serve three copies of his case or brief, upon respondent. Appellant duly served notice of this motion, but did not serve a copy of any affidavits to sustain the motion. This court held that there was, therefore, nothing before them to show that the clerk had erred; and, moreover, that appellant now admitted that he had never

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served respondent with a copy *of the brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3181; Dec. Dig. ⇐807.]

Motion refused. Opinion by SIMPSON, C. J., March 15th, 1881.

No. 997. MORGAN v. SCRUGGS. November Term, 1880.

[*Appeal and Error* ⇐842.]

Action at common law; complaint dismissed by the Circuit judge, because it appeared, to his satisfaction, "that the plaintiff herein is not the real owner of the notes sued on." The case was not tried by a jury, but by consent was referred to the master to hear and determine. The master set forth the facts as to the ownership, and as a conclusion of law found that plaintiff was the real owner. On appeal—*Held*, that the judgment of the Circuit Court was a finding of fact which could not be reviewed here; and that under the terms of the order, this court could not conjecture that it was based upon a proposition of law, and enter upon an inquiry as to the correctness of such legal proposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3319; Dec. Dig. ⇐842.]

Appeal dismissed. Opinion by McIVER, A. J., March 15th, 1881. A. Blythe, for appellant. Geo. Westmoreland, contra.

No. 1001. GARVIN v. GARVIN. November Term, 1880.

Motion before the presiding judge of the Circuit, to vacate and set aside a judgment and execution held by John Garvin against Robert Garvin. Judge Pressley, before whom the motion was made, refused to grant it, and Robert Garvin appealed. *Held* by this court—

[1. *Appeal and Error* ⇐842.]

That proceedings under the act of 1869 (Gen. Stat. 497, § 2,) are purely legal, and this court, therefore, can correct only errors of law committed by the Circuit judge in such proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. ⇐842.]

[2. *Judgment* ⇐337.]

The real purpose of this act considered and the conclusion reached that it probably was intended to affect only the method of procedure, and to provide a uniform proceeding for cases both at law and in equity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 665; Dec. Dig. ⇐337.]

[3. *Judgment* ⇐336.]

That from the wording of the motion, and after the decision in Garvin v. Garvin, 13 S. C. 160, the relator cannot now deny that his motion is under the act of 1869.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 664, 724, 746; Dec. Dig. ⇐336.]

[4. *Judgment* ⇐354.]

That the Circuit judge correctly held that under this statute he had no power to set aside the judgment except for errors of fact.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 691, 703, 704; Dec. Dig. ⇐354.]

[5. *Judgment* ⇐335.]

That no error of law was committed by the Circuit judge in holding that the facts which

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would justify a re-opening of *the case, must be such as were shown to his satisfaction to have been overlooked or newly discovered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647–663; Dec. Dig. ⇐335.]

[6. *Appeal and Error* ⇐113.]

It is very questionable whether any appeal is allowed under this statute; but, without reference to its phraseology, the conclusions of the Circuit judge as to what is "satisfactory proof," cannot be reviewed here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758–785; Dec. Dig. ⇐ 113.]

[7. *Appeal and Error* ⇐1024.]

This court cannot decide whether proof was "satisfactory to the presiding judge."

[Ed. Note.—Cited in Truett v. Rains, 17 S. C. 454.

For other cases, see Appeal and Error, Cent. Dig. §§ 820, 3816–3823, 3836, 3837, 4020–4022, 4025–4028; Dec. Dig. ⇐1024.]

Appeal dismissed. Opinion by McGOWAN, A. J., March 18th, 1881. P. A. Emanuel and M. W. Gary, for appellant. D. S. Henderson and G. W. Croft, contra.

[For subsequent opinions, see 21 S. C. 86; 31 S. C. 581, 10 S. E. 507, 17 Am. St. Rep. 48; 40 S. C. 435, 19 S. E. 79.]

No. 1004. DUNCAN, MALONY & CO. v BROWN. November Term, 1880.

This was an order restoring to the docket an appeal dismissed by the clerk under Rule VII. No opinion filed. Order bears date March 18th, 1881.

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME XV

CONTAINING CASES OF NOVEMBER TERM, 1880, AND APRIL TERM, 1881

BY ROBERT W. SHAND

STATE REPORTER

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER. HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

FIRST CIRCUIT,	HON.	B. C. PRESSLEY.
SECOND "	"	A. P. ALDRICH.
THIRD "	"	T. B. FRASER.
FOURTH "	"	J. H. HUDSON.
FIFTH "	"	J. B. KERSHAW.
SIXTH "	"	T. J. MACKEY.
SEVENTH "	"	W. H. WALLACE.
EIGHTH "	"	THOMAS THOMSON.†

ATTORNEY-GENERAL.

HON. LEROY F. YOUMANS.

SOLICITORS.

1*st Circuit*—W. ST. J. JERVEY.	5*th Circuit*—R. G. BONHAM.
2*d Circuit*—F. H. GANTT.	6*th Circuit*—T. C. GASTON.
3*d Circuit*—J. J. DARGAN.	7*th Circuit*—D. R. DUNCAN.
4*th Circuit*—G. W. DARGAN.	8*th Circuit*—J. S. COTHRAN.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

† Died May 5th, 1881, and the Hon. James S. Cothran, of Abbeville, and Solicitor of the Eighth Circuit, was appointed by the governor to fill the vacancy.

LIST OF ATTORNEYS

ENROLLED IN THE SUPREME COURT OF SOUTH CAROLINA DURING THE YEAR 1881

BEWLEY, W. D.....Anderson.
BOWEN, WILLIAM J.....Charleston.
BRADLEY, W. O.....Abbeville.
BRICE, ASHBEL G.....Chester.
BROOKS, U. R.....Columbia.
BROWNING, W. C.....Spartanburg.
CALVERT, A. B.....Spartanburg.
CARLISLE, MILTON A.....Newberry.
CLARK, T. H.....Camden.
CLOY, JOHN R.....Graniteville.
CROMER, GEORGE B.....Newberry.
DARGAN, C. P.....Darlington.
DARGAN, JOHN J.....Sumter.
DOUGLASS, CHARLES A.....Winnsboro'.
DUNLAP, J. ZED.....Chester.
ELLIS, R. A.....Allendale.
GADSDEN, E. M.....Charleston.
GAGE, GEO. WILLIAMS.....Chester.
GLAZE, W. L.....Orangeburg.
GLENN, J. LYLES.....Chester.
HAGOOD, P. B.....Barnwell.
HART, OLIVER J., JR.....Columbia.
HARVIN, J. REMBERT.....Sumter.
HAZARD, WALTER.....Georgetown.
HOWE, J. B.....Charleston.
HUTSON, EDWARD P.....Barnwell.
JENKINS, HAWKINS K.....Charleston.
JERVEY, THEO. D., JR.....Charleston.
JONES, IRA B.....Lancaster.
JONES, LAMBERT W.....Newberry.
KEITT, JOSEPH L.....Newberry.
KLEIN, W. E.....Charleston.
KLUGH, JAMES C.....Abbeville.
LADSON, C. TATTNALL.....Columbia.
LEE, A. MARKLEY, JR.....Charleston.
LIGON, THOMAS C.....Anderson.
LUDEKENS, EMIL.....Aiken.
MARTIN, W. H.....Laurens.
McBEE, E. A.....Greenville.
McGOWAN, F. P.....Laurens.
McLURE, T. E.....Chester.
McMASTER, JAMES M.....Columbia.
McQUEEN, J. M.....Cheraw.
MEHRTENS, JOHN C.....Charleston.
MILLER, W. C.....Charleston.
MILLER, W. L.....Due West.
MOBLEY, JOHN G.....Columbia.
MOORE, PAUL.....Lancaster.
MOORE, W. J.....Abbeville.
NICHOLLS, GEO. W.....Spartanburg.
O'BANNON, J. BRATTON.....Barnwell.
O'BRIEN, M. E.....Greenville.
O'CONNOR, CHARLES E.....Charleston.
PERRY, J. L.....Charleston.
PITTMAN, THOS. M.....Charlotte, N. C.
PRINCE, G. E.....Greenville.
PURDY, ROBERT O.....Sumter.
RAGSDALE, E. B.....Fairfield.
RAWLS, C. T.....Union.
ROBERTSON, T. R.....Charlotte, N. C.
SALE, GEORGE G.....Newberry.
SANDERS, C. P.....Gaffney.
SAWYER, A. B.....Orangeburg.
SIMKINS, LEWIS W.....Newberry.
SIMKINS, S. McG.....Newberry.
SIMPSON, HENRY Y.....Laurens.
SMITH, L. WARDLAW.....Abbeville.
SULLIVAN, C. P.....Laurens.
THOMASON, W. S.....Spartanburg.
TRANTHAM, WILLIAM D.....Camden.
TRENHOLM, GEORGE M.....Charleston.
WALKER, P. H.....Chester.
WATERS, J. J.....Rock Hill.
WHITE, JAMES E.....Charleston.
WILDER, JAMES T.....Sumter.
WILLARD, A. J.....Columbia.
WILSON, H. FRANK.....Sumter.
WINGARD, JACOB BROOKS.....Newberry.
WOFFORD, CHARLES P.....Spartanburg.
WORKMAN, W. H.....Camden.
WYLIE, R. EVANS.....Lancaster.
YOUMANS, PRINGLE T.....Columbia.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

Hon. W. D. SIMPSON, Chief Justice.
Hon. HENRY McIVER, Associate Justice.
Hon. SAMUEL McGOWAN, " "

15 S. C. *1

*(Case No. 1005.)

YORK COUNTY v. WATSON.

(November Term, 1880.)

[1. *Counties* ⟸98; *Officers* ⟸129.]

There being in this state no statute which imposes upon a county treasurer a higher obligation than that imposed by common law, such officer is not liable for the loss of county funds, occasioned by the failure of a savings bank, which was in good standing at the time the moneys were placed there on deposit.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 143; Dec. Dig. ⟸98; Officers, Cent. Dig. § 233; Dec. Dig. ⟸129.]

[2. *Evidence* ⟸333.]

The auditor's duplicate may be used as one of the means by which to ascertain the indebtedness of a county treasurer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247–1257, 1259–1265; Dec. Dig. ⟸333.]

[3. *Appeal and Error* ⟸1022.]

Findings of fact, concurred in by referee and Circuit judge, sustained, there being no clear preponderance of testimony to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⟸1022.]

Before Wallace, J., York, November, 1879.

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*Action commenced January 26th, 1878, by York county against a former treasurer of that county, John L. Watson, for an accounting of county funds which had passed through his hands. The issues as presented to this court, by the appeal, involved the defendant's liability for a loss occasioned by the failure of a bank, and also the matter of an alleged overcharge against the treasurer.

The case was first argued in this court May 28th, 1880, and being ordered for reargument, was again heard January 18th, 1881.

Defendant became county treasurer of York county, in March, 1871. Between that date and November, 1873, he made deposits of public moneys in the Yorkville branch of the Citizens' Savings Bank, the parent bank being in Columbia. These deposits were interest-bearing deposits. In November, 1873, defendant had to his credit in the branch bank $4683.33. He went to the parent bank on some day in November and presented his check for about $4000 (the brief nowhere gives the exact amount), which the bank did not pay, alleging as a reason want of knowledge as to his bank account in Yorkville. The next day Watson commenced proceedings against the bank in the state courts, and the bank then filed its petition in bankruptcy in the United States District Court. Watson received in all forty-seven and a half per cent. dividend on his deposits, for which he properly accounted. Interest upon his deposits was, at intervals, credited to him upon his bank account, but he at no time drew upon these interest credits, as such, nor drew any checks for amounts corresponding, although several checks were payable to and drawn by "self." Under the contract of interest deposits, the bank was entitled to notice of from fourteen to thirty days, according to amount of draft, which might be waived. It does not appear whether notice was exacted from Watson.

The issues of law and fact were referred to James Hemphill, Esq., to determine and report. He reported to the court the testimony taken before him and stated the accounts. His conclusions of fact were as follows:

"On the other question, as to the alleged corrupt and improper conduct of the defendant having caused the bankruptcy of the

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*bank, and thereby occasioned the loss of the county money, I do not see sufficient

ground to sustain the charge. There were some circumstances detailed by the witnesses on the part of the plaintiff which were apparently suspicious, but which were denied or explained by the defendant and his witnesses. I hold that there is not sufficient proof to make the defendant responsil le for the loss sustained by the failure of the savings bank.

"Second. I have given the defendant credit for * * * the sum of $971.80, which was allowed to the treasurer as an overcharge by the auditor and county commissioners, and which appears in the report of the county commissioners of November 1st, 1874; * * *. ——— allowed on the commissioners' report of 1874, upon the evidence of Col. W. B. Allison, formerly county commissioner and clerk of the board, and of the defendant.

"These two witnesses both swear positively that the accounts were carefully and thoroughly examined by the former county auditor, Mr. Enloe, who is now dead, and by Col. Allison, and that upon this investigation they ascertained that the defendant was justly entitled to this credit. * * * On the question of fact, I find—

"Third. That he was overcharged $971.80.

"On the item of commissions, I allowed the defendant four per cent. on all his collections."

The case came up before Judge Wallace on exceptions to the referee's report. The Circuit judge sustained the findings of the referee as to "the item of $971.80, as an overcharge, the court being satisfied that this amount should be deducted from the aggregate of charges against the defendant, as they shall be compiled according to the directions in this order." He also held that defendant was "not liable for any loss of the funds of plaintiff (principal or interest) incurred by reason of the deposit of said funds in the Citizens' Savings Bank, the court being satisfied with the findings of the referee upon this point, both as matter of law and fact." The Circuit decree also contained the following findings:

"5. It is further ordered and adjudged,

*4

that the defendant *should also be charged with the assessments for county purposes proper, as shown by the auditor's tax duplicate for the years 1872, 1873, 1874 and 1875, after giving proper credits for the pro rata of abatements for those years belonging to the county proper, the court being satisfied that the auditor's books are the proper sources from which to make such charges.

"6. It is further ordered that it be referred to Winthrop Williams, Esq., as special referee, to take testimony and report the amount of principal and interest of the county funds proper which were in the bank at the time of the suspension, and, after charging defendant with the interest, to give him credit for fifty-two and a half per cent. of the original principal and interest as the uncollected portion thereof."

To this decree plaintiff excepted as follows, and appealed to this court:

1. For error in allowing defendant credit for the sum of $971.80, as an overcharge.

2. For error in holding "both as matter of law and fact," "that defendant is not liable for any loss of the funds of plaintiff (principal or interest) incurred by reason of the deposit of said funds in the Citizens' Savings Bank," and for ordering that the referee "after charging defendant with the interest," give him credit for fifty-two and a half per cent. of the original principal and interest as the uncollected portion thereof.

3. For error in holding, as matter of law, "that the auditor's books are the proper sources from which to" charge the defendant for the county taxes, "as shown by the auditor's tax duplicates for the years 1872, 1873, 1874 and 1875," thereby limiting plaintiff to those sources for making up such charges.

Mr. James F. Hart, for appellant.

The respondent being a receiver of public moneys, under bond for the faithful discharge of his duty as required by law, is absolutely liable for the loss of the funds in his custody, by whatsoever manner this loss occurs. This proposition rests on statute law and public policy. This principle has never been adjudicated in this state, but it has been acted upon. 15 Stat. 287, 465, 805, 819. It has been determined by tribunals of other

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states. *3 How. 588; 11 How. 154; 4 Wall. 182; 13 Wall. 17; 1 Denio 233; 3 Penna. St. 372; 33 N. J. 339; 6 Ohio St. 607; 1 Woodb. & M. 45; 30 Ill. 99; 22 Ind. 125; 12 Cush. 112; 39 Iowa 9; 32 Mich. 132. United States v. Thomas, 15 Wall. 337, does not, in its decision, conflict with these cases, although there are dicta which would seem to impair the force of the older cases. See Gen. Stat., pp. 83, 148, 213.

2. If the respondent deposited in bank the trust funds of the county in his custody in such a manner that he did not have immediate control over them, so as to be able to withdraw them on the first apprehension of danger, he is liable for their consequent loss. 2 Russ. & Myl. 215; Perry on Trusts 443; Hill on Trust. 540.

3. Having deposited the public funds in a savings bank, with a view of making interest thereon, he stands in the position of a bailee or trustee who has loaned the fund for profit, and is absolutely liable. 1 Beav. 525; 6 Beav. 239; 29 Beav. 213; Hill on Trust. 540; Perry on Trusts, §§ 429, 446. It was a lending of the funds without authority, and, therefore, at his own risk, and the consequent loss must fall on him. 32 Mich. 132; 2 Wall. 256; 5 Denio 555; 36 Ind. 346; 9 Metc. 499; 12 Cush. 112; 4 Vroom 339; 26 N. Y. 514.

Mr. G. W. S. Hart, on same side.
Messrs. Witherspoon & Spencer, contra.

March 21st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This is an appeal in a case "in chancery," and it involves questions both of law and of fact.

The respondent was county treasurer for York county, from March, 1871, to March, 1877. It is alleged in the complaint that during the period he held this office he collected large sums of money for the appellant, a considerable portion of which he failed and neglected to account for and pay over to appellant.

This allegation seems to be true, but it appears that this default of respondent resulted from the fact that respondent had deposited this money in the Citizens' Savings

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Bank; that this *bank has failed, and the loss which has occurred was on account of this failure of the bank.

The appellant contends that, even admitting this to be true, yet, as matter of law, respondent should be regarded as an insurer, liable for the whole amount collected, and that the facts set up by him constituted no legal defence.

The Circuit judge declined to enforce this stringent principle, and, holding that respondent's liability was dependent upon negligence and the proper performance of his duties, he decreed, upon the facts, that the respondent was not liable for the loss incurred by reason of his deposit in the Citizens' Savings Bank.

The ground of appeal in this case, involving this point, brings up for the first time in this state squarely the question as to the absolute and unconditional liability of a public officer for public funds collected by him.

This is an interesting and very important question, both to the state and to all those connected with the fiscal department of the government, and it has been maturely considered by this court.

It is a well-settled principle of the common law that agents, trustees, receivers, and all those sustaining fiduciary relations to private individuals, and thereby having the custody and management of their property, such as administrators, executors, guardians and other trustees, are liable only for the exercise of good faith and proper legal diligence and care. True, the court will watch very narrowly the conduct of such trustees, and will never suffer them to escape responsibility out of mere tenderness to their misfortunes. But when it is made to appear that they have kept themselves within the rules prescribed for the discharge of their special duty, and yet a loss has occurred without any fault or negligence on their part, the court will protect them.

This principle is founded upon the highest justice and the soundest morality. It has its roots in the doctrine of ex æquo et bono, and it meets the approval of all just men. Where a party attends to his own business and a loss occurs, he cannot throw this loss on some one else, but he must meet and shoulder it himself. Where, then, he is under the necessity of procuring the assistance of another to attend to his affairs, because he is unable to do so himself, all that he can just-

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ly require from his agent is *good faith, competency and such diligence and care as to the matter in hand as he himself would have given it. This being bestowed, if a loss occurs it should be his loss and not that of the employé. Any other doctrine would cut up, root and branch, one of the most important departments of the business and social economy of the country—the department of bailments. This term, in its broadest sense, covers all classes of agencies. These ramify into and touch every interest of society, and unless properly regulated, society would go to pieces.

It is a matter of the gravest importance, therefore, that whilst the rights of bailors should be most carefully guarded and protected, yet that bailees should not be hastily sacrificed.

The principles referred to above are those which prevail between private parties, and, in reference to private affairs, as found in the common law. They have been applied in many cases in this state. It is only necessary here to refer to the recent case of Twitty v. Houser, 7 S. C. 164, where an administrator, depositing in this same bank, was protected.

Does this common law principle embrace public bonded officers as well as private individuals acting in a quasi official capacity as trustees, &c.? It would be difficult to find a clear distinction between the two—a distinction founded upon principle, such as would justify the exclusion of the one and the inclusion of the other. If it would be wrong in principle to hold a private trustee responsible for a loss which no care of his could have prevented, would it not be equally wrong to hold a public officer responsible under like circumstances? The liability of a bonded officer may be considered, as was said in the case of United States v. Thomas, in a two-fold or double aspect. First. The obligation arising from official duty, and, second, that arising from the condition of his bond. The first is a duty which the law imposes, and the second is a duty which he expressly contracts to perform. The first is governed by the principles of the common law, the other by the terms and conditions of the bond; and if a party binds himself by an express contract to perform a certain act unconditionally, at all events, he must be held by the stipulations of that contract, because such is the agreement he has made.

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*Now, independent of the special stipulations and conditions found in the bond of a public officer, it has been held at common law that the principles referred to above, as applicable to private individuals, apply also to public officers, so far as their obligations arising simply from official duty are concerned.

It was said in the case of United States v. Thomas, 15 Wall. 344 [21 L. Ed. 89]: "The basis of the common law rule is founded on the doctrine of bailment. A public officer having property in his custody, in his official capacity, is a bailee, and the rules which grow out of that relation are held to govern the case." And in Boyden v. United States, where the officer was held responsible, this doctrine was not denied. On the contrary, it is said in that case: "The contract of bailment implies no more, except in the case of common carriers, than ordinary care; and the duty of a receiver, virtute officii, is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking." The defendant in that case was held liable under the terms of his bond.

Mr. Justice Bradley, in the case of United States v. Thomas, said: "The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulations." Accordingly, the congress of the United States and several of the states have made statutory regulations upon this subject, laying the foundation in the official bonds required for a

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more stringent responsibility than is *ordinarily imposed by the common law, especially as to collectors and receivers of public moneys.

It will be found that the cases relied on by the appellant, viz., United States v. Prescott, 3 How. 578 [11 L. Ed. 734]; Same v. Dashiel, 4 Wall. 185 [18 L. Ed. 319]; Same v. Keehler, 9 Wall. 83 [19 L. Ed. 574]; Boyden v. United States, 13 Wall. 17 [20 L. Ed. 527]; Bevans v. United States, 13 Wall. 56 [20 L. Ed. 531], decided in the Supreme Court of the United States, and the case of Muzzy v. Shattuck, 1 Denio 233, in New York, all turned upon the stipulations and conditions of the bonds; it being held in those cases, in accordance with established principles and many decided cases, that where a party contracts without qualification or condition to do a thing, he must perform it or make compensation in damages for non-performance, because it is nominated in the bond. But even this stringent rule was much relaxed in the Supreme Court of the United States in the recent case of United States v. Thomas, 15 Wall. 337 [21 L. Ed. 89], where a collector was excused even from his bond on account of overruling necessity, where it appeared he was without neglect or fault. And this rule was relaxed, although under the acts of congress collectors are allowed all necessary additional expenses for clerks, fire-proof chests and vaults for the safe-keeping, transferring and disposing of the public moneys collected by them.

Now we have no act in this state which imposes a higher or more stringent obligation upon collectors and receivers of public money than that imposed by the common law. The form of the bond, it is true, is prescribed by statute, but the only condition is "that the duties shall be well and truly performed." This condition is the condition of the common law, arising from official duty, and is met at common law by an honest, faithful, prudent and zealous discharge of duty. Should it be thought that public policy required a more stringent rule, the general assembly, in its wisdom, could easily provide the necessary enactments to that end, but it has not done so as yet, and in the absence of such statutory regulations, the courts must follow the common law applicable to such cases. We think, in this case, the Circuit judge followed that law in declining to hold the respondent as an insurer.

We do not understand that the Circuit judge

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ruled as a matter *of law, that the auditor's duplicates were the only source from which to obtain the assessments by which to charge the respondents, but that he referred to these as one of the means by which this could be done, and we see no error in this.

The referee and the Circuit judge have both found, as a matter of fact, that the item of $971.80 was an overcharge, and should have been deducted from the aggregate against the respondent. They have also found, as matter of fact, that the evidence did not sustain the charges of corrupt and improper conduct alleged against the respondent as to the insolvency of the bank in which he had deposited the funds in question.

Where the referee and judge concur in conclusions of fact, it must be shown that the clear preponderance of the testimony is

the other way to authorize this court to overthrow their findings. Austin v. Kinsman, 1 S. C. 111; Blackwell v. Searles, Id. 117. We do not find such clear preponderance in this case as to the facts involved in this appeal.

The decree below is affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 10

(Case No. 1006.)

HAMMOND v. PORT ROYAL AND AUGUSTA RAILWAY COMPANY.

(November Term, 1880.)

[1. *Pleading* ⇐193.]

Every cause of action in a complaint should be completely stated, and contain, within itself, all necessary averments, or it will be held bad on demurrer.

[Ed. Note.—Cited in Hellams v. Switzer, 24 S. C. 42; Latimer v. Sullivan, 30 S. C. 114, 8 S. E. 639; Iseman v. McMillan, 36 S. C. 36, 15 S. E. 336; State v. Johnson, 45 S. C. 488, 23 S. E. 619; Harman v. Harman, 54 S. C. 105, 31 S. E. 881; Hickson v. Early, 62 S. C. 51, 39 S. E. 782; Lewis v. Hinson, 64 S. C. 578, 43 S. E. 15; Scott v. Seaboard Air Line Ry., 67 S. C. 146, 45 S. E. 129; Wright v. Willoughby, 79 S. C. 440, 60 S. E. 971.

For other cases, see Pleading, Cent. Dig. §§ 425, 428–435, 437–443; Dec. Dig. ⇐193.]

[2. *Pleading* ⇐193.]

Where the facts are sufficiently presented as a cause of action, without regard to statements made in other counts, a demurrer will not be sustained, although the allegations are not as formal and distinct as they should be.

[Ed. Note.—Cited in Welborn v. Dixon, 70 S. C. 113, 49 S. E. 232.

For other cases, see Pleading, Cent. Dig. §§ 425, 428–435, 437–443; Dec. Dig. ⇐193.]

[3. *Appeal and Error* ⇐436.]

A demurrer to one of the causes of action set forth in the complaint being overruled, and defendant having at once given notice of appeal therefrom, and declined to answer, further proceedings under that cause of action should have been suspended until the appeal was disposed of.

[Ed. Note.—Cited in McCown v. McSween, 29 S. C. 134, 7 S. E. 45; National Exchange Bank of Augusta v. Stelling, 32 S. C. 106, 10 S. E. 766; Kaminisky v. Trantham, 45 S. C. 10, 22 S. E. 746; Rhodes v. Southern Ry., 68 S. C. 502, 47 S. E. 689.

For other cases, see Appeal and Error, Cent. Dig. §§ 2191, 2192; Dec. Dig. ⇐436.]

[4. *Railroads* ⇐129.]

A railroad having been sold by order of *11

court to pay the debts of the cor*poration, the purchasers, the defendant corporation, are not responsible for injuries done by the railroad to adjoining lands before the sale, and, therefore, in action against the new company for damages done by the railroad to such lands caused by a failure to maintain proper drainage, the Circuit judge erred in charging the jury that "you will take into consideration all you have heard as to the value of the land then and now," in estimating the damages.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 402; Dec. Dig. ⇐129.]

[5. *Railroads* ⇐114.]

But whether the damages should be measured by the rent of the land, the value of crops or the deterioration in value of the land, one or all, was a matter for the jury to determine from the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 365–371; Dec. Dig. ⇐114.]

[6. *Deeds* ⇐110.]

The intention of the parties to a deed, as to whether an estate upon condition has been created, must be determined by the court from the words of the deed itself, and should not be submitted to a jury.

[Ed. Note.—Cited in De Camps v. Carpin, 19 S. C. 124; Arnold v. Bailey, 24 S. C. 497; Boozer v. Teague, 27 S. C. 360, 3 S. E. 551; Sullivan v. Latimer, 38 S. C. 420, 17 S. E. 221; Cartin v. South Bound R. Co., 43 S. C. 223, 20 S. E. 979, 49 Am. St. Rep. 829.

For other cases, see Deeds, Cent. Dig. §§ 255, 293; Dec. Dig. ⇐110.]

[7. *Deeds* ⇐165.]

A deed conveyed a strip of land to a railroad company, to them, their successors and assigns forever, "provided always, and this deed is upon the express condition" that a certain system of drainage was to be kept up by the railroad company. *Held*, that this created a condition subsequent in deed, and voidable by the grantor upon condition broken.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 521; Dec. Dig. ⇐165.]

[8. *Deeds* ⇐168.]

But no action for the recovery of the land could be brought by the grantor until he had made entry upon the land after condition broken, or made claim, if entry was impossible.

[Ed. Note.—Cited in White v. Britton, 75 S. C. 432, 56 S. E. 232.

For other cases, see Deeds, Cent. Dig. §§ 526–533; Dec. Dig. ⇐168.]

[9. *Deeds* ⇐166.]

Whether the grantor had waived his right to enforce a forfeiture, is a question of intention depending upon the facts, and was properly submitted to the jury.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 522–525; Dec. Dig. ⇐166.]

[10. *Railroads* ⇐72.]

Public policy does not forbid a railroad corporation from accepting land for its roadbed upon such conditions—conditions reasonable and possible to be performed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168–178; Dec. Dig. ⇐72.]

[This case is also cited in Cartin v. South Bound R. Co., 43 S. C. 224, 20 S. E. 979, 49 Am. St. Rep. 829, without specific application, and in Elliott v. Pollitzer, 24 S. C. 85; Gentry v. Richmond, &c. R. Co., 38 S. C. 284, 16 S. E. 893, and distinguished therefrom, and in Kibler v. Luther, 18 S. C. 606; Chavis v. Chavis, 57 S. C. 177, 178, 35 S. E. 507; Lavender v. Daniel & Harmon, 58 S. C. 135, 36 S. E. 546; First Presbyterian Church of Beaufort v. Elliott, 65 S. C. 256, 258, 43 S. E. 674, as to the effect of subsequent conditions in deeds.]

Before Aldrich, J., Aiken, April, 1880.

This was an action instituted June 26th, 1879, by Paul F. Hammond against the Port

Royal and Augusta Railway Company, upon two causes of action, which are sufficiently stated in the opinion of this court.

On May 22d, 1872, Hammond executed and delivered to the Port Royal Railroad Company a deed of bargain and sale, whereby he conveyed to the railroad company a strip of land through his Cathwood plantation, in South Carolina, upon the conditions set forth in the opinion of this court. Hammond had, before that time, at great expense, reclaimed this land and the lands adjoining, so that they had become very highly productive and valuable. Hammond, believing that

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the corporation had failed to *perform these conditions, filed a bill for specific performance in the Superior Court of Richmond county, in the State of Georgia, through which county this railroad passed. The jury to whom the cause was submitted, May 4th, 1875, found a verdict for $3000 damages, and that the railroad company be required to comply with their agreement, as set forth in the deed, within ninety days, under a penalty of $5000. This verdict was set aside by the Supreme Court of Georgia, on appeal, upon the ground that the court had no jurisdiction to compel a Georgia corporation to go into an adjoining state to perform a contract. 58 Ga. 583.

December 15th, 1874, a bill was filed in the United States Circuit Court for the District of South Carolina, by mortgage creditors of the Port Royal Railroad Company for a foreclosure of their mortgage. On March 28th, 1878, Hammond filed his petition in this cause, setting forth the deed, the failure of the corporation to comply with its conditions, and his damages, and praying to be made a party defendant, and that he be heard upon all questions relating to the sale and the application of the proceeds, and for his damages and a removal of the obstructions. On May 9th, 1878, this petition was referred to James Simons, Esq., as special master, for investigation and report. On April 25th, 1879, Mr. Simons filed his report, wherein he ascertained the damages at $8940, but that such damages were not an encumbrance superior in law to the mortgage.

Meantime, on June 6th, 1878, the railroad was sold by order of the United States Court and purchased by a new company, who organized under the name of the Port Royal and Augusta Railway Company, and took possession in May, 1879. The sale was confirmed during this same month, "without prejudice to the claim of Paul F. Hammond," who obtained leave the same day to withdraw his petition upon payment of costs.

On June 12th, 1879, Hammond, by his attorney, demanded, by letter, from the defendants, the possession of the land described in the deed—but possession was not surrendered.

Action was then brought as above stated. Defendants answering the first cause of action denied title in the plaintiff, and demurred to the second cause of action. The de-

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murrer was *overruled, and defendants excepted and gave notice of appeal, and asked for a continuance pending the appeal. Leave was granted to put in an answer, which was declined. The case was required to go on. After the evidence for plaintiff closed, defendants moved for a nonsuit, which was refused.

The defendants asked for several instructions to the jury, which are repeated in their grounds of appeal. The charge of the presiding judge was as follows:

The requests to charge have been read, and you will be able to arrive at your conclusions after I have delivered to you my charge. I will note on them for the purposes of this case those that I refuse and those that I charge, so that the whole matter can be discussed in the Supreme Court. As this is a very important case, I desire that every word may be clearly understood.

Next to life and liberty, the law guards with jealous care the freehold of the citizen. The questions of law in this case have been very fully and ably discussed by counsel. They are very interesting and important. These I have decided. If I am wrong I will be corrected by the Supreme Court; if I am right, much time and labor will be saved to the parties to this cause, and much expense to the county. With these questions of law you have nothing to do; you will understand them from what I am about to say; for them the court alone is responsible. The evidence has been given you from the stand.

There are three questions of fact to decide, which is your peculiar province, and I do not propose to influence your minds, as the law has allotted to you that exclusive duty.

The first is, did the plaintiff, Hammond, sign and execute this paper, intending to convey to the Port Royal and Augusta Railroad Company, the defendant, an estate on condition that his system of drainage was to be preserved as it then was, or was it a covenant, which, if violated, gave him an action for damages against the company, to be assessed by the jury.

If you find it was an estate on condition, and that the condition has been broken, then the verdict will be for the land conveyed in the deed—on the breaking of the condition the title reverted—and such damages as you may find the plaintiff has sustained by the non-performance of the condition. Now this

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*question of condition is one of evidence. Did the plaintiff, Hammond, convey the strip of land to the railroad company on condition? The charter of the company empowered the corporation to enter upon the freehold of

the plaintiff, appropriate his land against his consent, at such a valuation as a jury of freeholders might assess. This was giving the corporation the right of eminent domain, which none but the sovereign state can exercise. The surrender of this sovereign right is a concession to those great corporations which add so much to the wealth, convenience and happiness of the people. They convey the mail and passengers with the speed of the wind—annihilate time and space and develop the resources of the country, convey its produce with celerity at reduced rates, enhancing the value of lands through which they pass or which are adjacent, build up towns, villages, and sometimes cities on their lines, increasing the wealth of the state, and adding to the convenience and comfort of the people—a benefit hardly to be appreciated.

For these reasons the state has permitted these corporations to share her right of eminent domain. But, while the state has been thus generous to the projectors of these enterprises which add to her wealth, and to the convenience and comfort of her people, she has not been unmindful of the rights of the proprietors, her own citizens and children. So when she granted this charter empowering the company to enter upon and appropriate the right of way, she also imposed upon them the duty of getting the consent of the proprietor, or, if he refused, to have the damages assessed. In this particular case the company elected to negotiate with the proprietor, and the deed before you is the result. From this deed and the evidence you have heard, the question for you is, what was intended by it? Was it a conveyance of the strip of land on which the railroad is erected, a title to the land on condition that the system of drainage should remain as it then was, or the land revert, or was it not? What did the plaintiff intend when he executed the title, and what did the defendant understand when it received it?

If both parties intended that unless this system of drainage as it then was, should be preserved, the land should revert to the plaintiff, then the plaintiff is entitled to recover,

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and your verdict *must be for him for the land, and such damages as you think, from the evidence, he has sustained.

The next question is, has the plaintiff waived his right under the deed, supposing you to consider it to be a title on condition? In all those negotiations between the plaintiff to avoid this litigation and settle this dispute on amicable terms, is it a waiver? You will decide these questions by the evidence. If it was a waiver the plaintiff is not entitled to recover. Has the plaintiff, in his interviews and by correspondence with Mr. Wilson, the president, or Mr. Fleming, the superintendent, waived his rights? Has he, by his litigation in the court of Georgia or of the United States, waived his rights? This is a question of fact, of which you are the judges and the only judges.

Having passed on these questions, your next inquiry, if you find for the plaintiff, is, what are his damages? In deciding this you will take into consideration all you have heard as to the value of the land then and now. Has the railroad company injured the plaintiff, Hammond? If so, how much? Now, gentlemen, in deciding this case you must not decide it because the plaintiff is your neighbor, your fellow-citizen, and the defendant is a corporation of New York or Georgia capitalists, but as your consciences will dictate, and as truth and justice demand. If this company has exercised the high power conferred by the state with arrogant assumption of authority and a willful disregard of the rights of the citizen, then your verdict will teach them that the landed proprietors along the route have some rights which you will protect, and you will inquire what is the extent of the damage to the plaintiff, and you will also inquire if the plaintiff has been guilty of neglect in not putting his land in order for cultivation before the work at the water-way of the railroad was done by the company. That is all the ciphering you have to do. If, however, you conclude that the land has been deteriorating in fertility and value, and the plaintiff, Hammond, well knowing of this has brought his suit as a speculation to extort money from the company, then he should not recover a single cent. Take the case.

If you find for the plaintiff generally on all questions, your verdict will be "we find for the plaintiff the land in dispute, and

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*so many dollars damages." If for the defendant, your verdict will be, "we find for the defendant."

The presiding judge did not, before the jury retired, note on the defendant's requests those that he "refused and those that he allowed," nor has this been done since the trial.

The jury found for the plaintiff the land in dispute, and $6346.31.

Defendants appealed upon the following grounds:

I. *First.* That his Honor erred in overruling the demurrer to the second cause of action.

Second. That his Honor erred in ordering for trial the said cause of action against the objection of defendant's counsel after said demurrer had been overruled, and notice of appeal from said ruling given.

II. The defendant will renew his motion for a non-suit, on the following grounds:

First. Because the deed of Paul F. Hammond to the Port Royal Railroad Company did not create an estate upon condition.

Second. Because if the said deed did create an estate upon condition, the omission to

perform the condition did not, ipso facto, determine the estate, but only rendered it liable to be defeated at the election of the grantor by an actual entry, or a claim where entry is impossible, and there was no evidence that the plaintiff had ever made a formal entry upon the land for the purpose of enforcing the forfeiture, or had ever done any act equivalent to an entry at common law, or to a continuous claim.

Third. Because the forfeiture of a breach of condition may be waived by the grantor, and the testimony of the plaintiff, Paul F. Hammond, showed that he knew of the alleged breach of condition at the time of said breach or within six days thereafter, and without notice of his intention to enforce the forfeitures, permitted the company to make large expenditures in the construction of its track upon the land in question, and as late as February, 1879, gave directions to the defendant company as to the changes which he desired to have made in the digging of the ditches and the construction of the water-

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ways, and after the *work had been done accepted it, and declared the same satisfactory, and by each of these acts waived the forfeiture and treated the title of the company as still subsisting.

Fourth. Because whatever the terms of a condition attached to an estate of freehold, the estate will continue notwithstanding a forfeiture, unless the forfeiture be enforced by an actual entry or a claim when entry is impossible, and an action for the recovery of real estate cannot serve as a substitute for an actual entry or its equivalent at common law.

III. The defendant will also move for a new trial on the following grounds:

First. Because his Honor refused to charge that the following language of the deed, "that the system of drainage shall remain the same as now, except that such ditches as have been filled up by the party of the second part, shall be re-opened by them, and ditches to remain of such a depth as to allow as heretofore the drainage of the land to the depth of five feet," does not create an estate upon condition, and the jury must find for defendant upon the first cause of action.

Second. Because his Honor refused to charge that even if the said words do create such a condition, the omission to perform the condition does not, ipso facto, determine the estate, but only renders it liable to be defeated at the election of the grantor, and the verdict of the jury on the first cause of action must be for the defendant, unless they find from the testimony that the plaintiff made a formal entry upon the land for the purpose of enforcing the forfeiture, or if he was deterred from entering upon the land by menaces or bodily fear that he made claim as near to the land as he could, for the same purpose, and with like forms and solemnities.

Third. Because his Honor refused to charge that forfeiture for breach of condition may be waived; that if the jury found from the evidence that the plaintiff knew of the improper construction of the waterways and trestles, by means of which the ditches were obstructed and his drainage interfered with, at the time this was done, or soon afterwards, and did not enter on the land, or do any act equivalent to an entry

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at common law, but *permitted the company, without notice of his intention to enforce the forfeiture, to make large expenditures upon the land, and if they further found that the plaintiff, after breach of condition, instituted proceedings in the courts of Georgia to compel the company to dig the ditches to a proper depth, and to construct its waterways and culverts in a proper manner, and if they further found that the plaintiff, after the forfeiture, gave directions to the defendant company as to the changes which he desired to have made in the ditches and water-ways, he, by any or all of these acts, waived the forfeiture, and the verdict must be for the defendant upon the first cause of action.

That whether the acts above named are a waiver, does not depend upon the intention of the plaintiff to waive the forfeiture, but such waiver was the legal effect of doing the acts with a knowledge that the alleged condition had been broken. The question is one of fact and not of intention.

Fourth. Because his Honor refused to charge that, under the second cause of action, the jury could not find damages for anything done prior to the possession of the land by the present defendants; and, in assessing the damages, they must make allowance for whatever part thereof had been caused by the negligence of the plaintiff in not digging the ditches below the railroad tract.

Fifth. Because his Honor refused to charge that the measure of damages against the defendant (if the jury find they have been negligent) is the interest on the value of the land since October, 1878, at the rate of seven per cent., that is to say, according to the testimony, seven per cent. on $8000 for eighteen months, less the value of the crops raised on the lands during that time, which according to the same testimony, was, during the two years, between $800 and $900.

Sixth. Because his Honor refused to charge upon the construction of the deed, and left it to the jury as a question of fact to decide whether the said deed was intended to convey to the Port Royal Railroad Company an estate on condition that the grantor's system of drainage was to be preserved as it then was, or to create a covenant which, if violated, gave him an action

against the company, to be assessed by the jury.

Seventh. Because his Honor erred in

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charging the jury that if *they found "that the deed created an estate on condition, and that the condition had been broken, that the verdict should be for the land conveyed in the deed (for, on the breaking of the condition the title reverted,) and such damages as they might find that the plaintiff had sustained by the non-performance of the condition. Now, this question of condition is one of evidence. Did the plaintiff, Hammond, convey the strip of land to the railroad company on condition? * * * From this deed and the evidence you have heard, the question for you is, what was intended by it?" * * *

Eighth. Because his Honor erred in instructing the jury that "if both parties intended that unless the system of drainage, as it then was, should be preserved, or the land should revert to the plaintiff, then the plaintiff is entitled to recover, and your verdict must be for him for the land and such damages as you think, from the evidence, he has sustained."

Whereas, it is submitted that the plaintiff could not treat the clause in the deed, upon which he relied, as creating a "condition," the breach of which might be enforced by a forfeiture of the estate granted to the railroad company, and, at the same time, as a "covenant," the breach of which would entitle the plaintiff to maintain an action for damages.

Ninth. Because his Honor erred in charging the jury as follows: "In all these negotiations between the plaintiff to avoid this litigation and settle this dispute on amicable terms, is it a waiver? You will decide these questions by the evidence. If it was a waiver the plaintiff is not entitled to recover. Has the plaintiff, in his interviews and by correspondence with Mr. Wilson, the president, or Mr. Fleming, the superintendent, waived his rights? Has he, by his litigation in the courts of Georgia or of the United States, waived his rights? This is a question of fact, of which you are the judges, and the only judges."

Whereas, it is submitted that he should have charged that the plaintiff having, with full knowledge of the improper construction of the water-ways and trestles, by means of which his ditches were obstructed and his system of drainage interfered with, permitted the company, without notice of his intention to enforce the forfeiture, to make large ex-

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penditures upon the land, and *having subsequently instituted proceedings in the courts of Georgia to compel the Port Royal Railroad Company to specifically perform the "covenants of the deed," by digging its ditches to a proper depth, and constructing its culverts and water-ways in a proper manner, and to recover damages for the "breach of the covenants" of the said deed, and having filed his petition in the United States Court, praying the payment of the damages he had sustained by the breach of the "covenants" of the said deed up to the date of the decree, and for the removal of the obstructions to the plaintiff's drainage, and having, after the sale of the premises to the present company, given directions to its officers as to the changes he desired to have made, and having afterwards approved and accepted the work so done at his suggestion, and having addressed to the superintendent the letter dated March 5th, 1879, had waived the forfeiture and could not recover the land. These facts were all established by the uncontradicted testimony of the plaintiff and other witnesses, by his letter of March 5th, 1879, and by the records of the courts of Georgia and the United States, and their effect should have been ruled as a question of law.

Tenth. Because his Honor erred in charging the jury as follows: "Your next inquiry, if you find for the plaintiff, is, what are his damages? In deciding this, you will take into consideration all you have heard as to the value of the land, then and now. Has the railroad company injured the plaintiff, and if so, how much?"

Whereas, it is submitted that the present company, the defendant, could not be held liable for damages done to the plaintiff by the Port Royal Railroad Company, and the jury should have been told that they could only take into consideration such depreciation in the value of the land and other damages as had been caused by the unlawful or negligent acts of the defendant since October, 1878, when the property was conveyed to it. The failure to distinguish between the damage caused by the old and defunct company, and that caused by the defendant company, could not fail to confuse the jury, and was error on the part of the judge.

[For subsequent opinion, see 16 S. C. 567.]

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*Mr. S. Lord, Jr., for appellant.

I. Every fact which the plaintiff must prove to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred. Code, § 165; Circuit Court Rules VIII.; Pom. on Rem., § 552, note, 575; Bliss' Code Pl., §§ 121, 282, 283; 12 S. C. 1, 8; Steph. on Pl. 304; 1 Chit. Pl. 366; 1 Add. on Torts 247.

II. The seventh ground of appeal is alone decisive.

In refusing the motion for a non-suit, the court said: "This question of intent is one that may fairly be submitted to the jury, and while I am obliged to consider it in deciding this motion, I will take care that the jury shall be untrammeled when it is submitted to them."

Accordingly the court charged the jury: "From this deed and the evidence you have heard, the question for you is, what was intended by it?"

Mowry v. Stogner, 3 S. C. 251, expressly rules that this is error, and upon this ground a new trial must be granted.

As, however, the inquiry as to the proper construction of the deed of 1872, and the effect of the plaintiff's acts in waiving the alleged breach of condition, will be conclusive of the case, it is desirable that the court should enter upon it now. This was the course pursued in 11 S. C. 75, and if adopted it will save the delay and expense of another appeal.

The ruling question is, whether the deed of Hammond to the Port Royal Railroad Company created an estate upon condition. The presiding judge, on the motion for a nonsuit, ruled that it did.

The clause relied on is susceptible of three constructions:

1. That it annexed a condition subsequent to the estate granted.

2. That it reserved to the grantor an easement.

3. That it created a covenant running with the land.

The rules which should govern the court in the determination of this question are well settled. 4 Kent 132; 15 Penna. 295.

As proper to frame a condition, certain words are recognized which, of their own nature and efficacy, without the addition of other words, are sufficient. Among these, three

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are said to be *most appropriate to make an estate conditional, namely, "proviso," "ita quod," and "sub conditione." Now, in that clause of the deed particularly under review, we have the apt words, "upon the express conditions," and hence it will be argued that by the legal import necessarily attributable to them, the estate granted is a conditional interest. But this argument overlooks the well settled principle, "that these conditional words sometimes serve to work a qualification or limitation, and sometimes to make a covenant only, according to the intention of the parties." 2 Greenl. Cruise 730, § 4; 2 Pars. on Cont. 526.

There is, therefore, no "rigid and unbending rule ascertained by settled authority" which requires the court to construe this clause as a condition. If the parties did not intend that there should be a condition, there is none. Now, to construe this clause as a condition, would entirely defeat this purpose. The benefit of a condition can only be reserved to the grantor or his heirs. It cannot be reserved to or assigned to a stranger, and the assignee of the reversion cannot enter for a condition broken. 4 Kent *122. If the grantor assigns the adjoining land and then enters, he holds the estate discharged of the condition and the owner of the land assigned derives no benefit from it. Co. Lit. 214 a, 214 b, 215 b; Com. Dig., "Condition," A 6.

The only way, then, to effect the intent of the grantor, is to construe the clause under consideration as the reservation of an easement, or as a covenant running with the land conveyed to the railroad company.

We next inquire as to the presumed intention of the grantee. It is difficult to suppose that it could have been the intention of the company to accept a conveyance which would give the plaintiff the right, if his ditches did not remain at the depth of five feet or "the cattle guards or the stop gaps" on the line of the road were not kept in constant or uninterrupted repair, to take possession of the premises and render its entire road from Port Royal to Augusta useless.

Such a condition would be clearly void as against public policy. 101 U. S. 71.

And the deed itself points to the conclusion,

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that by this *clause a covenant and not a condition, was intended, for the clause immediately preceding states the contingency on which the land was to revert to the grantor.

It is well settled "that where the words of an instrument are ambiguous, the court will call in aid acts done under it as a clue to the intention of the parties." Broom's Max. *300; 8 Bing. 178; 2 Greenl. Cruise, ch. XXV., § 9; 9 Paige 427.

In the statement of facts the evidence is referred to, which shows that from the execution of the deed down to the bringing of this action, the plaintiff has invariably elected to treat the clause in question as a covenant. He is now concluded from averring that it is a condition.

III. But conceding that the estate granted was upon condition, and that it has been broken, the next inquiry is, has the breach been waived?

By the conveyance from Hammond the railroad company took a fee in the premises. Such is the legal effect of the language of the deed. The habendum is to the company and their successors and assigns forever. This fee, if plaintiff's construction be correct, was qualified by a condition subsequent. It is laid down by all the authorities that where a freehold estate is granted upon condition subsequent, the estate vests in the grantee, subject to be defeated by the omission to perform the condition. But the breach of condition does not (as his Honor charged), ipso facto determine the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so by entry or its equivalent, there is no forfeiture. 4 Kent 126; 2 Bla. Com. 155, and authorities passim; 4 Kent 128.

As the condition is reserved for the benefit of the grantor, it is competent for him to waive the breach and treat the estate as still subsisting, "and as the rigorous execution of them is a species of summum jus, and, in many cases, hardly reconcilable with con-

science." 4 Kent 128, 129. The inclination of courts is strongly in favor of giving every act or declaration of the grantor which evinces an intention to overlook the breach and treat the estate as still subsisting, the effect of a waiver, especially if attended by a lapse of time or any other circumstance which

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would *render it inequitable to enforce forfeiture. Note to Dumpor's case, 1 Smith's L. Cas. 97; 4 Burr. 2052; Cowp. 803; 12 Barb. 440; 5 Ohio 388; 35 N. Y. 208.

Applying these principles to this case, it is impossible to resist the conclusion that the petitioner has waived his right to insist upon a forfeiture of the estate granted to the railroad company.

The question of waiver was submitted to the jury as one exclusively of fact to be determined by them, and without the slightest explanation of the legal doctrines they were to apply. That this was error, is ruled in 2 S. C. 524.

IV. The next question in the case is, whether the plaintiff was bound to make an actual entry before he could maintain his action?

It is of consequence to bear in mind the distinction between conditions subsequent annexed to an estate in fee, and the like conditions annexed to an estate for years. In the former, the only mode in which advantage can be taken of a breach is by entry, or, if that should be impossible, by claim. 1 Greenl. Cruise 504, § 9, and especially note 1; 2 Washb. on Real Prop. *452, § 16; 4 Kent 127.

The reason of the rule is stated with great clearness in 1 Conn. 87.

In those states in which the fictions of the English practice are dispensed with, an action of ejectment cannot be brought as a substitute for an actual entry. 5 Serg. & R. 375; 35 Maine 342; 18 Conn. 535; 57 Ind. 564; 11 N. Y. 315; 12 N. Y. 121.

The entry and claim referred to in these authorities is described by Blackstone.

In many states statutes have been passed dispensing with the necessity of actual entry. No act of this character can be found upon the statute books of this state. The plaintiff's title must, therefore, "be judged by the rules of the common law," and so judged, it is clear that until an actual entry, both the legal title and the right of possession were in the defendant when this suit was brought.

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*Messrs. D. S. Henderson, M. C. Hammond and the Attorney General, contra.

Mr. William Elliott, in reply.

March 21st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. In this case two causes of action were joined. In the first the plaintiff sued to recover a certain strip of land situate in the county of Aiken, in this state, the same being two hundred feet wide and one mile and one-half long, extending through the plantation of plaintiff, known as "Cathwood." This strip of land the plaintiff had previously sold to the Port Royal Railroad Company as a right of way, upon which to construct a portion of their railroad. The deed conveying this strip of land to said company will be hereafter considered. It may be stated here, however, that this deed was claimed by the plaintiff to be a deed upon conditions; that these conditions had been broken, and, therefore, that the title had been forfeited. This action was brought to recover the land.

For the second cause of action the statement is as follows: "That said defendants having wrongfully taken possession of said tract of land aforesaid, had continued the construction and running a railroad through the same, and because of the negligent construction of said road-bed, the culverts, trestles and mudsills, so continued negligently and unlawfully, said defendants have damaged and almost completely destroyed the system of drainage which existed on the plantation of Cathwood aforesaid, by closing up and obstructing the ditches and canals which supported said system, thus causing to plaintiff the loss of his crop and great deterioration in the value of his lands, to the damage of plaintiff eight thousand dollars."

To the first cause of action the defendants answered, denying title in the plaintiff and claiming title themselves.

To the second defendants demurred, "on the ground that complaint does not state facts sufficient to constitute a cause of action." The case was heard before Judge Aldrich. The first issue tried was the issue of law raised by the demurrer. Judge Aldrich overruled the demurrer. The defend-

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ants at once appealed, and *moved the court to proceed no further with the trial of the second cause of action.

There is some difference of recollection between counsel as to what occurred at this point; but the trial proceeded as to both causes of action. The defendants did not ask leave to file an answer when the demurrer was overruled, but distinctly refused. Upon the close of plaintiff's testimony defendants moved for a non-suit on the first cause of action, on grounds which will be found in the grounds of appeal. This motion was refused. The jury found for the plaintiff the land in dispute and $6046.11. The defendants appealed on the various grounds which will be referred to as far as may be necessary in the discussion which follows.

Should the demurrer have been sustained? is the first question for our consideration.

The complaint embraces two distinct causes of action; one for the recovery of a tract or strip of land and damages for its detention, and the other in the nature of an action on the case for damages done to real

estate (other than this strip) by stopping up ditches, interfering with drainage, &c., &c., by defendants.

Under the old practice these two causes of action could hardly have been joined in one suit, but under the code this is allowable, and hence no objection was interposed on that account. But the demurrer was based on the ground that while two or more actions may be joined in one suit or complaint, yet that these different causes of action must each stand on its own statements, and must be considered as if no other was embraced, and upon demurrer each must be tested by what it contains, without help from any other count in the complaint. If this position can be sustained, then it will become necessary to test the second count by this rule. This question must turn upon the construction which must be given to the provisions of the code upon the subject of complaints.

The code, although it has been in use in this state since 1870, is still somewhat new to us. In our own decisions we have not as yet sounded its depths or reached its heights. Many questions have arisen elsewhere under it, which have not been presented to our courts. We have a right, it is

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true, to construe it *for ourselves, and this we propose to do as necessity may arise: but at the same time it will be our pleasure and duty to get all the aid we can from the decisions of able judges in other states, and especially from the labors of distinguished writers and annotators who have made the entire system the subject of earnest and profound study. Among these writers, Pomeroy and Bliss are, perhaps, the most prominent and most frequently quoted.

Mr. Pomeroy, in section 275 of his Remedies and Remedial Rights, says: "Where a complaint contains several counts, it is a settled rule that each separate division or count must be complete by itself, and must contain all the averments necessary to a perfect cause of action. Defects and omissions in one cannot be supplied by allegations found in another, nor can the pleader, by merely referring to material facts properly set forth in a former count, incorporate them into and make them part of a subsequent one. In other words, all issuable or material facts constituting the ground for a recovery must be stated in each cause of action, even though some repetition might thereby become necessary."

Mr. Bliss (section 121) says: "The presumption is that every statement embodies a cause of action altogether new, hence the rule that it must be complete in itself. It must contain all the facts which constitute the cause of action embraced in it, and its defects cannot be supplied from other statements. Although this reason is denied in Indiana, yet the requirement that each count shall contain the facts necessary to the cause of action, is rigidly enforced in that state, and a second count, which counted upon a mortgage, and referred to the land as described in the first, was held to be bad, on general demurrer, upon the ground that the court would not look outside the count for a description of the land. So imperative is the requirement that each statement should be complete, that when a statute requires that copies of the instrument upon which the action is based should be filed with the pleadings, it is held that where the same paper is made the foundation of a second count, it should be referred to as filed with that count also."

The same has been held in Wisconsin and New York. Bliss, 121: "Whenever a cause

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of action is attacked by a demurrer, *either against it alone or against the entire pleading, it must stand or fall by its own averments; it cannot be helped out by any facts, however sufficient in themselves, in another paragraph." Pom., § 575; Alendorff v. Bondley, 2 Wis. 222.

So far as this matter has been discussed in other states, this rule seems to have been adopted and enforced with great strictness. At first it would seem to be harsh, rigid and extremely technical, and in conflict with the liberal tendencies of the code; but, upon consideration, it will be found based on correct principles and consonant with the true theory of pleadings. The code makes a considerable stride when it permits two or more different causes of action to be joined in the same complaint, and unless these different causes are kept separate and distinct, much confusion and complication must be the result. To prevent this, an orderly system of pleadings should be adopted, and to this end each action should be stated in a single and independent division, so that defendant might meet it without confusion with others, and each should contain all the averments necessary to raise the issues upon which the case is to be tried. This was always necessary under the old practice when actions could not be joined.

The facts constituting the cause of action were required to be stated in the declaration, not as a matter of mere form but as an essential element in the action, and without which it could not proceed: and there can be no reason why this should be dispensed with now because joinder is permitted.

In Childers v. Verner & Stribling, 12 S. C. 8, Mr. Justice McIver said: "The rule is that while a plaintiff may combine in one complaint several distinct causes of action, yet these different causes of action must be stated separately, in order that the defendant may plead to them separately, if necessary or desirable."

It would seem to follow as a necessary supplement to this that the causes thus stated separately should each contain, in itself, the necessary averments to support it. While the

code has made great improvement in pleading in the adoption of a single form of action, and in cutting off much of its useless and unnecessary verbiage, yet, for the proper ad-

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ministration of the laws, some *symmetry and order should be preserved; and, in the absence of statutory regulations to that end, the court should mould the pleadings into proper shape. And upon this matter, and for this purpose, we are disposed to adopt the principles laid down by Pomeroy and Bliss, and the decisions in the other states, and hold that each count or statement of a cause of action in a complaint should contain, in itself, all the averments necessary to develop the issues involved.

Now apply this test to the statement of the cause of action attacked by the demurrer in this case. The wrong which the plaintiff seeks to have redressed by this action is an alleged injury to his Cathwood plantation, in Aiken county, caused by a serious interference on the part of the defendants with the ditches, canals and system of drainage, which, at great labor and expense, he had established thereon.

The only facts necessary to be stated in an action to redress this wrong are, first, that the plaintiff is the owner, and is in possession of the plantation injured; second, that the defendants have committed the injury complained of; third, that the premises are within the jurisdiction of the court. It is true that these facts are not as formally stated in the count as good pleading would require; but is there not enough to present these facts, and to show that they are relied upon as a cause of action, even without the help of any other count in the complaint?

It is certainly stated that the plantation injured is the Cathwood place. The system of drainage, which is alleged to have been destroyed, is referred to as being on that place. It is further alleged that the plaintiff's land and crops were injured, and no other land or place but the Cathwood place is mentioned. Is this not substantially an allegation that the plaintiff is the owner of the Cathwood place, and that it is the injury upon that place of which he complains?

The defendants are sufficiently charged with committing this injury, and the venue is laid in Aiken county. As we have already said, it is true that these allegations are not as distinctly and as formally set forth as they should have been; and this style of pleading should not be encouraged. But, on the other hand, as the plaintiff has alleged

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enough, by close inspection, to *bring his case before the court, and it is apparent that the defendants have not been taken by surprise, we think the Circuit judge should be sustained in his order overruling the demurrer.

By reasonable intendment the facts may be made out. Mr. Whitaker, quoting from Zabriskie v. Smith, 13 N. Y. 330, says: "It is sufficient that the requisite allegation can be fairly gathered from all the averments in the complaint, though the statement of them be argumentative and the complaint deficient in technical language."

On this branch of the case the defendants appeal, because the judge refused to charge that, under the second cause of action, "the jury could not find damages for anything done prior to the possession of the defendants."

It seems that the Port Royal company, the predecessor of defendants, went into possession in 1873, and continued in possession until some time in 1878. The obstruction to the ditches began soon after the company went into possession, and continued during the whole period of its possession. The plaintiff commenced action against the company in Georgia in 1879, and recovered verdict for the damages up to that date, which the jury at that time assessed at $3,000. The verdict was set aside by the Supreme Court of Georgia for the want of jurisdiction. The plaintiff then commenced proceedings in the United States Court at Charleston. The motion was referred to a referee, who assessed the plaintiff's damages at $5640. That was May, 1878. The defendants went into possession in October, 1878, and the present action was instituted on the 20th of June thereafter.

The greater part of the damages to plaintiff, then, had accrued before defendant's purchase, and by the acts of others. The defendants were certainly not liable for injuries caused by the acts of other parties. There can be no doubt that the plaintiff has been greatly injured. This fact has been found by two juries, and also by a very competent referee. But there is no principle of law which can make one responsible for injuries which he had no agency in committing.

The judge charged the jury: "If you find for the plaintiff, your next inquiry is, what are his damages? In deciding this you will take into consideration all you have heard as

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to the *value of the land then and now. Has the railroad company injured the plaintiff—and, if so, how much?" This was calculated to mislead the jury, and, from their finding, they must have gone back behind the possession of defendants. We think the charge should have been more specific, and that the jury should have been confined, in accordance with the request of defendants to the damage resulting from defendants' acts.

As to the measure of damages, we see no error in the charge. Whether it should be measured by the rent of the land, the probable value of the crops that might have been grown, or the permanent deterioration of the land, one or all, was a matter for the jury, dependent upon the evidence. But in no event should the defendants have been made

responsible for any injury except that occasioned by their own acts of commission or omission.

This brings us to the consideration of the grounds of appeal connected with the first cause of action. The prominent issue in that branch of the case is the title to the strip of land in dispute, and this must depend upon the construction which shall be given to the deed under which defendants claim. This deed is the deed of the plaintiff to the Port Royal company, through which the defendants claim. It is contended by plaintiff that this deed is a deed upon conditions, which conditions have been broken and violated, and, therefore, the title thereunder forfeited, and, on this account, the defendants cannot set it up. It would encumber this opinion too much to copy the deed in full. I shall, therefore, briefly state its conclusion. The habendum is: "To have and to hold the said strip * * * unto the said party of the second part, their successors and assigns forever: provided always, and this deed is upon the express conditions:

"1. That the right of way is granted under the restrictions of the act of the general assembly of South Carolina, of September 22d, 1865, and, if abandoned, reverts back to the party of the first part.

"2. That the system of drainage shall remain the same as now, except that such ditches as have been filled up by the party of the second part are to be re-opened by them, and ditches to remain of such a depth as to allow, as heretofore, the drainage of the land to the depth of five feet.

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*"3. That whenever the road crosses the line of any fence or other enclosure of the party of the first part, the party of the second part shall construct and keep in repair proper and sufficient cattle guards or stock gaps. And provided further, that the said railroad may occupy a wider space." * * *

Estates upon condition are of feudal origin, and have come down to us from that remote day. They are treated of not only in Blackstone but are recognized in Kent and Washburn, and all the writers on real property, and also in the decisions of many of the states of the Union. They are not favored, but when created by the parties interested they have been sustained. The condition which is to affect the estate may be express or implied, and may be precedent or subsequent. Upon a precedent condition the estate may be commenced or enlarged, while a subsequent condition defeats an estate already vested.

In this case the conditions, if any, are subsequent, and we will confine our attention to that class. The intention of the parties must always govern as to the question whether an estate upon condition has been created; but that intention must be reached by interpretation or construction of the instrument in which it is alleged to exist. Testimony dehors the instrument cannot be allowed. Hence, it is always a matter for the court and not a matter of fact for the jury. The judge seems to have submitted this question to the jury. This was erroneous and must be reversed. Mowry v. Stogner, 3 S. C. 251.

The material question, however, in this deed is not met by this ruling. Does it create an estate upon condition subsequent? This court might avoid this question under the grounds of appeal, but inasmuch as the case is to go back to the court below it is important that we should pass upon it now.

Prominent among the forms of expression which create a condition in a grant or deed, as is found in all writers on this subject, are the following: "Provided always, on condition." 4 Kent 122, 140; 2 Washb. on Real Prop. 3. These expressions, both, are found in this deed, and they have been held sufficient to create an estate upon condition, unless there is something in the deed to negative this idea. And inasmuch as estates upon condition working forfeiture are odious, the courts have generally laid hold of any plausible feature to sustain the deed.

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*But what is there in this deed to negative the idea that these expressions were used according to their usual, and, we might say, judicial interpretation, when found in a deed? It is said they imply a covenant running with the land. Covenants running with the land are covenants which bind the grantor. This is not a deed of indenture, but is a deed-poll, signed by the grantor alone, and how can the stipulations in this deed be made the covenants of the grantee? If Hammond had intended to rely for his protection upon a covenant by the grantee, would he not have taken a separate instrument, properly prepared and executed?

The fact that he did not do this affords a strong presumption that he preferred the right to enforce forfeiture as the most effectual means of protection. His system of drainage had been constructed at great expense, and it was natural that he should desire to throw around it the most effectual safeguard, and the danger of forfeiture, on the part of the company, was certainly the highest incentive that could influence the company to do its duty in the premises. When, then, Hammond has used the very terms which the books lay down as the special terms to be used to create such an estate, and when this was his interest, and nothing is found in the deed to negative the idea that it was also his purpose, why resort to implication? Why not take him at what he says? It seems to the court that it would be in violation of all rules of construction to hold otherwise than that this deed created an estate upon condition.

What is the effect of a subsequent condition? There is a broad and wide distinction between a condition and a limitation. A lim-

itation upon a condition, or, in other words, a conditional limitation, is where the property is limited over to a third party in case the condition be not fulfilled, denominated by Littleton a condition in law. 1 Inst. 234. In such case the estate determines, ipso facto, that the contingency happens. But when the estate is upon a condition in deed, as in this case, the law permits it to endure beyond the happening of the contingency. It is voidable, but not void ipso facto. 2 Bl. Com. 155; 4 Kent 127.

Such conditions are not favored and must be construed strictly, and will, under no circumstances, be enforced further than may

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*be absolutely required, and so strong is this principle engrafted in the law that courts of equity will seldom lend their aid to divest an estate for the breach of a condition. If parties, however, will make contracts involving such conditions, they must not expect to get relief by any interposition on the part of the courts. In Hill v. Barclay, 18 Ves. 56, Lord Eldon said: "Relief might be granted against a breach of a condition to pay money, but not where the breach of the condition consisted of acts of commission, directly in the face of it, and the law had ascertained the contract and the rights of the parties. A court of equity could not interfere."

Estates upon condition are created for the benefit of the grantor and his heirs and no one else can take advantage of the condition, and the estate is not divested until the grantor acts. The law, from the beginning, has prescribed the mode of action on his part. In some of the American states this mode has been altered by statute; not so, however, in South Carolina.

Both the estate and the mode of enforcing forfeiture originated together in feudal times, and though the reasons for their origin as to both have long since passed away, yet they were adopted together, and must stand or fall together, except so far as any state may have amended by statute.

Actual entry, or, if that be impossible, by claim, was the original mode of enforcing forfeiture. This was a part of the very law authorizing the estates upon condition subsequent. 2 Washb. R. P., § 16, 450; 4 Kent 127; 2 Greenl. Cruise, ch. II., §§ 42, 45, note 1. Mr. Washburn says that nothing short of an actual entry will serve to defeat an estate upon condition broken. Finder v. Says, 46 Barb. 123. He adds: "It cannot be done by action, for, when the grantor conveyed, he parted with the seizin, which he can only regain by an entry made." Shep. Touch. 496; Co. Lit. 218; Chalker v. Chalker, 1 Conn. 79. We have no authority which authorizes this court to modify this principle.

In an action to recover real estate, the plaintiff must have title when he begins his action. In this case plaintiff parted with his title by the deed to the Port Royal company. Has this title returned to him? Ordinarily a reconveyance would be necessary, but in deeds upon condition an entry upon breach of

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con*dition will operate as a reconveyance; or if entry cannot be made, claim will be sufficient; either will do, but in the absence of both the title cannot return. The Circuit judge should have charged the jury that entry, or, if that was impossible, claim was necessary on the part of the plaintiff to divest the defendants of title.

We think there was no error on the part of the judge in submitting it to the jury as a question of fact, whether the plaintiff had waived his right to enforce forfeiture. All the authorities agree in the opinion that this is a right which may be waived. Whether it has been waived in a given case, is entirely a matter of intention on the part of the grantor, to be reached in each case by the special facts. In some cases it has been decided that long acquiescence after condition broken, standing by and permitting improvements, unexplained, and acts of that kind, might be relied on as evidence of waiver; but we know of no rule of law more certain or more explicit than to say that where the evidence shows an intention to waive this right, then this intention must govern, and when once the right is waived it is gone forever. Washb. and Kent, supra.

We do not think that considerations of public policy can enter into this case. The Port Royal company had the right, under the act of the general assembly, to condemn this strip of land, and take possession by virtue of the mode therein prescribed. If it saw proper to resort to a private agreement and purchase, we do not see that they can interpose the public interests as a shield against their positive and distinct contracts, especially as the conditions imposed were reasonable and proper, and do not appear to have been surrounded with any great difficulty in being met and discharged.

We think that the notice of appeal from the order overruling the demurrer should have stayed proceedings as to the second cause of action until the appeal was heard. Code, § 369.

The judgment below is reversed and the appeal sustained, and it being admitted that there was no evidence whatever showing entry or claim before action brought, the defendant's motion for non-suit as to the first cause of action should have been granted,

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*and the judge's order refusing this motion is reversed and the non-suit ordered. The case is remanded for a new trial on the second cause of action.

McIVER and McGOWAN, A. J.'s concurred.

15 S. C. 36

(Case No. 1007.)

ADAMS v. AGNEW.

(November Term, 1880.)

[1. *Homestead* ⟸107.]

A being indebted to B for balance on bond of long standing, given for the purchase money of land, B, in May, 1868, accepted a new bond from A and sued it to judgment, but obtained no endorsement of a certificate that the judgment was based upon an obligation for the purchase of the land. *Held*, that the judgment was founded upon the new bond, and that, under the constitution of April, 1868, A was entitled to his homestead exemption in such land as against this judgment.

[Ed. Note.—Cited in Oliver v. White, 18 S. C. 242.

For other cases, see Homestead, Cent. Dig. § 172; Dec. Dig. ⟸107.]

[2. *Judgment* ⟸122.]

A judgment taken by default before the clerk of the court since the act of November 25th, 1873, amending the code, is absolutely void; nor will it be made valid by the refusal of ex parte motions afterwards made (1) by the plaintiff to docket and take judgment in open court, and (2) by junior judgment creditors to vacate; or even, it seems, by a decree declaring the judgment valid in an action brought by other judgment creditors to set it aside, to which action the judgment defendant was a party and did not appeal.

[Ed. Note.—Cited in Agnew v. Adams, 17 S. C. 369; Id., 26 S. C. 106, 1 S. E. 414.

For other cases, see Judgment, Cent. Dig. § 222; Dec. Dig. ⟸122.]

[3. *Homestead* ⟸51.]

An assignment of homestead, together with an accompanying plat referred to for a description by metes and bounds, was returned in due time to the proper officer, who recorded the assignment but not the plat, which was put into a drawer in his office. The judgment creditors knew of the assignment and that defendant was living on the land, claiming it as his homestead. *Held*, that the defendant was entitled to his homestead so laid off and assigned.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 75; Dec. Dig. ⟸51.]

[This case is also cited in M. S. Bailey & Sons v. Wood, 71 S. C. 48, 50 S. E. 631, without specific application.]

Before Thomson, J., Richland, March, 1879.

This was an action commenced September 30th, 1878, by Thomas Agnew to recover two hundred acres of land from Robert Adams. Agnew claimed as purchaser at sheriff's sale under executions against Adams. The de-

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fendant claimed that the tract *described in the complaint was his homestead, duly assigned and laid off to him before the sheriff's sale. The land levied upon and sold by the sheriff seems to have contained nine hundred and two acres, and to have been bid in at $225. It was levied on in 1874; the assignment of homestead was dated January, 1875, but no sale was made under the levy until March, 1878. This action was to recover the two hundred acres. It does not appear that the possession of the lands in excess of the homestead was withheld by the defendant. At the sale notice was given by Adams' attorney of the assignment of the homestead.

After the close of testimony for the plaintiff, defendant moved for a non-suit, which was refused. There were several instructions to the jury, requested by defendant, and exceptions to evidence and to the rulings and charge of the Circuit judge, but they were not considered by this court and need not be stated. Every fact necessary to a full understanding of the case, and also the points decided, are sufficiently stated in the opinion.

[For subsequent opinions, see Agnew v. Adams, 17 S. C. 364; Id., 26 S. C. 101, 1 S. E. 414.]

Mr. J. E. Bacon, for appellant.

Mr. Youmans, attorney-general, contra.

March 22d, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action for the possession of a tract of land known as the "Bluff Plantation." The defendant resisted the plaintiff's right to recover two hundred acres of the tract, mainly on the ground that it "had been assigned to him as a homestead, according to the provisions of the constitution and laws of the state."

Prior to 1875, several judgments and executions had been lodged against the defendant, Robert Adams, and in October of that year these executions were levied upon the Bluff plantation, then described as containing nine hundred and two acres, in the possession of the defendant. He made application for homestead, and the sheriff issued his warrant, naming in it all the cases in his office against the defendant (except that of Amie A. Weston, assignee, to which particular reference will be made hereafter,) appointing appraisers to lay off homestead for

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the de*fendant. The appraisers made an assignment, which, together with a plat of the land assigned, was returned in proper time "for record in court." The clerk recorded the assignment. It seems, however, that he did not copy the plat upon the record, but placed it in a desk in his office. At that time none of the creditors objected to homestead, but, after the decision in Cochran v. Darcy, 5 S. C. 126, was published, it was mooted that two of the judgments against Robert Adams had been rendered upon contracts older than the constitution, and, as against them, the assignment of his homestead could not stand. These judgments were as follows:

1. That of Amie A. Weston, assignee, v. Robert Adams and James P. Adams, upon a bond dated April 24th, 1866, for $727.23. This judgment was rendered by default before the clerk of the court, out of term time, February 3d, 1874. A motion to docket the case and take judgment in court had been refused, and also an application to set aside the judgment had been denied by the same

judge, on the ground that at the time the judgment was rendered before the clerk there was no valid law forbidding it.

2. The judgment of James P. Adams v. Robert Adams, for $3800, upon a bond bearing date May 25th, 1868, but alleged to be the renewal of an indebtedness older than the constitution, part of which was the balance of a bond given for the half interest of James P. Adams in lands (seventeen hundred and sixty acres,) which James P. and Robert had inherited from their father, and of which the "Bluff Plantation" was part. Robert had sold off nearly half of it, leaving in his possession little more than his own half, nine hundred and two acres.

The judgment creditors, James P. Adams and Amie A. Weston, one a cousin and the other a brother of Robert Adams, never disturbed his possession of the homestead, but some time prior to 1878 they assigned their judgments to John Agnew, Jr., who, as assignee, directed the sheriff to levy and sell the land which had been assigned to the defendant as homestead. The defendant gave notice of his claim of homestead, but, March, 1878, the sheriff sold, as he testified, "simply according to his advertisement, and as sheriffs always sell." Thomas Agnew became the

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*purchaser at a price less than half the rental value for one year, took sheriff's titles, reciting that the land was sold under the execution of Amie A. Weston, assignee, and brought this action to recover it from the defendant. Upon the facts, of which the above is only a meagre outline, the case was tried, and, under the direction of the judge, the jury found for the plaintiff "two hundred acres of land, fully described in a plat made by S. G. Henry, Esq., January 16th, 1875, and marked 'Homestead of Robert Adams.'" The defendant made a motion for a new trial, which was refused, and the appeal comes to this court.

The grounds urged for non-suit and a new trial, and the exceptions for errors of commission and omission on the part of the judge, are very numerous, but the real questions are involved in the following rulings:

"That the judgments of James P. Adams and Amie A. Weston, assignee, were founded on bonds executed before the adoption of the constitution; the bond of James P. Adams, although dated May 26th, 1868, being, according to the evidence, the renewal of an old bond given in 1859 for the purchase money of the land in dispute, and cited the case of De La Howe v. Harper.

"That the return of the appraisers setting off the homestead had not been recorded, as required by the provisions of the homestead act, inasmuch as the plat, which is a part thereof, had never been recorded, and there is no description by metes and bounds or otherwise, of the homestead premises, and therefore the jury, provided they found the other facts for the plaintiff, must return a verdict for the plaintiff for the land in dispute, and such damages, if any, as they might think the testimony warranted."

The question is, whether there was error in these rulings. It is conceded that the defendant is not entitled to retain the homestead which was laid off to him in 1875, if either the judgment of Amie A. Weston or James P. Adams was a valid judgment, and rendered upon a contract made before the constitution of 1868. If that is shown, the assignment of homestead made must be considered as void, quoad such judgment, which conferred authority upon the sheriff to sell, and the purchaser can recover it from the defendant, notwithstanding his

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claim of homestead. *Bull v. Rowe, 13 S. C. 355. But if it appears that neither of these judgments makes such a case, then, no constitutional difficulty being in the way, the defendant, like any other citizen, is entitled to the much-valued right of homestead and to retain that already laid off to him. Upon this question the onus is on the plaintiff, who claims that these cases fall within the exceptional class, which excludes the right of homestead.

1. As to the judgment of James P. Adams. It was recovered on a bond bearing date May 25th, 1868, after the adoption of the constitution, which was ratified by the people at an election on April 14th, 15th and 16th, 1868. This bond was certainly prima facie evidence of the contract of the parties as of that date. The plaintiff and defendant were brothers. Robert swears that "on May 23d, 1868, James P. and witness had a settlement of old matters between them. James P. said: 'Let's wipe out old scores and begin over.' We did so, and I gave him a bond (the one now in judgment) for $3,800. Everything I owed James P. was put in this new bond. This bond was payable at a different time from the old bond, and at twelve per cent., I think, instead of seven per cent. on the old one." It is said that declarations of Robert were proved, in some particulars, in conflict with this statement. In any point of view this testimony raised a question of fact, whether the new bond was a novation or merely a substitution for the old indebtedness, and it was error on the part of the Circuit judge to withdraw that question from the jury. But we do not think that any such issue was properly involved. From the nature of the question the inquiry was simply as to the time the contract was made. The constitution of the United States declares "that no state shall pass any law impairing the obligation of contracts," without any reference to the time when the consideration arose, whether it was old or recent, a bond of older date or property sold that day. That which the constitution seeks to protect is the obligation of the contract, and

the bond affords at once evidence of the contract and the means of enforcing it. The case of De La Howe v. Harper, 5 S. C. 470, cited by the Circuit judge, has no analogy to this. That was the case of an administration bond, which was executed before the adoption of the constitution and a devastavit

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established against *the administrator afterwards. The question was, whether the judgment for that devastavit should, in regard to a claim for homestead, be considered as of the date of its recovery, or have reference back to the date of the administration bond, upon which it was established. The court say: "The obligation on which the judgment was founded was in existence at the adoption of the constitution of 1868, and was a proper subject for the protection afforded by the clause in the constitution of the United States," &c.

Besides, the plaintiff, James P. Adams, accepted the bond given May 25th, 1868, and sued on it and recovered judgment, which is the record in the case, but has upon it no such endorsement as a certificate of the court "that the same was issued to enforce the payment of an obligation contracted for the purchase of said homestead," as the law in such case requires, (15 Stat. 231), and neither the plaintiff nor his assignee, who holds under him, can now deny that the bond is the contract of the parties at its date, or go back of it into the consideration thereof. "A party cannot occupy inconsistent positions, and where one has an election between several inconsistent causes of action, he will be confined to that which he first adopts. Any decisive act of that party, done with knowledge of his rights and of the fact, determines his election and makes an estoppel." Bigelow on Estoppel 578; Rodurmond v. Clark, 46 N. Y. 354; Hyde v. Baldwin, 17 Pick. 303; Dewey v. Bell, 5 Allen (Mass.) 165; Hooper v. Hubbard, 7 Mass. 177. The sheriff, or his adviser, took this view, for it will be remembered that he placed this judgment among those in which proceedings issued to assign homestead in 1875. We think the Circuit judge erred when he charged the jury "that the judgment of J. P. Adams was founded upon a bond executed before the adoption of the constitution."

2. As to the judgment of Amie A. Weston, assignee. This was undoubtedly founded on a bond executed before the adoption of the Constitution, viz., on April 24th, 1866; but it is alleged that it is not a valid judgment, having been rendered before the clerk of the court February 3d, 1874, not in "term time and in open court." On November 25th, 1873, the legislature passed an amendment to the code as to the rendition of

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judgments by de*fault. The act was ratified February 26th, 1873, the last day of that session, and was not returned approved by the governor until the next regular constitutional session, November, 1873. In the meantime there had been an extra session of the legislature, and the judge of the Fifth Circuit held that the said act had not become a law, for the reason that it should have been "returned" to the extra session under Section 22, Article III., of the constitution, which declares that "unless the general assembly, by their adjournment, prevent its return, in which case it shall not have such power and effect unless returned within two days after their next meeting." But it has been decided that said amendment was properly returned, approved, to the next regular session, November, 1873. Arnold v. McKellar, 9 S. C. 338. That amendment is in these words: "That after the passage of this act no judgment shall be obtained in the Court of Common Pleas except during term time and in open court, and it shall be the duty of the clerk to place all cases filed in his office, in which there is no defence, upon a docket to be prepared by him for that purpose. * * * And no execution shall be signed on judgments obtained by default in any other manner than is herein provided." 15 Stat. 502.

After this amendment became law, the alleged judgment of Amie A. Weston was rendered by the clerk of the court, not "during term time and in open court," in direct violation of its terms, which not only affords no authority for such a proceeding, but positively forbids it. This was not a mere irregularity susceptible of amendment, but a substantial defect, rendering it absolutely void, as much so as if it had been rendered by the mayor of the city of Columbia. We are, therefore, constrained to hold that the alleged judgment of Amie A. Weston, assignee, and the execution issued thereon, are absolutely void. "A judgment pronounced by a tribunal having no authority to determine the matter in issue, is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question." Freem. on Judg., § 120; Hill v. Robertson, 1 Strob. 1; Thompson v. Tolmie, 2 Pet. 169 [7 L. Ed. 381].

But it is said that a motion was twice made and refused to place the case on the proper calendar and take judgment in open

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*court, and also that a complaint was filed by D. Crawford & Sons and other creditors, to set aside the judgment for the defect stated, in which it was held that the judgment was good; that to this last proceeding Robert Adams was made a party defendant, and did not appeal from the decree holding that the judgment was regular, and, therefore, so far as he is concerned, the matter is res adjudicata, and he cannot now claim that it is no judgment. Neither of

these orders, nor all of them together amounted to the rendition of a new judgment. They were simply rulings upon the question whether a judgment had been previously rendered. As to the first two, it does not appear that Robert Adams was notified. They were orders proposed and refused, and in such case the doctrine of res adjudicata does not apply. It is denied that the proceeding of D. Crawford & Sons was in evidence, but assume that it was; mere omission to appeal could not breath vitality into that which never had existence. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one." Freem. on Judg., § 117. "Consent will not confer it, and it is so wanting in the color of judicial authority that it will not be reversed on appeal." Id. 91; Ex parte De Hay, 3 S. C. 567.

3. As to the assignment of homestead. The judge charged that the return of the appraisers setting off the homestead had not been recorded, as required by the provisions of the homestead act, inasmuch as the plat, which is a part thereof, had never been recorded, and there is no description by metes and bounds, or otherwise, of the homestead premises. The commissioners made return as follows: "We have appraised and set off by metes and bounds to the said debtor, as his family homestead, all that piece and parcel of land designated on the plat hereunto annexed, and marked 'family homestead,' containing two hundred acres, and have appraised the same at the sum of one thousand dollars, as will more fully appear by the plat hereto annexed," &c. They returned the assignment and plat to the clerk of the court, who recorded the assignment and placed the plat in his desk, where it could be easily referred to. The law does not, in express

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terms, *require that the plat shall be recorded. The appraisers are required to make return "for record in court," giving the metes and bounds, &c., "for which purpose they shall be allowed to call in the aid of a surveyor, if they or a majority of them, think it necessary." 15 Stat. 370. The metes and bounds appeared in the plat, which was referred to by the assignment, and was in easy reach. It was properly returned by the proper parties, in proper time and to the proper officer. Should the defendant lose his homestead, not for any neglect of his own or of the appraisers, but of the clerk? The right to homestead is a continuing right, and if the effort to assign it was a failure, it may still be perfected. There is no surprise. All the judgment creditors knew that homestead had been assigned and that the defendant was living upon it. There can be no practical difficulty in locating the homestead, as the plat is still in the clerk's office.

The judgment below is set aside and the case remanded for a new trial.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 44

(Case No. 1008.)

WEINGES v. CASH.

(November Term, 1880.)

[1. *Appeal and Error* ⇐856.]

The decree of a Circuit Court, based upon untenable conclusions, will not be disturbed if it can be sustained upon any other grounds. The practice indicated by which such grounds should be brought to the attention of this court.

[Ed. Note.—Cited in Archer v. Ellison, 28 S. C. 246, 5 S. E. 713; Callaham v. Robinson, 30 S. C. 255, 9 S. E. 120, 3 L. R. A. 497; Ex parte Winkler, 31 S. C. 180, 9 S. E. 792; Burns v. Gower, 34 S. C. 164, 13 S. E. 331; Ex parte Ware Furniture Co., 49 S. C. 26, 27 S. E. 9.

For other cases, see Appeal and Error, Cent. Dig. § 3406; Dec. Dig. ⇐856.]

[2. *Fraudulent Conveyances* ⇐123.]

Pending suit by W. against E., E. at the home of his sister in an adjoining county, while on a visit to her, and upon the solicitation of C.'s husband, confessed judgment to C. for an amount less than his indebtedness, which covered a period of thirty years, E. receiving no benefit from the arrangement. Within a month a transcript of the judgment was lodged in the county where E. resided and owned real estate. Afterwards E. sold a valuable horse, but it did not appear that C. knew of such sale. *Held*, in action by W., who had obtained judgment in his suit, that C. was chargeable with no fraud in the transaction, and could enforce her judgment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 400; Dec. Dig. ⇐123.]

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[3. *Fraudulent Conveyances* ⇐155.]

* Even if the judgment had been confessed by E. to defeat a recovery by W., this notice would not affect C. unless she had participated in such fraudulent intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 493; Dec. Dig. ⇐155.]

[4. *Judgment* ⇐63.]

A confession of judgment entered without action in the clerk's office during vacation, is valid; the twenty-first section of the act of November, 1873, amending the code, does not affect judgments by confession, but relates to Section 269, subdivision 1, of the code.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 101; Dec. Dig. ⇐63.]

[5. *Judgment* ⇐64.]

There is now no law which requires a confession of judgment to be obtained or read in open court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 102, 103; Dec. Dig. ⇐64.]

[6. *Judgment* ⇐50.]

A confession of judgment for an amount less than what is actually due, contains a sufficient statement in the words following: "The said judgment arises from the fact that I am

indebted to her on account of the purchase and rentals by me of lands to which she was entitled to an interest, as one of the heirs of her father's estate, and also to the interest of her mother therein, which she has transferred to the plaintiff and directed me to pay to her, the same not exceeding the amount aforesaid, and the said amount is now justly due to the plaintiff."

[Ed. Note.—Cited in Ex parte Carroll, 17 S. C. 448, 450; Woods v. Bryan, 41 S. C. 78, 19 S. E. 218, 44 Am. St. Rep. 688; Ex parte Graham, In re Plyler v. Robertson, 54 S. C. 166, 32 S. E. 67.

For other cases, see Judgment, Cent. Dig. § 75; Dec. Dig. ⟸50.]

[7. *Judgment* ⟸292.]

Slight discrepancies and minor deficiencies and irregularities of form in the transcript of a judgment may be amended, and do not render the transcript invalid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 572; Dec. Dig. ⟸292.]

[8. *Appeal and Error* ⟸421.]

[Where some of the grounds on which plaintiff claimed his right were decided against him before the decree was rendered in his favor, it will be presumed, on his appealing, that he only wished to discuss the points decided against him, though his notice of appeal did not so specifically state.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2148; Dec. Dig. ⟸421.]

[This case is also cited in McPherson v. McPherson, 21 S. C. 270, without specific application, and in Kohn v. Meyer, 19 S. C. 198, as to the sufficiency of statements in confessions of judgments.]

Before Kershaw, J., Kershaw, February, 1880.

This case is fully stated in the Circuit decree, which is as follows:

This action was tried before me as an equitable action, without a jury, upon the pleadings, evidence and arguments of counsel.

On December 9th, 1878, the plaintiff commenced an action for damages against Robert G. Ellerbe, the defendant, for an assault and battery, in the Court of Common Pleas for Kershaw county; and at September Term of said court, in the year 1879, obtained a verdict therein for the sum of $2000, for which sum, together with $63.05, the costs and disbursements of said plaintiff in said action, judgment was duly entered and execution was duly signed and lodged in the office of John Doby, sheriff of said county, in October, 1879. A notice of appeal was served in said action September 10th, 1879, but afterward was abandoned. During the pendency of said action—in January, 1879—Robert G. Ellerbe, the defendant, who resides in Kershaw county, visited his sister, Allan E. Cash, the defendant, and his mother, Mrs. E. M. Ellerbe, who was then residing with E. B. C. Cash, the husband of Allan E. Cash, who, with her husband, resided in Chesterfield

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*terfield county. While there the said Robert G. Ellerbe was pressed by the said E. B. C. Cash to secure certain indebtedness, which, it was alleged by him, existed from said Robert G. Ellerbe to his sister, Mrs. Allan E. Cash, and his mother, Mrs. E. M. Ellerbe, arising from the use and possession of certain lands in Kershaw and part of Sumter counties, which, it was alleged, belonged to the heirs-at-law of William Ellerbe, deceased, the husband of Mrs. E. M. Ellerbe, and the father of Robert G. Ellerbe and Mrs. Allan E. Cash, and also of one William C. S. Ellerbe and one Napoleon Ellerbe, the latter named of which left home twenty years ago and has not been heard from since. Upon this land Mrs. E. M. Ellerbe resided with her family until about 1848 or 1849, when Mrs. Cash and William C. S. Ellerbe married and left the family homestead, Robert G. Ellerbe then being about eighteen years of age. He continued to reside there with his mother until some five or six years ago, when his mother left. It appears that Mrs. E. M. Ellerbe has been physically too infirm, for twenty years past, to attend to her own affairs. Robert G. Ellerbe testified that in the year 1868 he purchased his mother's interest in the land for $2000, which was less than its value, but never paid her anything for it. There was no deed of conveyance put in evidence conveying said interest to him, though a paper having the appearance of a deed was attempted to be proven by defendant's counsel without calling the subscribing witnesses, one of whom was said to be in Charleston, but, upon the objection of plaintiff's counsel, the paper was withdrawn. Robert G. Ellerbe also testified that he had bargained at one time for Mrs. Allan E. Cash's interest in the land, but it was never carried into effect. It appears also that from 1848 Robert G. Ellerbe managed and controlled the plantation, conducting said lands without interference from his mother, though she continued to live there as before, kept a carriage of her own for part of the time, and always got what she wanted. The cotton continued to be branded in the old brand previously used on the place, but of late years another brand (R. C. E.) has been used in connection with it to distinguish classes of cotton. No demand for rent appears to have ever been made by any of the parties, and none ever

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paid until 1878, when a payment was *made on account of Mrs. Cash, and another in 1879, which collectively amounted to $500. Six years ago Robert G. Ellerbe told Samuel Young that he owed the other heirs of his father more than he was worth (in effect); but since his controversy with Weinges arose he has boasted that he owed no one anything, always paid his debts, and had over $1000 on hand that he had no use for. When Col. E. B. C. Cash pressed R. G. Ellerbe to secure his mother and Mrs. Cash, he assigned as his reason for doing so the probability of a recovery by the plaintiff of a heavy judgment

in the case then pending. Robert G. Ellerbe did not deny his liability, but was reluctant to comply with the demand, because he did not believe Weinges would recover against him, or, perhaps, would not press his suit to judgment. He finally yielded, or, as he says, was "forced to do so by Col. Cash." A calculation was then made, computing the rent supposed to be due to Mrs. E. M. Ellerbe and Mrs. Cash, with interest. This was rather an estimate (as Col. Cash testified) that an exact calculation, and it amounted to over $20,000. They estimated that this sum was unnecessarily large, and that a less sum would suffice to cover all the property of Robert G. Ellerbe. They therefore settled the amount to be secured at $15,000. In these transactions Col. Cash does not appear to have consulted with Mrs. Ellerbe, or Mrs. Cash, but as he said he deemed it his duty so to act for them. Having fixed upon the amount, Col. Cash and Robert G. Ellerbe proceeded to Cheraw and consulted W. L. T. Prince, Esq., an attorney-at-law, on the subject under their consideration, the result of which was that a statement was drawn up and signed by Robert G. Ellerbe for the purpose of creating the entry of a confession of judgment without action, in the manner provided in the Code Procedure, Chapter III. of Title 12. This statement was in words following:

"The State of South Carolina, county of Chesterfield, Court of Common Pleas. Allan E. Cash v. Robert G. Ellerbe. I hereby confess myself to be indebted to Allan E. Cash, the plaintiff, in the sum of fifteen thousand dollars, and consent to and authorize the entry of judgment therefor. The said judg-

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ment *arises from the fact that I am indebted to her on account of the purchase and rental by me of lands to which she was entitled to an interest as an heir of her father's estate, and also to the interest of her mother therein, which she has transferred to the plaintiff and directed me to pay to her, the same not exceeding the amount aforesaid, and the said amount is now justly due to the plaintiff.

(Signed) "R. G. Ellerbe."

At the foot of this statement R. G. Ellerbe made an affidavit thereto appended in writing, sworn before a notary public, wherein he swore "that the above statement is true; that he justly owes the plaintiff the amount stated above, on account of the facts stated." To this is appended the date, "27th January, 1879." The paper containing the statement and affiadvit is endorsed: "Allan E. Cash v. Robert G. Ellerbe. Prince, plaintiff's attorney. Confession. South Carolina, Chesterfield county. Roll 844. On filing the within statement and confession, it is adjudged by the court that the plaintiff do recover against the defendant the sum of fifteen thousand dollars, with five dollars costs and fifteen dollars disbursements, making the sum of fifteen thousand and twenty-five dollars. 28th January, 1879. (Signed) Thomas F. Malloy, clerk. Filed 28th Jan'y, 1879. Thomas F. Malloy, clerk. Judgment signed and entered 28th January, 1879. (Signed) Thomas F. Malloy, clerk." The same day the papers were signed in Cheraw, but after their execution by R. G. Ellerbe, and after he and Col. Cash had returned to the home of the latter, in pursuance of the advice of Mr. Prince, Col. Cash drew up and Mrs. Ellerbe signed a paper in the following words: "Cash's Depot, S. C., Jan'y 27th, 1879. I hereby assign and transfer to my daughter, Allan E. Cash, all my claims against my son, Robert G. Ellerbe." Below this writing there is a blank, occupying nearly one-half of the page, at the bottom of which is written "E. M. Ellerbe," in the handwriting of Mrs. Ellerbe, but in different ink from that used in the writing and signature above. There is no explanation of this last or lower signature of Mrs. Ellerbe. On February 14th, 1879, a transcript of judgment (as it was en-

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titled) was filed in the office of *the clerk of the court of Kershaw county, purported to be founded on the above confession. It is written on the usual printed blank, and contains a mere abstract, as follows: "By confession. Names of parties against whom judgment has been obtained—Robert G. Ellerbe. Names of parties in whose favor judgment has been drawn—Allan E. Cash. Amount debt—$15,000. Costs and disbursements—$20.25. Filed 28th January, 1879. Attorney's name—W. L. T. Prince." Below appears the certificate of Thomas F. Malloy, and under seal of his office, in the following words: "State of South Carolina, county of Chesterfield, Court of Common Pleas, clerk's office, 6th January, 1879. I certify the foregoing is a correct transcript of the final judgment on file in my office." On August 30th, 1879, a similar transcript, certified in like manner, was filed in the office of the clerk of court for Sumter county, with some slight differences, which will be noted. The words "by confession," are omitted from the latter—the amount of costs and disbursements is not filled upon the face of the latter, but is stated on the back, "costs and disbursements, $25." The certificate of the clerk to the latter transcript bears date August 28th, 1879. Executions were signed by the respective clerks of Sumter and Kershaw counties, based upon the aforesaid transcripts; and after the recovery of judgment by the plaintiff against Robert G. Ellerbe, as hereinbefore stated, John Doby, the sheriff of Kershaw county, with whom an execution had been lodged for that purpose, proceeded to levy upon all the property of said Robert G. Ellerbe in the county of Kershaw, and advertised the same for sale in satisfaction of the judgment of the said Allan E. Cash.

Whereupon the plaintiff commenced this action to prevent said sale by a restraining order, alleging that the said confession of judgment is fraudulent and void as against the plaintiff. That no bona fide indebtedness existed from R. G. Ellerbe to Mrs. Cash or his mother. That its purpose was to defeat the recovery of the plaintiff and to hinder the enforcement of his judgment. That the said confession is irregular, insufficient in form, without authority of law, and, therefore, void; and that the said transcripts are irregular and not sufficient to authorize the issue of executions thereupon. All these con-

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tentions are denied by the *defendants, Allan E. Cash and Robert G. Ellerbe. The affirmation of all these issues is upon the plaintiff, and I am to determine whether he has made good his allegations and charges.

The first point I shall consider is that which involves the question whether the proofs warrant me in concluding that Robert G. Ellerbe was not indebted at all to his mother and Mrs. Cash.

It has not been denied that the property, whose use was the basis of the alleged indebtedness, was in 1848 owned in common by the heirs-at-law of Dr. William C. Ellerbe, who were his widow and children above specially named.

Robert G. Ellerbe, one of the tenants in common, appears to have controlled the profits of the estate from 1848 or 1849. It is familiar law, that in all such cases "when one party receives all the profits he is bound to account to the other parties in interest for their respective shares, deducting the proper charges and expenses, whether he acts expressly by their authority as bailiff, or only by implication as manager, without direct jure domini over the property." 1 Story's Eq. 466. Our cases confine the liability to the rent of such lands as were capable of producing rents at the time the occupying tenant went into possession. Hancock v. Day, McM. Eq. 69 [36 Am. Dec. 293]; Thompson v. Bostick, McM. Eq. 75.

The proof is that there were thirteen hundred acres of land, of which about one hundred acres were woodland, some of the rest in old fields and briars, but the most of it arable; and that up to 1865 there was a body of slaves on the place. That the place was cultivated by Mrs. Ellerbe before 1848, and there is no proof that any of the land was brought into cultivation for the first time by R. G. Ellerbe.

I cannot, therefore, conclude that there was no foundation for the indebtedness claimed upon the proofs made. A liability results from the facts, and there is no affirmatory evidence to the contrary. It is urged, however, that the amount claimed is excessive. The proof is that arable lands are generally worth $3 per acre rent per annum, and there is no evidence to the contrary. Upon the data provided me in the case, I cannot assume that the amount is excessive. True, in

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a hostile proceeding Mrs. *Cash would not have been allowed interest after the lapse of so great a period of time; but if R. G. Ellerbe acted in good faith and chose to allow it, he had a right to do so. Moreover, as the parties made up the account with interest, it amounted to over $20,000, and they reduced it to $15,000. It is further contended that the statute of limitations should be applied to this claim, and therefore that the account should be stopped within the statutory period, i. e., six years. No one is bound to plead the statute of limitations, and if the debtor failed to do so, no one else can complain. To hold otherwise would enable any creditor affected by the failure of his debtor to plead the statute in a suit by any other creditor to intervene and compel such pleas, or to set aside a judgment obtained on a demand to which the statute might have been pleaded. There is no such case. It is a plea personal to the debtor, and the only instance in which third parties are allowed to avail themselves of the plea, when the debtor has failed to do so, is that of a legatee or devisee, or heir-at-law, sought to be charged with a debt of the ancestor or devisor barred by the statute, or in other cases of trust, or in cases of fraud and collusion. I do not, therefore, consider this a valid objection. If R. G. Ellerbe was ever liable for the claim, he was not bound to shelter himself behind the statute of limitations.

It is urged, also, that the judgment confessed by R. G. Ellerbe to Mrs. Allan E. Cash is for an excessive amount, in so far as it includes the claim of Mrs. E. M. Ellerbe. Upon this point I conclude that the assignment to Mrs. Cash, made by Mrs. Ellerbe the same day, together with the other circumstances in proof, authorize the conclusion that she affirmed the transaction, and even confirmed the statement of R. G. Ellerbe in the writing that she had directed him to pay her share of the claim to Mrs. Cash. The judgment was not entered until the day after the assignment, and Col. Cash said in his testimony that it was all one transaction. The judgment, therefore, was unobjectionable on that ground.

I come now to consider whether the confession of judgment, impressed with the characteristics derived from the foregoing conclusions, is nevertheless fraudulent and void

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in law as against *this plaintiff. If it was given for a bona fide debt, it could only be fraudulent in consequence of some covinous agreement or secret trust between the parties to it, whereby Robert G. Ellerbe was to obtain some personal advantage to himself out of the arrangement at the expense of the rights of the plaintiff herein as a creditor. A debtor has a right to prefer any one of his

creditors to all the rest, either by sale, mortgage or judgment; such a preference may have been a fraud under the bankrupt law, if made within the period of inhibition imposed by that law, but that cannot avail anything here. The case of Cureton v. Doby, 10 Rich. Eq. 411 [73 Am. Dec. 96], I think will be found fully to answer the objections urged here against the judgment of Mrs. Cash on the ground of fraud. Doby, the defendant therein, hearing of his debtor Price's pecuniary embarrassments, and influenced as much by his solicitude for the welfare of the family of Price, who was nearly related to him by marriage, as to secure the payment of his debt, instructed his attorney to procure a confession of judgment from Price, and if his property was brought to sale to bid in the property and settle it upon his (Price's) wife and child. Price knew of these instructions, and says he therefore the more cheerfully confessed the judgment. The judgment was assailed by a creditor for fraud, but was sustained by the entire court, consisting of Judges Dunkin, Johnston and Wardlaw. I transcribe here, as applicable to the case, a portion of the judgment of the court: "Certainly a judgment may be fraudulent, though the amount for which it is confessed be bona fide due. This principle is recognized in Bird v. Aitken, Rice's Eq. 73, as where one renders assistance to a debtor to enable him to defraud his other creditors, that is a fraud upon the part of him who assists. The bona fides of his own debt will not sanctify the transaction; and Pickett v. Pickett, 2 Hill's Ch. 470, is cited as a striking illustration in which a bona fide purchaser assisted an absconding debtor in eloigning his property. But in the same case of Bird v. Aitken it was authoritatively adjudged that the mere fact of securing a preference of his own debt by a confession of judgment, does not constitute an unlawful or fraudulent hindrance as to the unpreferred creditors. It cannot be doubted, says Chancellor Harper, that the

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mere preference of one creditor *to another cannot impeach the transaction; and if there were nothing else in this case than that, Aitken had given a voluntary preference by confessing the judgment, that could not be impeached, though he might have foreseen that the effect would be to defeat other creditors. That would not be a fraudulent but a lawful purpose. There is no fraud either in the debtor or in the preferred creditor." The Court of Appeals affirmed the doctrine, and furthermore held that there was nothing in the case to invalidate the transaction. While the law thus allows a debtor to give a preference among his creditors, it will not allow him to secure an advantage to himself at the expense of creditors as the price of such preference. That in every case the inquiry should be as to the rights of the creditors, and in pressing those rights care should be taken that an act of spontaneous kindness and indulgence on the part of the creditor be not confounded with fraud in the debtor. The best of feelings should not be chilled and stifled by an overweening tendency to detect collusion. "My own experience," said the late wise and venerable president of this court, in Maples v. Maples, Rice's Eq. 300, "my own experience is that a great deal of fraud is committed in carrying out the rules which have been prescribed for its prevention."

The badges of fraud urged here are—

1. That the judgment was confessed and entered in another county than that where the defendant, R. G. Ellerbe, resided and where plaintiff's case was pending. The purpose of secresy that is sought to be assumed from this fact is rebutted by the circumstance that R. G. Ellerbe was on a visit to Mrs. Cash at the time; that it was reluctantly given by him upon the urgency of Col. Cash, and that within a month a transcript was entered in Kershaw county.

2. The fact that it was made to his mother and sister.

This is one of the badges of fraud in the Weinges case, but the authority cited above sufficiently shows that here it is not regarded as significant of fraud in itself.

3. That it was not properly enforced against R. G. Ellerbe, and he was allowed to sell some of his property in the meantime. The proof is that he sold one of his race-

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horses after the judg*ment was given, but it did not appear that Mrs. Cash knew of it. In South Carolina, indulgence after judgment is not a badge of fraud. Adair v. McDaniel, 1 Bail. 158 [19 Am. Dec. 664].

4. That it was taken not for the precise amount, but for sufficient to cover the property of the debtor.

The proof shows that the judgment was entered for less than the amount admitted to be due by the debtor. Had it been for a greater amount it would have been very strong evidence of fraud, but not otherwise. I conclude, therefore, that plaintiff has not established the fraudulency of the judgment of Mrs. Cash.

The next point I shall consider is, as to the sufficiency of the statement upon which the confession was entered. By the second subdivision of Section 400 of the code of procedure, such a statement "must state concisely the facts out of which it (the debt) arose, and must show how the sum confessed therefor is justly due." It must not only state that the money is due, but "the facts out of which it arose." It must also "show that the sum confessed is justly due." In other words, the consideration of the debt must be stated in such manner as to furnish within itself the means of determining that it is justly due. In the language of the court in Chappel v. Chappel, 12 N. Y. 215, "the statute

looks not to the evidence of the demand, but to the facts in which it originated"—in other words, "to the consideration which sustains the premises." This rule has been followed in New York in all cases decided since Purdy v. Upton, 10 How. Pr. 494; Bowden v. Johnson, 11 How. Pr. 503; Von Beck v. Shuman, 13 How. Pr. 472; Kendall v. Hodgins, 7 Abb. 309; Dunham v. Waterman, 17 N. Y. 9; Winebrenner v. Edgerton, 17 How. Pr. 363; Claflin v. Sanger, 17 How. Pr. 574; McDowell v. Daniels, 38 Barb. 143; Curtis v. Corbitt, 25 How. Pr. 58; 12 Abb. 403. In these cases it was held that a statement, with particularity of a promissory note, was not sufficient. The statement of a note for $400 and interest and protest fees (giving the date) discounted by the plaintiffs and now owned by them, held insufficient.

So, a statement of liability as endorser of a note stated with particularity. So, of a

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note particularly stated, with the addi*tion "that said note was given for money had and received by me of the said plaintiff at my request." So, for goods sold and delivered and upon an accounting had, "on the day when the confession was made." So, that the indebtedness was for "goods and groceries, and for one horse and cow, the payment of which, $300, is now due to the plaintiff." So, for lumber and building materials furnished by the plaintiff to the defendant. So, "for beer sold and delivered and money paid, laid out and expended." So, "for money lent to the defendant to pay off his debts," &c. So, "for money lent to and advanced at various times from December 1st, 1853 to date." So, when the statement was made of various sums or items of money lent or paid, with sufficient particularity as to time and amounts, but without distinguishing between sums lent and sums paid, nor showing to whom paid for use of defendant, was held insufficient in McDowell v. Daniels. There are many other decisions to the like effect, but these are sufficient to show that the statement in this case would not be held sufficient in New York.

The principle is that the statement must be made with such particularity as to furnish on its face the means of testing its accuracy and good faith. The statement here is that the defendant was indebted to Allan E. Cash "on account of the purchase and rental by me (the defendant in the judgment) of lands to which she was entitled to an interest as an heir-at-law of her father's estate, and also to the interest of her mother therein, which she has transferred to the plaintiff," &c.

This does not come up to the requirements of the law, and fails to furnish the means of testing its accuracy and good faith. It does not show how much of the amount was for purchase money and how much for rent. It does not show of what lands the statement is made, nor what the interest of Mrs. Cash and her mother was in such lands; nor does it name the party of whom Mrs. Cash is the heir; nor how much of the amount was due for her share, and how much for her mother's share; nor whether the rents were due upon a contract or for use and occupation; and it is entirely silent as to time. It is fatally defective in form and substance, and the judgment en-

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tered thereon is *utterly void as against the other creditors of Robert G. Ellerbe, though it may stand as between the parties.

The only remaining question is as to the validity of the transcripts. They are in the form generally in use in this state, and substantially indicate the judgment. The minor deficiencies and irregularities of form pointed out, like those of the judgment itself, might be amended. I should not incline to pronounce them void if they rested upon a sufficient original judgment. The case in [Harrison v. Southern Porcelain Mfg. Co.] 10 S. C. 278, in my opinion, does not conflict with these views. There is a prayer in the complaint for the appointment of a receiver. The case made does not support such an appointment.

It is adjudged that the defendant, Allan E. Cash, and her agents, be perpetually enjoined from collecting or enforcing the judgment obtained by her by confession from the defendant, Robert G. Ellerbe, until the demands of the plaintiff, Conrad M. Weinges, the plaintiff herein, including the costs of this case, be fully paid and satisfied. And the said judgment is hereby declared void and of no effect as against the said Weinges and all other existing judgment creditors of said Robert G. Ellerbe. It is further adjudged that the plaintiff recover of the defendant, Robert G. Ellerbe, $———, costs and disbursements of this action.

From this decree both plaintiff and defendants gave notice of appeal, upon exceptions which are substantially stated in the opinion of this court. But, as stated in the opinion, the defendants were properly the only appellants, the judgment being in favor of the plaintiff.

Messrs. W. Z. Leitner and R. C. Watts, for appellants.

Mr. W. L. De Pass, contra.

March 23d, 1881. The opinion of the court was delivered by

McIVER, A. J. The object of this action, which was brought by a junior judgment creditor of the defendant Ellerbe, was to set aside a judgment confessed by said Eller-

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be to his co-defend*ant, Mrs. Cash. The judgment was originally entered in Chesterfield county, and transcripts thereof were docketed in the counties of Kershaw and Sumter.

The grounds relied upon were: 1. Fraud

in the original judgment. 2. That the "statement" accompanying the confession was insufficient to render the judgment valid as against the rights of other creditors. 3. That the transcripts docketed in the counties of Kershaw and Sumter were invalid. 4. That the provisions of the code authorizing a confession of judgment without action, have been repealed. 5. That if these provisions have not been repealed, yet the confession of judgment in question here was of no effect, "because it had not been obtained or read in open court, as required by law."

The Circuit judge held that the plaintiff had failed to establish any fraud in the judgment in question, but that the "statement" upon which it was entered was not sufficient, and, therefore, while the judgment was good between the parties it was void as to the other creditors of Ellerbe. He also held that while there were "minor deficiencies and irregularities of form" in the transcripts, they might be amended, but that he "should not incline to pronounce them void if they rested upon a sufficient original judgment." He therefore adjudged that the plaintiff in the judgment, Mrs. Cash, be perpetually enjoined from enforcing said judgment until the judgment obtained by Weinges, the plaintiff in this case, against Ellerbe, is fully satisfied. From the judgment below both parties have appealed, though the notice of appeal on the part of the plaintiff ought, properly, to have been a notice that if this court should find itself unable to sustain the judgment below on the ground upon which it is rested by the Circuit judge, then plaintiff would insist that said judgment should be sustained on the grounds mentioned in his notice of appeal. For the judgment below being in favor of the plaintiff, it was scarcely his intention to appeal from it, and we will, therefore, assume, for his benefit, that the only object of his notice of appeal was to enable him to discuss the points made in his notice of appeal. The first point which he makes is, that the Circuit judge erred in holding "that the facts and circumstances proven did not establish a legal fraud upon

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the rights of *the plaintiff." This question has been so fully and satisfactorily disposed of in the decree below, that we deem it scarcely necessary to add anything to what is there said. Indeed, we do not understand that, in the argument here, the plaintiff's counsel impute fraud of any kind to any one except Ellerbe, and as to him only legal or constructive fraud, which is inferred from his acts and declarations, evincing, as argued, an intent to hinder, defeat and delay Weinges in the collection of any amount he might recover in the suit for damages then pending. Even were this the correct inference to be drawn from the testimony, we do not see how it could affect Mrs. Cash. There is no pretence whatever that she participated in any such fraudulent intent, (if any such there was) and, as is said in Smith & Gibson v. Pate & Stubbs, 3 S. C. 208: "It would be inconsistent with every principle of law and morals" to say that she, against whom no imputation of fraud is made, should in any way be affected by the fraudulent motive which, it is alleged, influenced Ellerbe, even if such allegation had been proved. Mrs. Cash's husband, acting as her agent in the whole transaction, does not seem to have done anything more than he had a perfect right, both in law and morals, to do for the purpose of securing a debt due to his wife; for there is no evidence to show that the preference which he obtained for her was secured by any promise or understanding that Ellerbe was to receive any benefit from the arrangement. We are unable to see how this point can be sustained, and, on the contrary, concur fully with the Circuit judge in his conclusion as to the question of fraud.

The second point made by the plaintiff's notice of appeal is: "Because his Honor failed to decide that a confession of judgment taken before the clerk of the court is void at law." The question here raised was not considered by the Circuit judge, doubtless, for the very good reason that, under the view which he took of the case, it was altogether unnecessary to do so. But under the view which we take it will be necessary for us to determine the question. The rule in this court is, that while a Circuit judgment will not be reversed or set aside, except upon grounds taken in the court below, or except upon such questions of jurisdiction as may be raised at any

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stage of the proceedings, *yet if the judgment below can be sustained upon any ground, whether taken in the court below or not, this court will not only consider it, but base a judgment of affirmance upon it. And, as will be hereinafter seen, we do not think the judgment below can be sustained upon the ground upon which the Circuit judge places it, and, as it could be sustained if the position taken by the plaintiff's second ground of appeal be well founded, it becomes necessary for us to consider the question there raised. The determination of this question depends entirely upon whether Sections 399 to 401, inclusive, of the code, relating to confessions of judgment without action, have been repealed by the twenty-first section of the act of November 25th, 1873. 15 Stat. 495. It is perhaps proper to state here that the repealing act relied upon has been spoken of throughout the argument as the act of March 8th, 1875. 15 Stat. 868. But in the case of Arnold v. McKellar, 9 S. C. 335, it was determined that there was no ground for the doubts which had been previously entertained as to whether the act approved November 25th, 1873,

was a valid law, and hence the subsequent act, in totidem verbis, approved March 8th, 1875, was altogether unnecessary, and the true date at which these numerous and important amendments to the code took effect was November 25th, 1873, and not March 8th, 1875. We proceed then to inquire whether the sections of the code providing for the taking of confessions of judgment have been repealed by the twenty-first section of the act of 1873. It is very manifest that they are not expressly repealed, and, if repealed at all, it must be by implication. Repeals by implication are not favored, and "to repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled." Potter's Dwar. on Stat. 155, note 4, and the cases there cited. The title of the act of 1873 is "An act to alter and amend the code of procedure, being Title V., Part III., of the general statutes." In the first section it provides "that the code of procedure * * * be and the same is hereby amended in the several sections thereof as is hereinafter provided," and it then proceeds to provide for amendments to various sections of the code, specifying them by their numbers, though

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it does not refer *to any of the sections of that chapter of the code which relates to confessions of judgment. But the twenty-first section of the act containing general provisions and not referring to any particular section of the code, is what is relied upon as repealing the provisions of the code relating to confessions of judgment. That section is in the following words: "That after the passage of this act no judgment shall be obtained in the Court of Common Pleas except during term time in open court, and it shall be the duty of the clerk to place all cases filed in his office, in which there is no defence, upon a docket to be prepared by him for the purpose, to be known as Docket No. 6, and they shall be called on the first day of the term, and the order for judgment shall be endorsed on the complaint and signed by the presiding judge, and no execution shall be signed on judgments obtained by default in any other manner than is herein provided." Is there such a positive repugnancy between the provisions of this section and those sections of the code providing for the taking of a confession of judgment without action, as that the two cannot stand together or be consistently reconciled? We confess that we are unable to discover any such repugnancy. They manifestly relate to different things. The sections of the code, from 399 to 401, inclusive, in terms, relate to confessions of judgment without action, while the twenty-first section of the act of 1873 as clearly relates to judgments to be recovered in actions brought in the Court of Common Pleas. It speaks of judgments "obtained in the Court of Common Pleas," and requires the clerk to place "all cases filed in his office in which there is no defence" on a certain docket, showing clearly that it relates to cases or actions brought in the Court of Common Pleas in which a defence might be interposed, all of which would be altogether inapplicable to a confession of judgment without action. Again, it provides that the order for judgment "shall be endorsed on the complaint," which is entirely inconsistent with the idea that there was any intention to refer to confessions of judgment in this section, for in such a proceeding there is no complaint. Finally, it provides, not as argued here, that no execution shall be signed on judgments obtained in any other manner than is provided for in that section, but the language is, "no execution

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shall be signed on *judgments obtained by default in any other manner than is herein provided." This shows very clearly that the prohibition does not extend to judgments by confession, for, to speak of them as judgments "obtained by default," would be a contradiction in terms—the very term "default" involving, necessarily, the idea that the person to whom it is imputed once had an opportunity to defend the action which he has lost by his neglect to do so in the proper way and at the proper time, and this is manifestly inconsistent with the idea of a confession of judgment without action. The provisions of Section 21 of the act of 1873, in our judgment, relate to Subdivision 1 of Section 269 of the code, and have no application to those sections of the code providing for confessions of judgment without action. The second point made by plaintiff cannot be sustained.

As to the plaintiff's third point, it is quite sufficient to say that we are aware of no law which requires a confession of judgment to be obtained or read in open court. The act of 1821, which did require such confessions to be read in open court, has been repealed by Gen. Stat. 819, and even under that act it was held that a failure to comply with that requirement did not affect the validity of the judgment or the lien which it secured. Stokes v. Cane, 6 Rich. 513.

We come now to consider the grounds of appeal on the part of the defendants. These grounds, though stated in various forms, may be substantially regarded as making the single question, whether the statement accompanying the confession of judgment, assailed in this case, and upon which it was based, was sufficient to give the judgment validity as to third persons. The Circuit judge held that the statement was insufficient, basing his conclusion upon various New York decisions cited in his decree. These decisions, upon examination, will be found, with two exceptions, all to be Supreme Court decisions, and not decisions of the court of last resort, and

some of them mere Special Term decisions. They were made between the years 1855 and 1861, inclusive, and it is manifest that there is much conflict in the decisions of the Supreme Court of New York, especially among those made within a few years after the adoption of their code of procedure. This may have arisen, as is suggested in one of the

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*cases, from the fact that the courts of that state, losing sight of the marked difference in the language of the New York act of 1818, with reference to confessions of judgment, and that employed in their code, based their earlier decisions under the code upon cases which had been decided under the more stringent terms of the act of 1818. That act required "a particular statement and specification of the nature and consideration of the debt," while the New York code, like ours, only requires a "concise" statement of the facts out of which the debt arises. The only decisions of the court of last resort in New York, cited by the Circuit judge to sustain his conclusion, are Chappel v. Chappel, 12 N. Y. (2 Kernan) 215, decided in 1855, and Dunham v. Waterman, 17 N. Y. (3 Smith) 9, decided in 1858. In the former case the statement simply set forth that the indebtedness grew out of two notes particularly described, but did not state what the notes were given for, and in Dunham v. Waterman the statement was that the indebtedness arose upon a note given on settlement of accounts. In both of these cases the statements were held to be insufficient, for the very good reason, that to state, as in Chappel v. Chappel, that the indebtedness arose on notes, is throwing no light whatever on the facts constituting the liability, for the notes are mere evidences of debt and afford no clue to the origin of the indebtedness. One who had given a note under seal, without any consideration, might safely swear that he was indebted in the amount of such note, but if he is required also to say what was the origin or consideration of the debt, he could not truthfully do so unless there was in fact a bona fide indebtedness for which such note was given. In Dunham v. Waterman, the only material difference in the statement from that held to be insufficient in the foregoing case, was the fact that it was there stated that the note was given in settlement of accounts, without saying anything as to the nature of the accounts. This, as the court very properly held, added nothing in the way of information as to the origin and consideration of the indebtedness. The nature of the accounts, upon the settlement of which the indebtedness was alleged to have arisen, should have been stated, so as to give creditors a clue by which they could investigate

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for themselves the honesty of the trans*action, and without this creditors would have no starting point at which to begin their inquiries.

In Freligh v. Brink, 22 N. Y. 418, decided in 1860, it was held that a statement that the indebtedness arose upon a promissory note given for borrowed money, with the additional statement: "And we hereby state that the sum hereby by us confessed is justly due to the said plaintiff, without any fraud whatever," was sufficient, for the reason that it was not confined to a mere statement of the note, but the consideration of it—borrowed money—was given, and it is difficult to see what more could be required.

In Neusbaum v. Keim, 24 N. Y. 325, decided in 1862, it was held that a statement was sufficient, which, after declaring that the plaintiff had sold and delivered to the debtor large quantities of meat in 1854 and 1855, averred that there was justly due him upon such sales a balance of so much, for which the judgment was taken. In this case it was objected that the statement did not show the amount of meat sold, nor did it show the payments which had been made, nor the prices at which it was sold. But the court said that it was manifest such details were not necessary, and that all the statute required was a concise, not a particular or detailed statement of the facts out of which the indebtedness arose.

In Hopkins v. Nelson, 24 N. Y. 518, decided in 1862, the statement was that "the plaintiff has this day endorsed my notes, payable at bank, for six thousand dollars in all, for my accommodation and to enable me to negotiate said notes." It was objected that the statement should have shown the date, time to run, amount and place of payment of each note so endorsed by the plaintiff, but the court held that such particularity was not required, and that the statement was sufficient.

In Thompson v. Van Vetchen, 27 N. Y. 568, decided in 1863, the statement was that the indebtedness arose on the sale and conveyance by the plaintiff to the defendant of his interest in certain partnership property, and it was held sufficient, though it did not state how the plaintiff was connected with the firm, or what was his interest therein.

Frost v. Koon, 30 N. Y. 442, decided in

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1864, again recog*nizes Lanning v. Carpenter and Freligh v. Brink, in holding that a statement that the debt was for money borrowed, without any specification of time or separate amounts, was sufficient.

From this review of the New York cases it is very manifest that the court of last resort in that state does not require that extreme particularity of statement which the earlier decisions of the Supreme Court seemed to exact, but, on the contrary, all that they require is a concise, as contradistinguished from a particular or detailed statement of the facts out of which the indebtedness arises.

In addition to the foregoing cases decided by the Court of Appeals in New York, we desire also to cite one of the cases relied upon by the Circuit judge for the purpose of ex-

tracting from it certain language used by the court, which, we think, more accurately expresses the true rule which should govern in the consideration of questions of this kind than we find anywhere else.

In McDowell v. Daniels, 38 Barb. 143, decided in 1861, the motion was to set aside four judgments upon the ground that the statements were insufficient. In two of the judgments the statements were held to be sufficient, while in the other two they were held to be insufficient. An examination of this case will show the very great extent to which the Supreme Court of that state was disposed to go in exacting the utmost particularity of statement instead of the concise statement required by the code. But even in that case the court lays down the rule in the following language: "Other creditors of Daniels are not obliged to take his statement under oath that the debt is justly due or to become due. They have a right to inquire into the honesty of the defendant and of the transaction. To enable them to do so—to get on the track of the fraud, if there is any—the statute requires the concise statement of the facts. This statement gives enough of the transaction, I think, to enable other creditors of Daniels to inquire into its truthfulness and the honesty of the alleged debt. I do not think it can properly be said that the object of the statute was to compel the debtor to state sufficient of the transaction out of which the indebtedness arose, to enable other creditors to form an opinion, from

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the facts stated, as to the *integrity of the debtor in confessing the judgment. If the debt is questioned, it is not to be presumed that the creditor questioning it will take the debtor's statement, however full. What the creditor wants, and what, I think, the statute intended he should have, is sufficient of the facts to enable him to inquire into the transaction and to form his opinion of the honesty of the judgment from the facts he shall ascertain."

Testing the case now under consideration by this rule, we think the statement upon which the confession was based, will be found amply sufficient and fully sustained by the more recent decisions in New York. The statement here is: "The said judgment arises from the fact that I am indebted to her on account of the purchase and rentals by me of lands to which she was entitled to an interest as one of the heirs of her father's estate, and also to the interest of her mother therein, which she has transferred to the plaintiff and directed me to pay to her, the same not exceeding the amount aforesaid, and the said amount is now justly due to the plaintiff." Here, then, we have a statement of the amount due, the consideration of the debt, the facts out of which such consideration grew, and that the amount was justly due. What more could be required to make it conform to the statute, which only requires the facts out of which the indebtedness arises to be stated concisely? If, as is contended for, the statement had proceeded to set forth in detail the items going to make up the amount sworn to be justly due, it would have been very far from that concise statement contemplated by the statute. It fixed definitely the amount of the debt, and showed clearly the origin and consideration of the indebtedness, and, in our judgment, nothing more was necessary. Indeed, since we have learned from the evidence in this case that the judgment was taken for a less amount than that ascertained by calculation, and admitted by the debtor to be really due, by way of compromise, it is difficult to conceive how it would have been possible to make a more definite statement. As was well said in McDowell v. Daniels, supra, a creditor who was disposed to question this judgment would not, of course, accept the debtor's statement as correct, even if it had been full to the minutest detail. All he would want to know would be what was

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claimed *to be the origin and consideration of the debt, and he would inquire for himself into the details. Here he is informed that the debt originated in the fact that the debtor had been using land in which the creditor had an undivided interest, and for which he was liable to pay rent, and in the fact that he had purchased another interest in the same land for which he had not paid the purchase money, and that this purchase money had been assigned to the plaintiff in the judgment. With these facts furnished to him by the statement, the creditor would have it in his power, by his own investigations, to ascertain how much ought to be due, and it is not to be expected that his action in the premises would be influenced by any details that might be contained in the statement, but by the result of his own investigations, which the facts there stated enabled him to institute. If a statement is simply to the effect that the defendant is indebted to the plaintiff in a certain amount, without stating the origin and consideration of the debt, the creditor is furnished with no starting point from which to commence his own investigations, and, therefore, such a statement would be insufficient. But where, as in this case, the origin and consideration of the debt are stated, the creditor is furnished with such starting point and may proceed with his own investigations, and there is no necessity for a detailed statement of the various items going to make up the amount of the indebtedness. We are, therefore, unable to agree with the Circuit judge that the statement in this case was insufficient.

As to the objections to the transcripts of the judgment docketed in the counties of Kershaw and Sumter, we agree with the Circuit judge that the slight discrepancies or minor deficiencies and irregularities of form

pointed out, might be amended, and are not sufficient to render them invalid.

The judgment of the Circuit Court is reversed and the complaint is dismissed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. *67

*(Case No. 1009.)

EVANS v. McLUCAS.

(November Term, 1880.)

[1. *Fixtures* ⇐35.]

A conveyed to a railroad company a right of way over his land, and afterwards A, B & C, a mercantile firm, erected a guano warehouse upon this right of way, by permission of the railroad company. After that, A conveyed to D land which included within its boundaries the site of the warehouse, but before the recording of D.'s deed, A and B, by deed, sold this building to C, who paid his money, having no knowledge of D's deed. In action brought by D against C for the possession of this warehouse —*Held*, that the action could not be maintained for the warehouse as a fixture, for fixtures go with the land as an incident, and plaintiff was not entitled to the immediate possession of the land.

[Ed. Note.—Cited in Watts v. Blalock, 17 S. C. 162.

For other cases, see Fixtures, Cent. Dig. §§ 67–79; Dec. Dig. ⇐35.]

[2. *Fixtures* ⇐35.]

The verdict—we find the fee in land for plaintiff, the house for defendant—was substantially a verdict for defendant.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 67–79; Dec. Dig. ⇐35.]

[3. *Fixtures* ⇐23.]

Under the facts of this case the warehouse was personal property and did not become a fixture; the builders could sell it, and plaintiff could not recover it from the purchaser.

[Ed. Note.—Cited in Watts v. Blalock, 17 S. C. 162; Ragsdale v. Southern Ry., 60 S. C. 388, 38 S. E. 609.

For other cases, see Fixtures, Cent. Dig. § 18; Dec. Dig. ⇐23.]

[4. *Vendor and Purchaser* ⇐239.]

If the warehouse had become a part of the realty, plaintiff could not now recover it; and defendant would be protected as a purchaser for valuable consideration without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583–600; Dec. Dig. ⇐239.]

[5. *Fixtures* ⇐5.]

[Cited in De Laine v. Alderman, 31 S. C. 274, 9 S. E. 950; Padgett v. Cleveland, 33 S. C. 345, 348, 11 S. E. 1069; Hurst v. Craig Furniture Co., 95 S. C. 228, 78 S. E. 960, to the point that where a chattel is annexed to land, and is used for a purpose distinct from that of the occupier of real estate or for carrying on a trade, it is not considered part of the realty.]

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 4; Dec. Dig. ⇐5.]

Before Wallace, J., Marion, April, 1879.

Action by Eliza J. Evans against John D. McLucas, for the recovery of the possession of a warehouse, and for rents and profits. The case is fully stated in the opinion.

Messrs. Townsend & McKerall, for appellant.

Messrs. Johnson & Johnson, contra.

March 23d, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action "to recover the possession of the S. A. Durham & Co. Warehouse," rents and profits, &c., situated in the town of Marion, within sixty-five feet of the centre of the track of the Wilmington, Columbia and Augusta railroad. William Evans originally owned the land,

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and he *had conveyed it to the said railroad company as a right of way, in accordance with the terms of the charter of the same, granted in 1846, and which provides as to such right of way, that "the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same may be used only for the purposes of the said road and no longer." 11 Stat. 389.

In 1869 the firm of S. A. Durham & Co., which was composed of S. A. Durham, John D. McLucas and William Evans, were doing a large mercantile business in the town of Marion, and, at the suggestion of William Evans, who owned the fee in the land, they obtained from the railroad company permission to erect a warehouse near the track of the road, for the purpose of receiving directly from the cars and storing guano and other heavy freights. The railroad company concurred in the project, and assisted by transporting lumber to build the house, which cost the firm $450, and was used by them for the purposes indicated.

In 1872 William Evans conveyed to his daughter, Eliza J. Evans, the plaintiff, for life, a tract of land, the boundaries of which included the ground on which the warehouse was built, but no reference to it was made in the deed, which was not recorded until February 8th, 1878, a short time before this action was brought.

In 1873 the firm of S. A. Durham & Co. dissolved and sold all their partnership property, including the warehouse, which was purchased by the defendant, McLucas, at the price of $300, for which he accounted in settlement, and took a deed of conveyance from S. A. Durham and William Evans, the other partners, which declares that "for and in consideration of three hundred dollars to us in hand paid by J. D. McLucas, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released unto the said J. D. McLucas, all and each of our joint and several interest, right and title, to a building known as 'S. A. Durham & Co.'s Guano Warehouse,' * * * together with all the rights and appurtenances thereto in

any wise belonging, and we, the said Durham and Evans, for ourselves, our executors, administrators and assigns forever, warrant

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and de*fend the right, title and interest of the said building unto the said McLucas, his heirs and assigns, against us, our heirs and assigns," &c.

William Evans afterwards died, and Eliza J. Evans brought this action for possession of the warehouse, claiming that as she is owner of the fee under her father's deed to her, she is entitled to the warehouse as an incident of such ownership, notwithstanding the easement of the railroad company in the land. The jury found "fee in land for plaintiff, the house for defendant." The plaintiff excepted to the rulings of the judge, and the appeal comes to this court.

The action was not to recover real estate, but "for the possession of the S. A. Durham & Co. warehouse," rents and profits, &c. An action for the land, or the warehouse as "a fixture" of the land, could not now be maintained by the plaintiff, for the reason that she is not entitled to the immediate possession of the land or anything on it as "a fixture" which, as an incident of the land, goes with it. William Evans, previous to his deed to her, had conveyed the land to the railroad company as a right of way, and she holds her fee subject to this right of the company to the possession and use of it. No action for the land or for possession of the warehouse as an incident to it, is now maintainable by any one except the railroad company, who are in possession for all purposes pertaining to their corporate functions, and likely so to remain in possession for an indefinite period. The railroad company is not here complaining, and we can only regard this an action for the warehouse as personal property. We shall not, therefore, consider more at length the second, third, fourth, sixth and tenth exceptions, which, in different forms, make points relating to the plea of purchase for valuable consideration without notice, which, in the view the court takes, has no proper connection with the case.

The remaining exceptions are as follows:

"1. Because the defendant, in his answer, prayed for no affirmative relief, and the court erred in instructing the jury any could be afforded by their verdict.

"5. Because his Honor erred in instructing the jury that as William Evans originally

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consented to the erection of the *building on the land in controversy, he being at that time the owner of it, the title to the building vested in the members of the firm of S. A. Durham & Co.

"8. Because his Honor erred in instructing the jury that although the house was a fixture the owner of the fee could sell it."

As to the first exception it is only necessary to say that the title to the land was not in issue by the pleadings, and the verdict is substantially a verdict for the defendant.

As a general rule, all things that are annexed to the land become a part of it, but to this there are exceptions, as where there is a manifest intention to use the alleged fixtures in some employment distinct from that of the occupier of real estate, or where the chattel has been annexed for the purpose of carrying on trade, it is not, in general, considered as part of the realty. In modern times, for the encouragement of trade, many things are now considered as personal property which seem to be attached to the freehold. This is particularly true as between landlord and tenant for years. The tenant may take away chimney pieces or a cider mill and press or pump erected by him on the land. It is well settled under the American decisions that this exception (as to fixtures) extends to houses and other structures of a permanent character, and that they may retain their character of personal property and be the subject of a distinct and independant ownership as chattels, apart from any title in the soil on which they are erected. Carliss v. Hoyt, 19 Conn. 154; 2 Kent 343; 2 Bouv. Inst. 163; [Fairis v. Walker] 1 Bail. 540; 2 Am. Lead. Cas. 747, and authorities cited. For the purposes of this case the owner of the fee may be considered as the landlord, and the railroad company in a position analogous to that of tenant for years, having the right to erect buildings, such as depots connected with their business, without making them fixtures for the benefit of the land-owner. The railroad company having a dominant easement in the soil, erected or consented to have erected upon it a warehouse to facilitate their business as an assistant depot. The owner of the soil has no right to this building, and those who built it might without damaging the land-owner, remove it

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at *any time if it could be done in such way as not to injure the land itself.

But in addition to this view, from the relations of the parties, it was a question of intention whether the house was to be a fixture for the benefit of the land-owner or personal property. The land-owner may waive the question of fixture, or as stated by the Circuit judge, "sell it." Here all the parties, the railroad company and the owner of the fee, consented to the erection of the warehouse. William Evans consented, indeed assisted in erecting it, without saying anything about an ultimate claim as owner of the fee. He encouraged others to put their money into it. He afterwards joined in the sale, with warranty to the purchaser, receiving his part of the purchase money, and all who claim under him are now estopped from denying that the purchaser has good titles.

"When a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent if

his conduct or acts of encouragement induce the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adverse claim." Swain v. Seamens, 9 Wall. 274 [19 L. Ed. 554]; Bollmann v. Bollmann, 6 S. C. 46. As personal property, the plaintiff is not entitled to the warehouse as an incident to land of which she is not now entitled to the possession. She has no higher rights than her donor, who consented to its erection and afterwards joined in the sale of it as personalty and unaffected by his deed to her. She incurred no expense in building the house, and there is no proof that it injures the soil.

But if the warehouse were realty we do not see how it could benefit the case of the plaintiff. She could not now recover the land to which it is attached. Besides, the deed of plaintiff bears date in 1872, and was not recorded until February 8th, 1878. The defendant's title to the warehouse bears date February 1st, 1873, and was recorded within the same month. The defendant swears that when he purchased he had no notice of the deed to plaintiff or that any claim had been set up in conflict with his own until a short time before suit was brought. The judge having referred the question of notice to the

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jury, and they, by *their verdict, as we must assume, having found that the defendant had no notice, the deed of plaintiff not having been recorded in the time required by law, and not until after the deed of defendant was recorded, was, as to the defendant, void and incapable of barring his rights under the operation of the recording acts. Gen. Stat. 422; Act 1872, 15 Stat. 5.

The judgment below is affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 72

(Case No. 1012.)

JOHNSON v. CLARKE.

(November Term, 1880.)

[1. *Payment* ⇦67.]

Whether one security operates as payment of another, is always a question of intention, the onus probandi resting upon the party affirming it.

[Ed. Note.—Cited in Murray v. Witte, 16 S. C. 516; Union Bank v. Wando Min. & Mfg. Co., 17 S. C. 362; Sullivan v. Sullivan Mfg. Co., 20 S. C. 92; Chalmers v. Turnipseed, 21 S. C. 142; McKibben v. Salinas, 41 S. C. 109, 19 S. E. 302.

For other cases, see Payment, Cent. Dig. §§ 162, 189–194, 198; Dec. Dig. ⇦67.]

[2. *Appeal and Error* ⇦848.]

Where the issues in a common law case have been referred to a referee, and his findings have been confirmed by the Circuit Court, this court can consider only questions of law raised by proper exceptions.

[Ed. Note.—Cited in In re Solomons' Estate, 74 S. C. 191, 54 S. E. 207.

For other cases, see Appeal and Error, Cent. Dig. §§ 3372–3376; Dec. Dig. ⇦848.]

[3. *Appeal and Error* ⇦848.]

Concurrent findings of fact by referee and Circuit judge, in such case, set aside, it appearing that error of law was committed in improperly imposing upon the plaintiff the burden of proving that a second note was given as a substitute and not as a payment.

[Ed. Note.—Cited in Hall v. Hall, 41 S. C. 167, 19 S. E. 305, 44 Am. St. Rep. 696.

For other cases, see Appeal and Error, Cent. Dig. §§ 3372–3376; Dec. Dig. ⇦848.]

[4. *Appeal and Error* ⇦848.]

[Although the issues of law and fact were referred to a referee, that alone does not make it a case in chancery. The case being still a law case, it is the duty of the appellate court to consider only errors of law which may be raised by exception.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3372; Dec. Dig. ⇦848.]

[This case is also cited in Moody v. Southern Ry. Co., 79 S. C. 301, 60 S. E. 711, as to burden of proof.]

Before Mackey, J., Kershaw, September, 1879.

Action by Hampton Johnson and John Johnson, trustees of Isabella Joiner, against T. H. Clarke, as executor of Henry H. Clarke, deceased, and against T. H. Clarke. The judgment demanded was against T. H. Clarke, as executor, &c., to be levied of the goods, &c., of H. H. Clarke, &c., "and if none, then of the further goods, &c., of T. H. Clarke." The case is stated in the opinion.

The Circuit decree, after fully stating the pleadings, evidence, report of referee and the exceptions to the report, continues as follows:

There is no evidence whatsoever to show

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that the reason that *impelled the plaintiffs to take the new note at the increased rate of interest, was to make "an approximation to the par value of gold and currency." Nor is there any proof that the new note was taken under a clear understanding that it was to stand in lieu of the old note. The witness, John Johnson, states that he was not present when the notes were exchanged between his cotrustee, Hampton Johnson, and the defendant, T. H. Clarke, and he professes to recite only what he heard Hampton Johnson say upon the subject.

As this reported conversation between the plaintiffs is not shown to have been held in the presence of the defendant, T. H. Clarke, it was clearly inadmissible hearsay, and should not have influenced the finding of the referee in any degree. On this point the witness, John Johnson, testifies as follows: "I never spoke to the executor in my life about changing the note; I had no conversation with T. H. Clarke about the matter until recently." This witness further testifies that

not until "about the time of the commencement of this action did he claim to the defendant, T. H. Clarke, that the new note was against the estate of H. H. Clarke." The new note matured January 10th, 1873, and this action was commenced March 15th, 1876.

On the contrary, the witness, T. H. Clarke, testifies positively that he substituted his individual note, signed as executor, for the old note of testator; and he states, on cross-examination, that nothing was said by the plaintiff, Hampton Johnson, at the time about defendant, the witness, signing the new note as executor.

The defendant, T. H. Clarke, further testifies, and on this point his testimony is uncontradicted, that the increased rate of interest, from seven to twelve per cent., was the only consideration that induced the plaintiff, Hampton Johnson, to exchange the note of testator for defendant's note.

The testimony of T. H. Clarke upon this point is supported by the further fact in evidence, that at the time he executed the note in question he was known to be abundantly solvent, as evidenced by the plaintiff, Hampton Johnson, lending him the sum of $500 on his note without security. At that date the note of the defendant, T. H. Clarke, was manifestly regarded by the plaintiffs as in every respect as good as the note of the de-

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ceased. *and it fully appears from the testimony that it was not urged as a demand upon the testator's estate until the defendant was generally reputed to be financially embarrassed.

Moreover, as every man is presumed to know the law, it must be assumed that the plaintiffs well knew that the defendant, T. H. Clarke, as executor, had no legal power or authority to bind the estate of his testator by increasing the rate of interest of the testator's note from seven to twelve per cent., and thus committing a breach of his trust as executor by charging his estate with a rate of interest which was usurious when testator's note was executed. Had the executor applied any of the assets of the estate to the payment of such usurious note, even though executed by the testator, he would have been guilty of a devastavit, as in the case of a bond ex turpi causa, as well against the legatees as creditors. Vez v. Emery, 5 Ves. 142; Winchcombe v. Bishop of Winchester, Hob. 167; 2 Wms. on Ex'rs 1634, 1635.

The mere circumstance, stated in the second exception, that the defendant about the time he signed the note in question "T. H. Clarke, executor," borrowed money from the plaintiff, Hampton Johnson, and gave another note therefor, which is signed "T. H. Clarke" simply, without the affix "executor," is sufficiently explained in the testimony of the defendant, that there was no agreement that he should sign the new note as executor, and that it was so signed through inadvertence. This circumstance is also fully counterpoised, if it has any weight at all, by the fact that in defendant's letters to the plaintiff, Hampton Johnson, (which letters are adduced in evidence by the plaintiffs,) in reference to giving the note in question for the testator's note, and immediately pending the exchange of notes, defendant signed himself "T. H. Clarke," without the addition of the word "executor."

It may be stated generally, as settled law, that a referee's finding of fact has all the weight of a verdict of a special jury, and should not be disturbed unless clearly against the preponderance of the evidence.

The exceptions to the conclusions of the referee, as to the matters of fact herein, are

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therefore overruled. The remaining *four exceptions, which relate to the findings of law, may, for the sake of brevity, be considered together.

It is well settled that if a person indebted in one right, in consideration of the forbearance of the creditor promises to pay in another right, this convenience will be a sufficient consideration to maintain an action against him in the latter right. Rann v. Hughes, 7 T. R. 346; Forth v. Stanton, 1 Wms. notes to Saund. 211; Sm. on Cont. *87.

In the case at bar the defendant, T. H. Clarke, as executor, was pressed by importunate creditors of his testator to pay a note with interest, long due. He tendered such assets as he held in payment and they were refused. The creditors were urgent, and insisted that they were entitled to demand gold coin in payment of a note in which it was not expressly stipulated that it should be paid in specie.

That demand was made at a period when a gold famine prevailed in the money markets of the country. The executor tendered in payment the lawful currency of the United States, known as "greenbacks," then as now universally recognized as a legal tender in the commercial world, and so declared by law.

In that conjuncture of the affairs of the estate committed to his charge, the defendant, T. H. Clarke, executor, gave the note which is the subject of this action, and received in exchange therefor testator's past-due note, thereby securing the estate against suit for at least one year.

I am fully warranted by the evidence in holding that this was the consideration which moved the defendant to give the note in question, for the creditors, by refusing the lawful paper currency of the country, and demanding gold coin in payment, thereby virtually declared their purpose to bring suit immediately upon their note if a satisfactory arrangement was not made for its future payment, which arrangement was effected by their receipt of a note bearing nearly double the rate of interest of that on which they

were pressing payment so inordinately. There is no doubt that such forbearance on the part of the creditors, in agreeing to accept another note payable at a future day, or the preventing of a suit by giving such note, would be a sufficient consideration to bind the executor individually. The authorities

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*in support of this view may be multiplied indefinitely. Johnson v. Whichcott, 1 Roll. Ab. 24; Davis v. Reyner, 2 Lev. 8; Goring v. Goring, Yelv. 11; 1 Sid. 89; case of Scott v. Stephens. Says the learned author, Williams on Executors, vol. II., *1614: "If an executor be indebted to J. S. in £100, who demands the money, the executor is chargeable only in respect of assets, and not otherwise; but if he promises to pay the debt at a future day the forbearance is a sufficient consideration, and it becomes his own debt and to be satisfied out of his own estate. Said Chief Justice Hale in the leading case of Homer v. Smith, 2 Lev. 122, 'though a bare accounting by the executor with a creditor of his testator will not bind the executor to pay de bonis propriis, yet a promise in consideration of forbearance will.'"

It now remains to determine whether the defendant, T. H. Clarke, by giving the note described in the complaint, and receiving the testator's note therefor, did discharge the estate from the debt and bind himself individually.

The note given by the said defendant was a sealed note, which itself imports a sufficient consideration. The executor is a trustee for all persons interested in the estate, both creditors and legatees, and the law throws around such estate peculiar safeguards to protect it alike from criminal devastavit and an improvident administration of the trust. Hence, it impresses upon the acts of an executor a certain legal character and effect, of which all must take notice who deal with him in regard to the estate. Creditors of the testator who contract with an executor are assumed in law to do so with full knowledge of the legal limitations upon his powers, and to know when the contract binds the estate of the testator and when it binds only the individual estate of the person who holds the executorship.

On this head the following modern case is of the highest authority, and directly in point. Two executors gave a promissory note, for a debt of the testator, to the plaintiff, in the following words: "As executors to the late T. T., we severally and jointly promise to pay to N. C. the sum of £200 on demand, with lawful interest for the same." The Court of Common Bench held that they were personally liable on the instrument, upon the ground that "the promise, from the

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circumstance of *interest being added, necessarily imported a payment at a future day; and an executor promising to pay a debt at a future day makes the debt his own." Childs v. Monins, 2 Brod. & B. 460; see, also, 2 Wms. on Ex'rs 1613, and cases there cited. In the case now under consideration the executor not only promised to pay at a future day, but entered into a new contract entirely distinct from that entered into by the testator, and which was forbidden by law at the date of the original contract with deceased; such new contract being in the form of a sealed note, bearing interest at an exorbitant rate, far in excess of what the testator had stipulated to pay.

That a new note without a special contract would not, of itself, discharge the original cause of action, is not denied. "But," says Chief Justice Marshall, in the case of Sheehy v. Mandeville, 6 Cranch 253 [3 L. Ed. 215], "if, by express agreement, the note is received as payment, it satisfied the original contract, and the party receiving it must take his remedy on it." This principle appears to be well settled. The note of one of the parties, or of a third person, may, by agreement, be received in payment. See, also, on this point Lord Kenyon's opinion in Barclay v. Gooch, 2 Esp. 571; Cumming v. Hackley, 8 Johns. 202; Witherby v. Mann, 11 Johns. 518.

I have shown, by the authorities cited, that where an executor gives a note payable at a future day, with interest, he thereby binds himself individually, and it follows that the acceptance of such note by creditors, especially when it varies to their advantage the original contract of testator, imports conclusively an agreement on their part to discharge the estate and hold the executor individually liable. This conclusion is strongly reinforced by the fact that the creditors in this case surrendered the testator's note to the executor, and thus enabled him to legally demand and receive credit therefor in the final settlement of his accounts with testator's estate. But we are not left on this point to depend alone on the legal intendment of the transaction between the plaintiffs and the defendant; for T. H. Clarke, the executor, swears positively, and his testimony on this point is not contradicted by legal evidence, that the plaintiffs agreed to take his "individual note."

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*I have fully considered the facts recited in the exceptions, that the defendant, T. H. Clarke, credited himself, in his return as executor, with the full amount of testator's note years before he gave his own note in exchange therefor. This is explained in the testimony, the executor having acted therein under legal advice, which, though erroneous, doubtless seem to be warranted by the fact that he had tendered payment in U. S. currency, which had been positively refused, and he regarded himself as individually responsible therefor, intending to protect the estate at least from any liability on said note; and

continuing for several years after his final return to pay the interest upon the same.

However this may be, certainly the surrender by the plaintiffs of testator's note to the defendant, enabled him, as executor, to fully support the credit that he had already received therefor in his final return, and deprived the legatees of any right of action against him to recover the amount so credited.

The exception that the referee should have found the debt and interest due against the defendant, T. H. Clarke, individually, if it was not due by him as executor, does not appear to be tenable. Says Williams on Executors: "A plaintiff cannot have an action against a defendant to charge him as executor, and also in his own right, for the judgment in the one case is de bonis testatoris, and in the other de bonis propriis. And such misjoinder of action, as well against an executor as by him, is a defect in substance, and, consequently, bad on a general demurrer or in arrest of judgment, or on error." 2 Wms. on Ex'rs *1754; Jennings v. Newman, 4 T. R. 347; Brigden v. Parkes, 2 Bos. & P. 424.

The exceptions to the referee's findings of law are overruled.

It is therefore ordered, adjudged and decreed that the report of the referee be confirmed, and stand as the judgment of this court; and that the complaint herein be dismissed, with costs.

The plaintiff appealed to this court.

Argument of the late William M. Shannon was submitted in behalf of the appellants.

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*Messrs. Chestnut & Workman, contra.

March 25th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This was an action on a note for $1200, given to the plaintiffs as trustees, January 10th, 1872, and signed T. H. Clarke, executor. The note was given under the following circumstances: Henry H. Clarke, in his lifetime, borrowed money from the plaintiffs, as trustees, and gave them his note for the amount, $1200. H. H. Clarke afterwards died, leaving a will, of which T. H. Clarke is the only qualified executor, who made payments of the annual interest on the note for years. The endorsement of the numerous payments covered the back of the note, leaving no room for other credits, and, in 1872, as stated, the note sued on was given. The question was, whether the new note was a payment and satisfaction of the old note against the estate of H. H. Clarke, or was a mere substitution. By consent the case was referred to W. Z. Leitner, Esq., as special referee, who heard the testimony and reported that, in his judgment, the new note was taken in satisfaction of the old note, which was given up; that it was the individual note of T. H. Clarke, and that the estate of H. H. Clarke was discharged.

The Circuit judge confirmed the report, and from his judgment the appeal comes to this court upon the following, among other, exceptions:

"1. That his Honor erred in the statement of the evidence, as reported by the referee, and especially in this, that the consideration for the exchange of notes was only the increase of interest, when the whole evidence and the statement of the witness, and defendant, Clarke, himself, states that the note was full of credits, and that one credit on the old note had to be written on a separate paper.

"That the signature of the defendant, as executor, was an inadvertence instead of a thoughtful act, showing that it was a debt of the estate, and his signing his own note in his own name, about the same time, is pregnant with proof of his intention.

"2. That his Honor erred in law in holding that the mere surrender of the note was equivalent to payment: that it was necessary for plaintiffs to show that there was an

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express agree*ment that the new note was given as and for a continuation of the old debt by testator. Payment is an affirmative proposition, and the burden of proof rests on the party pleading it."

The main question involved was one of fact: whether by the change of the old note for the new the parties intended to pay and discharge the old note, which was a debt of the estate of the testator, H. H. Clarke, and to take instead the individual note of T. H. Clarke, the executor. Whether one security operates in payment and satisfaction of another, is always a question of intention. Burton v. Pressly, Cheves' Eq. 1; Costelo v. Cave & Bradley, 2 Hill 528 [27 Am. Dec. 404]; Adger v. Pringle, 11 S. C. 527, and authorities cited. Upon the question of intention, there is not much testimony. Hampton Johnson and T. H. Clarke, the executor, made the exchange. Johnson is now dead, and the defendant, T. H. Clarke, is the only living witness of the transaction.

It is not within the province of this court to review the whole case and decide as to the weight of testimony. Although the issues of law and fact were referred to a referee, that alone does not make this a "case in chancery." It is still a law case, and, therefore, it is the duty of this court to consider only errors of law which may be raised by exceptions. This court always hesitates to set aside the judgment of the Circuit Court when it concurs upon facts with the report of the referee. Yet this rule, properly understood, only applies where the facts have been considered upon proper issues, and especially in regard to the burden of proof. It does not apply when there has been error of law in

the manner in which the facts were considered as bearing upon the proper issues in the case. The defence of the defendant amounts to the plea of payment and satisfaction, and, as in all other cases, he who affirms must prove. The onus of proof was upon the defendant to maintain his plea. As the court say in the case of Adger v. Pringle, before cited, "whether the debt of the ancestor is discharged by the bond of the heirs, is a question of fact depending upon intention. It is not payment unless so accepted by the creditor, and the burden of proof is upon the party affirming it." The referee held and the Circuit judge sustained him, as follows:

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*"The fact that the new note was signed by T. H. Clarke, as executor, does not, of itself, bind the estate of H. H. Clarke, deceased. It could, at best, be regarded only as a link in the chain of evidence to show that the new note was intended as a substitute for the old. But this is destroyed by the fact that the old note was delivered up; the further fact that there was no express understanding that the new should stand for the old, and the still further fact that the new note was based upon a new and distinct consideration."

As we understand it, this substantially affirms the proposition that it was necessary for the plaintiffs to show that there was "an express understanding" that the new note was intended as a substitute for the old note, and that, having failed to do so, judgment for the defendant must follow. This is the reason of the rule, as we understand it. The plaintiffs stood upon their note, and the defendant, whose defence was payment and satisfaction, should have shown affirmatively that the new note was intended to be and was actually received in payment and satisfaction. This might be shown by facts and circumstances, as well as by positive proof. The only witness to the transaction now living, T. H. Clarke, does not say that was the understanding and agreement of the parties. He says "he does not recollect that Mr. Hampton Johnson, in express words, spoke of the substituted note as a release of the original note." There is no positive proof upon the subject. The circumstances under which the new note was given—the cause which made it necessary—the identity of the amount, $1200—the fact that defendant signed as executor, when, about the same time, he signed his own note for borrowed money in his own name without adding executor—his own statement that the note signed by him as executor "was substituted in lieu of the original note," all tend to negative the affirmative allegation which it was incumbent on the defendant to establish. In looking over the testimony we see no fact in the case tending to show that payment was intended, except, perhaps, the change in the rate of interest, from seven to twelve per cent., and this is referred to in the first letter, January 6th, 1872, which the defendant wrote to one of the plaintiffs upon the subject of giving the new note, in these terms: "I will

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come up to your house *and pay the balance of the interest and change the note to twelve per cent."

We think the onus of proof was on the defendant, and the case should be remanded to the Circuit Court for a new trial, and it is so ordered.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 82

(Case No. 1013.)

HUFF v. WATKINS.

(November Term, 1880.)

[1. *Master and Servant* ⇦336.]

Under a contract by which the services of an agricultural laborer are to be compensated by a share of the crop made, but he is to work under the exclusive direction of the employer, who is to have the entire control of the laborer's time and services, the relation of master and servant exists, and the master may maintain an action against one who, with knowledge of the prior contract, employs such servant.

[Ed. Note.—Cited in Kennedy v. Reames, 15 S. C. 551; Huff v. Watkins, 18 S. C. 511, 512; Carpenter v. Strickland, 20 S. C. 4; Richey & Miller v. Du Pre, Id. 11; Loveless v. Gilliam, 70 S. C. 392, 50 S. E. 9.

For other cases, see Master and Servant, Cent. Dig. § 1281; Dec. Dig. ⇦336.]

2. Burgess v. Carpenter, 2 S. C. 7 [16 Am. Rep. 643] distinguished and explained.

[3. *Jury* ⇦135.]

A juror called in place of one removed for cause from the panel presented, may not be peremptorily challenged.

[Ed. Note.—Cited in Gunter v. Graniteville Mfg. Co., 15 S. C. 443, 448, 449; Burckhalter v. Coward, 16 S. C. 444; Ward v. Charleston City Ry., 19 S. C. 524, 45 Am. Rep. 794.

For other cases, see Jury, Cent. Dig. § 606; Dec. Dig. ⇦135.]

4. Kleinback ads. State, 2 Speers 418, and Durant v. Ashmore, 2 Rich. 184, recognized and followed.

[This case is also cited in Whaley v. Jacobson & Son, 21 S. C. 54; Charles v. Byrd, 29 S. C. 552, 8 S. E. 1, and distinguished therefrom.]

Before Wallace, J., Newberry, February, 1880.

Action commenced May 16th, 1879, by William T. Huff against William Watkins, for $1000 damages for employing Jordan Butler, a servant of plaintiff, under the contract stated in the opinion, the defendant having knowledge of this contract.

At the trial the presiding judge asked if either party had objection to any of the jury presented. The plaintiff's counsel announced that they had none; the defendant's counsel

announced that he had no personal objection to any of the jurors, but suggested that if any one of them was related to either party to the suit, by blood or marriage, he should be withdrawn therefrom. Thereupon one juror announced that he was connected with

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the *plaintiff by marriage. The judge then directed him to withdraw. He did so, no objection thereto being made by plaintiff or his counsel. Then another juror was called in his stead. This juror was objected to by plaintiff's counsel peremptorily. The judge ruled that the plaintiff had no such right of challenge. The plaintiff excepted to the ruling.

Under the charge of the presiding judge the jury found a verdict for defendant. The plaintiff appealed.

[For subsequent opinions, see 18 S. C. 510; 20 S. C. 477; 25 S. C. 243.]

Mr. L. W. Simkins, for appellant.

Butler was a servant. Reeve's Dom. Rel. 482; Schouler on Dom. Rel. 599; Wood on Mast. & Serv. 2, 461; 107 Mass. 555; 70 N. C. 601; 16 Am. Rep. 780; 43 Ga. 331, 601. Defendant, having notice of this relation, is liable for damages. 1 Chit. Bl. 427, note 20; 2 Esp. 646; 1 Pars. on Cont., § 532, note F; 1 Wait's Act. & Def. 407; 2 Add. on Torts, § 1272; Wood on Mast. & Serv. 464. Plaintiff was entitled to his challenge. Gen. Stat. 523, §§ 25, 26.

Mr. J. F. J. Caldwell, contra.

In the matter of the challenge, the Circuit judge ruled correctly. 2 Rich. 184; 2 Spears 418. Butler and the plaintiffs were partners. Pars. on Part. 6, 54, 55; 45 N. Y. 797; 58 Id. 272; 4 Rich. 312; 2 H. Bl. 235; 6 Serg. & R. 259. Butler was certainly not a servant. Wood on Mast. & Serv. 1–3; 2 S. C. 7.

Mr. T. S. Moorman, in reply.

March 29th, 1881. The opinion of the court was delivered by

McIVER, A. J. This was an action brought by the plaintiff to recover damages from the defendant for enticing one Jordan Butler, who had been employed by the plaintiff as a farm laborer, to leave the employment of the plaintiff. The contract under which the said Butler, with the other farm laborers, had been employed, was not in writing, but is stated in the "case" as follows: "About the first of January, 1879, the plaintiff contracted with Jordan Butler and other persons to

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work his land during *the year. The plaintiff was to furnish the land, stock and farming implements, and to feed the stock, and to have the entire control of their time and services, and they to have therefor one-half of the crop that remained, after first deducting one bale of cotton, twenty bushels of corn and two hundred bundles of fodder to each horse; and that in consideration therefor they were to work under his exclusive direction and control from sun to sun, and do all things necessary for making and gathering a crop; also, that, in consideration that Jordan Butler agreed to assist the plaintiff in securing laborers and to take the lead in the work, the plaintiff agreed to pay him one bale of cotton extra."

The Circuit judge charged the jury that under the terms of said contract the relation of master and servant did not exist between the plaintiff and Butler, and, therefore, the plaintiff was not entitled to recover; to which charge exception was duly taken. The plaintiff requested the judge to charge the jury that the rule of law giving a remedy for employing the servant of another after notice, is not confined to menial servants, "but extends to all cases where the person is employed to give his exclusive personal service for a given time under the direction of an employer, who is injured by the wrongful act." This the judge refused to do, except with the qualification that it only extends to persons so employed for hire or wages of a definite sum. To this also exception was duly taken.

Most of the points presented in the argument here, have, in our judgment, been definitely settled by the decision of this court in the case of Daniel v. Swearengen, 6 S. C. 297 [24 Am. Rep. 471], and we deem it unnecessary to add anything to what is there said as to these points. In that case it was held: First. That the relation of master and servant exists in this state as at common law. Second. That to constitute such relation it is not necessary that there should be a contract in writing. Third. That one who contracts as a farm laborer may come within the class of servants, menial service not being essential to place one in that class. Fourth. That the statutes of this state do not prescribe the only mode of redress where one entices or persuades a servant to leave the employment of his master, but that in such cases, as at common law, the master is entitled to his action for dam-

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ages. It did not *appear, however, in that case whether the servants, who were there alleged to have been enticed away from their master's service, had been employed under a contract to pay them a stipulated sum of money as hire or wages, or whether, as in this case, their compensation was to be a certain proportion of the crop made. That case, therefore, furnishes no authority as to the main question presented by this appeal, which is, whether a farm laborer who is employed under a contract by which his services are to be compensated by a share of the crop, and not by a stipulated sum of money, can be regarded as a servant. It would seem, at the very outset, that the manner in which compensation is to be made ought not to have any effect in determining the nature

of the relation. Where one person has agreed to give his entire time to the service of another, working under his exclusive direction and control, certainly the manner in which payment for such service is to be made cannot have any effect in fixing the relation of the parties. That must depend upon the nature of the service required by the contract, whether it is exclusively under the direction or control of the employer, or, to some extent, optional or discretionary with the employé, and whether the whole or only a part of his time is to be devoted to the service of the employer. Here the contract required the laborers to work the land of the plaintiff "under his exclusive direction and control, from sun to sun," and gave him "the entire control of their time and services." It would be difficult to conceive what form of contract would create the relation of master and servant if this does not. If, where one binds himself, by contract, to devote his entire time, for a limited period, to the service of another, and to work under the exclusive direction and control of such other person, the relation of master and servant does not arise, we confess we are unable to see what form of contract would be sufficient for the purpose. The fact that, as an incentive, perhaps, to diligent and faithful work, the compensation of the laborer is not a fixed and definite sum of money, but is made to depend upon the amount of the proceeds of his labor, cannot change the relation in which the employé has voluntarily placed himself toward his employer. It certainly cannot, as has been argued, convert the relation into that of partners or joint

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owner *of the crop. Until the crop is divided it belongs to the employer, and all that the laborer is entitled to is in the nature of a chose in action—a right to demand compensation for his labor, which, by the agreement, is to be measured by the amount of the crop made. Rogers v. Collier, 2 Bail. 581 [23 Am. Dec. 153]; State v. Gay, 1 Hill 364; Holcombe v. Townsend, 1 Hill 399. The doctrine established by these cases seems to be recognized in the statute passed for the protection of laborers. General Statutes, Chapter CIII., Section 11, page 491, which provides that: "Whenever laborers are working on shares of crop or crops, or for wages in money or other valuable consideration, they shall have a prior lien upon said crop or crops in whosoever hands it may be," for if the laborer was regarded as part owner of the crop, either as partner or otherwise, it would be altogether inconsistent to speak of giving him a lien upon what belonged to him. It is true this section proceeds to provide that: "Such of the crop or crops to them [the laborers] belonging, or such amount of money or other valuable consideration due, shall be recoverable by an action in any court of competent jurisdiction." But this language, to make it consistent with the preceding language of the same section, as well as with the provisions of the preceding section, must be construed as applying only, after the division of the crop has been made, and the portion to which the laborers are entitled, has been ascertained in the manner provided for in the tenth section.

The case of Burgess v. Carpenter, 2 S. C. 7 [16 Am. Rep. 643], is not in conflict with these views, because, although the Circuit judge, in that case, did rest his decision upon the ground that a contract to pay a laborer for his services by giving him a share of the crop, constitutes the laborer a partner and not a servant, the Supreme Court did not place its decision upon any such ground, but upon the ground that the common law gave no right of action to the master for any injury done to the servant, except where the servant was a menial one, and as the employé, whose status was there in question, was an agricultural laborer and not a menial servant, the action could not be maintained by the employer. This view, as we have seen, has been repudiated in the subsequent case of Daniel v. Swearengen,

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supra. It is true that *Moses, C. J., in the latter part of his opinion, where he is attempting to reconcile the case of Daniel v. Swearengen with the previous case of Burgess v. Carpenter, does say that the decision in the latter may be supported upon the ground that the nature of the contract between the employer and the employee, in that case, gave rise to the partnership relation and not to the relation of master and servant. But in addition to the fact of this being a mere dictum, it is very obvious that the Chief Justice entirely misrepresents the decision in Burgess v. Carpenter, in stating as the material ground of that decision, not the ground upon which the majority of the court rested its decision, but the ground upon which the Circuit judge based his conclusion, which seems to have been the ground upon which the minority of the court rested the separate opinion. For it is quite clear that the Circuit judge, in Burgess v. Carpenter, based his conclusion solely upon the ground "that the contract to pay Henry Burgess a share in the crop made him a copartner and not a servant," and if the majority of the Supreme Court endorsed that view, it would have been very natural for them to have said so, as that would have been conclusive of the case. But, on the contrary, we find nothing of the kind in the opinion of the majority of the court, but we do find there an argument to show that the master's right of action only arose where the servant injured was a menial servant, and the conclusion is drawn that "Henry Burgess being exclusively concerned in the cultivation of the soil and proceeds arising therefrom, and there being no domestic caste in the nature of his service, [which seem to have been regarded in

the cases cited as a test of menial service,] he does not fall within the class to which the term 'servant' can, in any sense, be applied." We do not think that this dictum in the case of Daniel v. Swearengen, even were it better supported, is sufficient to overthrow the authority of the cases of Rogers v. Collier, State v. Gay and Holcombe v. Townsend, supra, especially when we find that the principle established by those cases has been recognized, impliedly at least, by the legislature in the statute for the protection of laborers, as we have previously shown. We think, therefore, that there was error in the charge to the jury in this case, as well as in the refusal to charge as requested.

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*The only remaining question is, whether the Circuit judge erred in refusing to allow the plaintiff to challenge a juror peremptorily who had been drawn to fill the place of a juror removed for cause. The ruling of the Circuit judge is fully sustained by the case of Kleinback ads. State,† 2 Speers 418 which was an action of debt for a penalty imposed by an ordinance of the city council of Charleston, and by the case of Durant v. Ashmore, 2 Rich. 184. The case of State v. Cardoza, 11 S. C. 195, being a criminal case, does not apply.

The judgment of the Circuit Court is set aside, and a new trial is ordered.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

† In the second edition of Speers, the title of this case is City Council of Charleston v. Kleinback.

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15 S. C. 88

(Case No. 1015.)

FLENNIKEN v. SCRUGGS.

(November Term, 1880.)

[1. *Chattel Mortgages* ⇐219.]

A being indebted to B by note, secured by a mortgage of a mare, dated April 24th, obtained the verbal permission of B to exchange with C the mare for a mule, provided A should give to B a lien on the mule. The exchange was made May 4th (the condition of the mortgage being then broken,) but C had no knowledge of the mortgage or of the verbal permission. This mortgage was recorded May 24th. A never gave the lien to B, and the mule died. *Held*, that B was not entitled to recover from C the possession of the mare.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 473; Dec. Dig. ⇐219.]

[2. *Trial* ⇐234.]

The Circuit judge instructed the jury that if they believed the testimony they must find for defendant. There being no conflict of testimony, this instruction was free from error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534–538, 566; Dec. Dig. ⇐234.]

[This case is also cited in McClendon v. Wells, 20 S. C. 520; Martin v. Jenkins, 51 S. C. 41, 27 S. E. 947, as to the rights of mortgagees after condition broken.]

Before Hudson, J., Fairfield, September, 1880.

This was an action commenced in June, 1880, by David R. Flenniken to recover from

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Clough H. Scruggs a bay mare, of *the value of $150, and for $100, his damages. To the full statement made in the opinion of this court, it is deemed proper to add only the terms of the agreement of April 24th, signed and sealed by D. S. Carter, which was as follows:

"Received this 24th day of April, A. D. 1880, of D. R. Flenniken, permission to trade one bay mare mule, which he has a mortgage on, for one bay mare belonging to F. Elder. The claim on the mule to be transferred to the mare—the said described property to be delivered to the aforesaid D. R. Flenniken or order, whenever demanded. And I hereby agree and bind myself to keep the said property in my possession, subject to the order of said D. R. Flenniken, and pay the full value of same if lost, by death or otherwise.

"Witness my hand and seal the day and year above named."

Verdict for defendant. Plaintiff appealed.

Mr. J. H. Rion, for appellant.

After condition broken, the mortgagee of a chattel is not absolute owner until foreclosure or its equivalent, but he has a right to the actual possession and control of the property for the purpose of subjecting it to the satisfaction of the debt. Such is the modern doctrine. Herm. on Chat. Mort., §§ 96, 194; Rice's Eq. 300; 1 Strob. Eq. 342; 2 S. C. 283. Carter could sell without plaintiff's permission; but he wanted to have the mortgage lien released. This plaintiff consented to do, only upon a condition which was not fulfilled. Defendant not knowing of this agreement, has not been prejudiced by it. And this agreement could not be carried out, because there was a mortgage to Elliott covering the mare. Unless plaintiff was absolute owner, Carter cannot be called plaintiff's agent.

Mr. A. M. Mackey, contra.

March 29th, 1881. The opinion of the court was delivered by

McIVER, A. J. The object of this action was to recover the possession of a certain bay mare found in the possession of the defendant. It seems that one Carter, being

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indebted to the *plaintiff in the sum of $700, on February 15th, 1878, gave his note to the plaintiff for the said amount, payable on November 1st, 1878, and, to secure the payment thereof, executed a mortgage to Flenniken upon various articles of personal property, amongst which was a certain mule. Carter, wishing to trade this mule, applied for and obtained permission from the plain-

tiff to do so, and on April 10th, 1880, traded the mule to one Elder for a mare, and on April 24th, 1880, he executed to the plaintiff an instrument in writing in the nature of a mortgage on the mare last mentioned, which instrument was recorded on May 24th, 1880. After the date of this instrument and before it was recorded, to wit, on May 4th, 1880, Carter again wishing to trade, swapped the mare to defendant for a mule, having previously applied for and obtained verbal permission from the plaintiff to do so, upon the condition that he "should give the plaintiff a lien on the mule received for the mare," which he never did. This mule died, but at what time is not stated in the "case," and the plaintiff finding defendant in possession of the mare in question, made a demand for her. Defendant at first agreed to give her up, but after taking legal advice he declined to do so, when this action was brought. It also appeared that the mule traded by defendant to Carter was under mortgage to one Elliott to indemnify him as endorser for defendant, but that when defendant found that the mare which he had obtained from Carter was claimed by the plaintiff, he gave Elliott additional security or indemnity. There was no evidence that defendant knew of the mortgage on the mare at the time he traded for her, or of the condition upon which Carter had obtained permission from plaintiff to make the trade.

The Circuit judge charged the jury, among other things: First. "That when there is a breach of the condition of a mortgage of personal property, the article mortgaged becomes the absolute property of the mortgagee, the possession of the mortgagor being thence merely permissive." Second. That if "the jury believe that the mare was transferred by Carter to Scruggs with Mr. Flenniken's permission, all Mr. Flenniken's right, title and interest in the mare became, upon the consummation of such trade, wholly gone, and he cannot now go upon this defend-

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*ant for the mare." Third. That the plaintiff "allowed Carter, as his agent, to make the trade, and if the agent made a bad trade, whether it arose from defect of title or any other cause, it was Mr. Flenniken's misfortune, and he alone must bear the loss." Fourth. That "the mare became released from any lien upon the exchange," made with defendant. Fifth. That as plaintiff "never had manual possession * * * Scruggs' legal rights remained unaffected by his promise made under a mistake." Sixth. That as there was no conflict of testimony in the case, "if the jury believe the testimony their verdict must be for the defendant." To these several points in the charge exceptions were duly taken as the foundation of this appeal.

Without undertaking to discuss the various exceptions, seriatim, we propose to consider and determine what we understand to be the real questions fairly arising upon the record. Whether it is true as an abstract proposition that the mortgagee of personal property becomes the absolute owner, in the strict sense of that term, after condition broken, may, doubtless, well be questioned, but there can be no doubt that, after condition broken, the mortgagee may seize and sell the mortgaged property in satisfaction of his debt, and there is as little doubt that, while a public sale is the proper mode, yet, with the consent of the mortgagor, he may sell at private sale, and if he can do this, he, certainly, may authorize the mortgagor himself to sell or otherwise dispose of the mortgaged property free from the lien of the mortgage. For these purposes the mortgagee, after condition broken, has all the rights of the absolute owner, and this is, manifestly, what the charge of the judge, properly construed, means. Here the undisputed testimony showed that Carter, the mortgagor, was authorized by the plaintiff, the mortgagee, to trade the animal in question, and when such trade was consummated it was unquestionably true, as the jury were instructed, that all the plaintiff's right, title and interest in the mare was gone, and, therefore, he could not recover in this action. The only persons who had any interest of any kind in the mare were Carter and Flenniken, and if Carter, by Flenniken's consent, traded the mare to the defendant, the rights of both Carter and Flenniken would pass to the defendant, and his right would thereby become indisputable.

It is said, however, that Flenniken's per-

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mission to Carter to *trade the mule was conditional, and that the condition was never complied with. To say nothing of the fact that Scruggs was ignorant of any such condition, it will be sufficient to say that the condition upon which the permission to trade was given was of such a character that it could not possibly be performed until after the trade was consummated. The condition was that Carter should give Flenniken a lien on the mule obtained in exchange for the mare, and this he certainly could not do until after the trade was made and the right to the property had passed. Surely the failure of Carter to comply with a private agreement made with Flenniken cannot have the effect of divesting the rights which Scruggs had previously acquired. Suppose, after the trade had been consummated, the mule had been accidentally killed while in the possession of Carter on his way home, before he had an opportunity of giving the lien to Flenniken, would it be said that the effect of this should be to divest Scruggs of his right to the mare which he had acquired by the exchange? Or, suppose that Flenniken had authorized Carter to sell the mare upon condition that he should apply the purchase money in a certain way, could it be said that

it was the duty of the purchaser to see that the purchase money was properly applied? If, in the case supposed, Carter should, through fraud, fail to apply the purchase money as directed, whereby loss ensued, could it for a moment be said that such loss should fall upon the innocent purchaser, ignorant of any such private instruction to the agent, or would it not fall upon him who had put it in the power of Carter to commit such fraud. We are unable, therefore, to see how the first four exceptions can be sustained.

The fifth exception does not seem to be relied upon in appellant's argument here, and, manifestly, cannot be sustained.

The sixth exception has not been urged, and cannot be sustained. There being no conflict in the testimony, and the rights of the parties depending solely upon the application of principles of law applicable to the undisputed facts, there was, certainly, no error in saying to the jury that if they believed the testimony the verdict should be for the defendant.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. *93

*(Case No. 1016.)

THOMSON v. SEXTON.

(November Term, 1880.)

[1. *Trial* ⟸251.]

Error may be committed in charging a correct principle of law as governing a case, where such principle is inapplicable to the issues on trial.

[Ed. Note.—Cited in Draffin v. Charleston, C. & C. R. Co., 34 S. C. 467, 13 S. E. 427.

For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. ⟸251.]

[2. *Sales* ⟸343, 344.]

That a sound price warrants a sound commodity is a correct rule, but does not apply where the defendant, after trial of a cotton gin, and with full knowledge of its defects, gave his note for a price agreed upon, relying upon the promise of plaintiff to repair the machine.

[Ed. Note.—Cited in Sullivan v. Huff, 24 S. C. 354.

For other cases, see Sales, Cent. Dig. § 948; Dec. Dig. ⟸343, 344.]

Before Thomson, J., Spartanburg, October, 1879.

Action upon sealed note by H. H. Thomson against F. M. Sexton, commenced January 28th, 1878. The case is fully stated in the opinion.

Mr. J. S. R. Thomson, for appellant.

Messrs. Bobo & Carlisle, contra.

March 30th, 1881. The opinion of the court was delivered by

McIVER, A. J. This action was brought to recover the balance due on a note, under seal, for $133.60, dated February 1st, 1876, and payable one day after date, upon which there was a payment by defendant on March 15th, 1876, of $36.60. The defence set up by the answer was that the note was given under the following circumstances: "That in 1875 defendant had contracted with plaintiff to purchase a cotton gin for $207; that plaintiff then furnished him with an old gin to be used without charge until a new gin arrived; that defendant used old gin during the winter of 1875 and 1876; that about January 1st, 1876, defendant paid plaintiff $60; that in February, 1876, defendant offered plaintiff to return old gin to him and let him keep the $60, and end the matter; that plaintiff refused, but promised, at next fall, to

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send a party to fix up the gin to *defendant's satisfaction, and would deduct $30, or that plaintiff would send and let him have new gin; that defendant thereupon paid $30 and gave his obligation as alleged in complaint; that plaintiff never sent any one to fix up the gin." At the trial the plaintiff testified that he had agreed in 1876 to furnish defendant a new gin; that in February, 1876, defendant agreed to take the gin first furnished, which was nearly new and a good gin; that a settlement of accounts was then had for the gin and belting furnished, and defendant thereupon gave the note upon which this action was brought, and that it was his custom to send out his machinist to fix up gins sold by him, and he would have done so for defendant if defendant had asked him. Defendant testified to the effect set forth in his answer; that the pinion of the gin was worn; that it was not worth more than the money he had already paid on it; that after using it a short time he laid the gin aside and used his old gin that he had been using for years, and has not used the gin he received from plaintiff since; that he gave his note to plaintiff under the distinct understanding that plaintiff would send a machinist to repair the gin to defendant's satisfaction the following autumn or send him a new gin; that the machinist never came to repair the gin, and a new one was never tendered. He also stated that he had "tendered back the gin before the note was given, but not afterwards, until February, 1878," which seems to have been after this action was commenced, as it is stated in the "case" that the summons and complaint were served January 28th, 1878. The defendant also introduced several witnesses who testified to the same effect as to the value of the gin, some of them saying that the gin was not worth $50. The plaintiff, in reply, introduced testimony that the gin was a valuable one, and could be repaired at a very small expense.

The Circuit judge charged the jury "that the rule was that a sound price warranted a sound commodity, and that if the gin sold to defendant was worth no more than had already been paid for it, then the jury should find for the defendant." The jury having found for the defendant the plaintiff made a motion for a new trial, which motion was refused, "on the grounds that, although a new contract might have been made in which

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the *defects of the gin had been considered, yet the rule that a sound price warrants a sound commodity, was the rule by which the case should be governed, and that if the jury believed the statement of the defendant, the verdict could be upheld on the ground that plaintiff had received already the value of the gin." Exceptions having been duly taken to the charge, as well as to the refusal of the motion for a new trial, the case is now brought here by appeal based on these exceptions.

It is undoubtedly true, as a general proposition of law, that a sound price requires a sound commodity, but the real question raised by this appeal is, whether this proposition of law is applicable to the facts of this case. Error may be committed not only by laying down to the jury incorrect general principles of law, but also by applying correct principles of law to cases in which they are not properly applicable. The maxim of the civil law that a sound price calls for a sound commodity, which has been adopted in this state, applies to cases where the defect in the thing sold was unknown to the purchaser at the time of the sale, or where, by fraud or misrepresentation, the purchaser is misled as to the character, extent or probable consequences of the defect known to him at the time of the sale. The object of the rule formulated in this maxim, is to protect the purchaser against latent defects and against fraud and circumvention, and it was never designed to enable persons to get rid of injudicious contracts fairly made, under a full knowledge of all the circumstances relating to the subject matter of such contracts. Whitefield v. McLeod, 2 Bay 384 [1 Am. Dec. 650]; Rose & Rogers v. Beatie, 2 N. & McC. 540; Watson v. Boatwright, 1 Rich. 404; Wood v. Ashe, 3 Strob. 71. Even in the case of Barnard v. Yates, 1 N. & McC. 148, where the rule has been carried as far as, perhaps, in any other case, Gantt, J., delivering the opinion of the court, says, in speaking of this rule, that it "can have no application or bearing where the buyer is correctly informed of the true nature and quality of the thing purchased, whatever may be its defects, or whatever the price agreed to be paid for it." Now, in this case, the defect in the gin was well known to the purchaser at the time he made the contract sued upon—perhaps better known to him than to the vendor, as he had been using the

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gin for the *season immediately preceding—and the only defect mentioned in the testimony—the wearing of the pinion—was, according to the testimony, slight, and could have been repaired "at a very small expense." It seems to us, therefore, that the maxim that a sound price warrants a sound commodity, had no application to the case made, and that the Circuit judge erred in instructing the jury that the case should be governed by that rule, and that if the gin sold to defendant was worth no more than had already been paid for it, then the jury should find for the defendant. Such an instruction afforded the jury an opportunity to substitute their own estimate, based upon the testimony in the case, of the value of the gin, for that fixed by the agreement of the parties; and it may be that the jury concluded that the price agreed upon by the parties was too large. Be that as it may, however, the testimony shows that the defendant agreed to give a certain price for the gin, knowing at the time of the defect in it, and relied upon the agreement of the plaintiff to have such defect repaired. If the plaintiff failed to do so, then all that the defendant could require would be to be allowed a discount for so much as such repairs would cost, and the plaintiff would be entitled to judgment for the balance of the price agreed upon, whether that price be larger or smaller than what the jury might believe the article was really worth. Suppose the parties had fixed upon $150 as the value of the gin with the defect repaired, and that the cost of such repairs would be $10, then, according to the contract, the plaintiff would be entitled to recover the difference—$140. But if the jury, as they may have done under the charge of the judge, substituted their own estimate of the value of the gin for that agreed upon by the parties, and, adopting the views of some of the witnesses, had fixed the value at $50, then the plaintiff could only recover $40.

When parties make a contract in which there is no fraud—and there is none charged here—they must be held to the contract as they have made it, and cannot be allowed to ask a jury to make one for them. The defendant, knowing of the defect in the gin, agreed to give a certain price for it, relying upon the agreement of the plaintiff to have such defect repaired, and he must be held to his part of the contract as he made it, for

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he took *no steps to rescind the contract, even if, under the circumstances, he would have had the right to do so, until after this action was commenced; and if the plaintiff has failed to perform his part of the contract by having the defect repaired, then the

defendant would be entitled to a discount to the amount of the cost of such repairs.

The judgment of the Circuit Court is reversed and a new trial is ordered.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. 97

(Case No. 1017.)

ASHLEY v. HOLMAN.

(November Term, 1880.)

[1. *Insane Persons* ⇨42, 92.]

If the committee of a lunatic become chargeable for profit made to himself by the labor of such lunatic, and then die, the succeeding committee may bring action against the executors of the deceased committee for an account of such profits, without joining the lunatic as a party.

[Ed. Note.—Cited in Cathcart v. Sugenheimer, 18 S. C. 131; Barnwell v. Marion, 54 S. C. 232, 32 S. E. 313.

For other cases, see Insane Persons, Cent. Dig. §§ 66, 161; Dec. Dig. ⇨ 42, 92.]

[2. *Insane Persons* ⇨48.]

The care of the persons and property of lunatics has always been in this state a branch of equity jurisdiction, and not a duty imposed upon the Chancellor apart from his powers as a judge of the Court of Equity.

[Ed. Note.—Cited in Cathcart v. Sugenheimer, 18 S. C. 127.

For other cases, see Insane Persons, Cent. Dig. § 75; Dec. Dig. ⇨48.]

[3. *Insane Persons* ⇨42, 89.]

An order of the Court of Equity appointing a committee for a lunatic and authorizing the committee to retain the entire annual interest of the lunatic's estate for his support and maintenance, is no bar to an action to require the committee to account for profit subsequently made to himself by the labor of his ward.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 66, 152; Dec. Dig. ⇨42, 89.]

[4. *Insane Persons* ⇨74.]

Although one non compos mentis cannot assent to a contract, yet the law raises an obligation on the part of a person benefited by the services of a lunatic to pay for such services; and upon this obligation an action may be maintained in the courts.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 127; Dec. Dig. ⇨74.]

Before Pressley, J., Barnwell, June, 1880.

Action commenced April 13th, 1880, by Joseph Ashley as committee of William Ashley, the younger, a person of unsound mind, against William A. Holman and William A. Bailey, as executors of the will of William

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Ashley, the elder, deceased. *The complaint alleged that William Ashley, the younger, was adjudged a lunatic by the Court of Equity, in October, 1854, and that in February, 1855, his father, William Ashley, the elder, was, by an order of said court, appointed committee of the lunatic's estate, which, "having been reported as of the value of $2000," derived by inheritance from his grandfather's estate, "it was provided in said order of appointment, that the annual interest thereon, or one hundred and forty dollars, be allowed said committee yearly, for the support and maintenance of said ward;" that this estate passed into the committee's hands; and that in his returns for twenty years he charged himself with $140, received as interest, and credited himself with $140, paid for support and maintenance, but did not charge himself with any sum for the labor of his ward, which had been regularly rendered by the lunatic to his committee, and was of the full yearly value of $200; that the father died in 1879, and the defendants became the executors of his will; and that in April, 1879, the plaintiff was appointed the committee of the lunatic, and had received from the defendants the $2000, the original estate, but had received nothing on account of the profits realized by the testator from his son's labor and services. Judgment was demanded for the sum of $200 a year for twenty-four years, with interest on each year's wages, as upon the investment which should have been made thereof.

The defendants demurred, upon the ground "that the complaint does not state facts sufficient to constitute a cause of action."

This demurrer was sustained by the Circuit judge, who filed the following decree:

The action being for an account, in which title to property is not involved, the plaintiff, as committee, is a necessary party, interested in the cause of action set forth in the complaint, and entitled to sue thereon in behalf of his ward. The latter should properly have been joined as a plaintiff in the action, but any objection on that score could be taken only on the ground of defect of parties, specially assigned as cause of demurrer, and under the present issue could not be considered.

The action is not upon a contract alleged to have been made between the lunatic and

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defendant's testator, nor upon circum*stances relied on as the basis of an implied contract. It is an action for an account for the value of the services of the lunatic, for which it is claimed that defendant's testator is chargeable as for money received as committee for the benefit of the ward's estate. The question whether an express contract entered into with an adjudged lunatic would be binding on either party, and if not binding, whether a contract would be implied, by law, under circumstances where an express agreement would be void, is therefore not involved in the present issue. For if the lunatic could not contract for wages, his committee could certainly contract for him, and as the com-

mittee would undoubtedly be held to account for any wages received from one with whom he had contracted, he would be equally liable to account for the value of his ward's services if he employed him in his own business.

The complaint states that the lunatic's capacity to render services as domestic servant or laborer existed at the date of the order appointing the committee and awarding maintenance. It must be assumed, therefore, that the court was duly apprised of the fact.

It is further stated in the complaint that the allowance was to the committee for the maintenance and support of the ward, not simply that the allowance was for maintenance and support, or to be expended therefor. It must be understood, therefore, as a provision for a fixed compensation to the committee for his care and maintenance of the ward. If the provision had been only for the allowance of a stated sum for maintenance, or to be expended for the support of the ward, the committee would be held bound to account for his disbursements of the fund, and the account would properly include any additional sums of money received by, or chargeable to, the committee for earnings of the ward.

Regarding, then, the allowance as a fixed rate of compensation to the committee, and assuming that the court was informed of the ward's capacity to labor and make earnings, it is apprehended that the court could not have contemplated or intended, that while the entire income of the estate should be retained by the committee by way of compensation, he should nevertheless be held to account for and pay back to the estate the val-

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ue of *the ward's services—worth more, according to the allegations in the complaint, than the income allowed—the result of which would be to increase the estate. It is considered that the effect of the order, as set forth in the complaint, was to allow the defendant's testator, as committee, as well the services of his ward as the income of his estate, as compensation for maintenance and support of the ward, and in the absence of any charge of fraud in procuring the order, or of other allegations affecting its integrity, the plaintiff is concluded by said order from claiming an account for wages. And upon this ground the demurrer must be sustained.

From this decree the plaintiff appealed, alleging error in "his Honor's conclusion of law, that the order for maintenance, as set forth in the complaint, concludes the plaintiff from claiming an account for his ward's earnings, as presented in the complaint, and hence, that said complaint does not state facts sufficient to constitute a cause of action."

[For subsequent opinions, see 25 S. C. 394, 1 S. E. 13, 60 Am. Rep. 512; 44 S. C. 115, 21 S. E. 624.]

Mr. John J. Maher, for appellant.

Whether the order of February, 1855, concludes this plaintiff, must, under a demurrer, be determined wholly by the matters stated in the complaint. 6 S. C. 49. This is a fair test: If the answer had set up this order in the indentical language of the complaint as a bar to the action, would a demurrer by plaintiff be sustained? There is nothing in the order to show that the court knew that the lunatic had the intelligence and physical aptitude to discharge the duties of a servant, or intended to let the committee have his ward's services as well as income. His Honor assumes that the court knew this fact, and hence his conclusion.

The proceedings under which a committee is appointed (Rich. Eq. Cas. 404; Stock on Non Comp. Ment. 85, 119, 189; Macpherson on Inf. 107, 216; 1 How. 134; 6 Wheat. 117; 5 Rich. Eq. 531,) gives no information to the court, except as contained in the master's report; but the complaint does not intimate that any such fact was brought to the attention of the court. There can be no presumption that it was, when the record, which is not in evidence because of the demurrer,

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would determine the matter. *The court cannot assume facts on a demurrer, as an estoppel to a plaintiff's claim, as to which its own records, if produced in evidence, would speak definitively. Particularly so, as against a lunatic, and in favor of his committee, whose duty it was then, and at all times afterwards, to bring to the attention of the court his ward's capacity to earn wages. Had this order been asserted in the answer as a defense, the record itself, and not parol testimony, would have been the proof; and the record disclosing only such facts as are stated in the complaint, the defence would have failed. Can the court assume what parol evidence would be inadmissible to prove?

His Honor may have considered that it was the duty of the court to be fully informed concerning this matter, and hence presumed that the court was informed. If the court had made order in regard to these earnings, we must presume that it acted after due investigation; but presumptions can go no further. Judicial acts are susceptible of regular proof; as to them, the maxim omnia presumuntur rite acta has a limited application. Best on Presump., §§ 57, 68, 74; 1 Greenl. on Ev., § 19; 4 Rich. Eq. 152; Rice 232; 13 Rich. Eq. 210; 2 Hill's Eq. 72; 2 Phil. on Ev. (Cowen & Hill) note 298; 12 S. C. 144. The order was dealing only with maintenance and provided it from an income certain, and not from an uncertain source. If there is any presumption at all, it would be that the entire interest would not have been appropriated, without abatement, if the value of the ward's services had been considered.

The distinction drawn between allowance

for maintenance and allowance to the committee, is merely verbal, and the inference not well founded. Stock on Non Comp. Ment. 189, 193; Macpherson on Inf. 348; Adams' Eq. 293; Rich. Eq. Cas. 3. There was no special contract with the committee; he was entrusted with a trust fund, appropriated exclusively for the purpose stated.

Whatever was justly due by the committee to his ward was paid by operation of law. 2 Strob. Eq. 206; 6 S. C. 490; 7 S. C. 153. The lunatic was no party to the former proceedings, and, therefore, not bound by what might have been put in issue. Nor does the doctrine of estoppel by matter of record embrace any matter to be inferred by

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argument from the judgment. 1 *Smith's Lead. Cas. 424; 1 Greenl. on Ev., § 528; 1 Stark. on Ev. 201; 6 Wheat. 109.

Mr. Samuel W. Melton, contra.

The decree of maintenance made, it must be assumed upon careful inquiry and consideration, is conclusive, and the matter not having been brought in question during the committee's lifetime, is res judicata, and moreover has been fixed by contract between William Ashley, the elder, and the Chancellor, representing the lunatic, and year by year performed and settled. The infant is a ward in chancery; the lunatic is not. It is a personal trust in the Lord Chancellor, delegated to him under the sign-manual of the King. From his decree an appeal lies only to the King in council. The Chancellor acts not as a court, but as the trustee of his lord the King. 2 Story's Eq. Jur., § 1334; 3 Bl. Com. 427; 19 Ves. 121, 280. In cases of infancy, the nature of the estate may not be changed; not so in lunacy. 2 Bligh (N. S.) 129. Here the state is the King and the Chancellor the agent, and that his administration has taken the form of judicial procedure is accidental.

The purpose of this peculiar jurisdiction is primarily not the preservation of the estate, but the comfort and well-being of the lunatic. With reference to the management of his person and estate, the discretion of the Chancellor is without limit or discretion. The great object in view, generally, is the interest and comfort of the lunatic, and not the interests of his heirs. 1 Ves., Jr., 296, 462; 2 Meriv. 102; 2 Ves., Jr., 72; 6 Ves. 8; 18 Ves. 285, 393; 14 Ves. 182; 19 Ves. 124; 1 Ves., Jr., 463, note 6; 2 Sch. & Lef. 439; Adams' Eq. 297. Everything is included in the idea of maintenance—what he should have and what he should be permitted to do. It must be assumed that the whole duty incumbent upon the court was done; and that whatever was adjudged is right, and is conclusive. Story's Eq. Pl. 782; Herm. on Estop., § 37; 3 P. Wms. 104. But this action is for account. Here, there was no contract between committee and lunatic, and could have been none. The contract between the court and the committee was only for maintenance. The committee was only the agent of the court, charged with a spe-

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cial *and expressed duty. He is no more chargeable with an account for services rendered than would be the superintendent of the asylum who made his patient useful about the premises.

The demurrer is proper, for a committee cannot sue for a lunatic, and if he has no right to sue, then there is no cause of action to him. Bliss' Code Pl., § 414; 28 N. Y. 242; 34 N. Y. 480; 3 Hill 338; Rice 56; Code, § 134. The committee is not the trustee of an express trust. 1 Story's Eq. Jur., § 980; Lewin on Trusts 299, 591; Adams' Eq. 295; Bliss' Code Pl., § 54; 8 Rich. Eq. 286. Nor is he a person authorized by statute to sue.

The action at law must be based upon contract. Here contract is not alleged, nor could it be, since a lunatic cannot enter into contract, and where a contract could not be expressly made none can be implied. Pars. on Cont. 383, 386; 2 Kent 450; 15 Wall. 9; 2 Paige 422; 2 Bl. Com. 443; 3 Id. 159. This is not such an action as equity would entertain—it is purely legal. 2 Story's Eq. Jur. § 459.

Mr. Robert Aldrich, for respondents.

Mr. J. J. Maher, in reply.†

March 30th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. William Ashley, the elder, was appointed committee, after inquisition found, of his son, William Ashley, the younger, then about twenty-five years of age, on February 13th, 1855. It is stated in

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the complaint that this appointment *was made by an order of the Court of Equity; that the estate of the lunatic, as reported to the court at that time, was valued at $2000; that the order constituted the father committee both of the person and the estate of his son; and that it was provided in the order that the annual interest on the estate, or $140, should be allowed the father, as

† The following matter of practice was determined in this case: Mr. Maher argued only his grounds of appeal. Messrs. Melton and Aldrich, for the respondents, raised in their arguments, other points taken in the court below, to sustain the conclusions of the Circuit judge. Mr. Maher, in reply, read an argument in print, which he had not filed with the clerk of this court. Messrs. Melton and Aldrich claimed the right to submit a printed reply to the points in Mr. Maher's second argument, which had not been discussed in his opening argument; but

The CHIEF JUSTICE ruled that the second argument of Mr. Maher being in reply only to the points made by the respondents, was in order; and that if he so preferred he might print such reply-argument; and that nothing further could be submitted by respondents.—REPORTER.

committee, for the support and maintenance of his son.

William Ashley, the father, died on February 25th, 1879. The defendants, respondents, qualified as executors of his will, and the appellant was afterwards appointed committee of the son.

Upon settlement attempted between the respondents, as executors of the former committee and the appellant as present committee, appellant claimed an accounting for the services of the lunatic, alleged to have been rendered to the former committee. The claim was at the rate of $200 yearly, and was in addition to the capital fund of $2000.

This claim was resisted by respondents, and appellant received and receipted for the capital fund, but without prejudice to his claim for the alleged services and the interest thereon.

This action has been brought for these services, the prayer of the complaint being that an account be taken under the order of the court of the sums received, or which should have been received, by the former committee on account of the wages earned by the lunatic from February 13th, 1855, to February 22d, 1879, and of the interest accrued on each several sum received, or which should have been collected on account of each year's wages, as upon the investment made, or which should have been made thereof.

To this action the respondents demurred, "for the ground that the complaint does not state facts sufficient to constitute a cause of action." The Circuit Judge sustained the demurrer, holding that the appellant was concluded by the original order by which respondent's testator was appointed committee, this order, in his judgment, when properly construed, being intended to allow the committee not only the interest on the capital fund, $140, but, also, whatever services the lunatic could render, if any, as compensation for the support and maintenance of

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the lunatic, which *his relation to him required the committee to furnish or see that he received it.

The appellant excepted to this ruling, and the appeal brings up the single question: "Whether the order, as stated in the complaint, precluded the claim of appellant to an account for the earnings as therein preferred."

The case has been argued before this court with great research and zeal by counsel on both sides, and we are greatly indebted to counsel for the thorough discussion given to the case in all its aspects, and for the very full preparation of the points and authorities with which they have furnished the court, so as to aid the court in reaching a proper conclusion.

There being, however, but a single question raised by the appeal, it will not be necessary to follow the argument into all of the points presented.

It is not the purpose of this court to express any opinion as to the facts; whether the lunatic, in this case, was able or did render any service of value to his committee, or whether the work he did, if any, should be regarded as the necessary and healthful discipline to which he should have been subjected as contributing to his physical comfort and health. If he was able to do steady work, even as a hireling or common laborer, sufficiently so to earn $200 per annum, it seems strange that he should require a committee to take care not only of his estate but of his person. But these are questions of fact which are not involved in this demurrer, and we propose to leave them for future investigation.

If this action was an action in behalf of the lunatic for an unsettled demand on account of wages earned by his labor, then the lunatic himself should have been party plaintiff.

In Sims v. McLure, 8 Rich. Eq. 286 [70 Am. Dec. 196], Chancellor Wardlaw said: "The practice of instituting suits in the name of the committee only is sustained by high authority, but in this state it is certainly better to follow the general rule of pleading, to make all parties to the suit, who are materially interested in the object of it, and not to litigate and adjudge concerning the estate of any person, even a lunatic, who is not before the court."

But this is not an action strictly for the

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wages of the lunatic. * It is a case "in chancery," by a trustee, against the representatives of a former trustee (as it is alleged) seeking an accounting for the estate of the cestui que trust, which, it is alleged, the former trustee had in his hands, at his death, belonging to the cestui que trust. It proceeds upon the theory that the former trustee having received the benefit of the labor of his ward he thereby became debtor to himself, as trustee, for the value of this labor, and, being both debtor and creditor, under the principle of Schnell v. Schroder, Bail. Eq. 335; Griffin v. Bonham, 9 Rich. Eq. 71; Jacobs v. Woodside, 6 S. C. 498, he is presumed in law to have paid himself, and since such payments he has been holding the amounts so received as trustee, and, therefore, it is a proper subject of accounting between the present committee and his representatives.

This, in the opinion of the court, is a correct principle, and if the facts will sustain the allegations the action would not be obnoxious to objection on account of the manner in which it is brought. William Ashley, the elder, being the committee of the person as well as of the estate, he was authorized to make proper contracts in his behalf, and if the lunatic was capable of service, he, the

committee, could contract as an individual, with himself as the committee, in reference to this labor, as well as he could with other persons, either expressly or impliedly. In which case he would occupy the relation, as to such matter, both of debtor and creditor, and the cases referred to above would apply.

All this is based on the idea that the committee was a trustee, and that the custody and control of lunatics is a matter of equity jurisdiction, analogous to and subject to the same rules and principles as are applied to other fiduciary relations, such as guardian and ward, trustee and cestui que trust, &c. Much learning was displayed in the argument upon this branch of the case, and there is no doubt but that in England lunatics and idiots occupy a different position to the courts and in the law from all other cestui que trust. There is no doubt but that the Lord Chancellor, under the sign-manual of the King, was the special custodian of this unfortunate class of society there, and that committees were his agents and responsible to him. It was not a subject matter over which his court had jurisdiction, but it was

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a power *conferred upon the Lord Chancellor, as the representative of the crown, to be exercised as a special and personal duty. But whatever may have been or may now be the law in England on this subject, or whatever may have been its origin there, this principle has never prevailed practically in this country.

Lunatics and idiots, and the care of their persons and property, are now and have always been with us considered and acted upon as a branch of equity jurisdiction, and the Chancellor who made the original order in this case, in 1855, acted by virtue of this jurisdiction, and not by any special power conferred upon him as an individual, either from the state or any other power as a special duty. Any other Chancellor of the state could have passed the order as well as he.

But this is aside from the question presented in the appeal, i. e., the effect of the original order of appointment. Is that order a bar to this action, as urged by respondents and held by the Circuit judge? The pleadings did not disclose fully the facts upon which the order was passed. It does not appear from the pleadings whether or not the condition of the lunatic (further than simply that inquisition had been found) was made known to the Chancellor, and we have no other guide as to the intent of the order than its terms. There is nothing said in it on the subject of the services and labor of the lunatic, and there is certainly no express contract contained in it permitting the committee to have the benefit of such labor as a part of the compensation to be allowed him for his care and trouble.

It is manifest, from the character of the order, that the Chancellor had no conception that any services could be rendered by the lunatic. Assuredly not that his services could be worth $200 per annum, otherwise he would not have provided so especially for his support and maintenance out of the funds in hand. He expressly set apart the interest on this fund, $140, for support and maintenance. This would have been wholly unnecessary if the lunatic had been regarded able to support himself by his own labor. And we have no idea, on the other hand, that the committee ever dreamed for a moment during his life that his estate, after his death, would be called upon to respond to a claim like this. But, although this may be true, and, also,

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that the court *in passing the order and the committee in accepting the trust, both acted upon the supposition that the labor of the lunatic could be of no service to any one, and was not to be regarded or provided for, yet we do not think that the order, under the circumstances of the case, amounted to a judgment, final and conclusive, upon that question, in the sense that the question has already once been adjudicated, and that that adjudication must be held as a bar to this claim, whether meritorious or not.

It is said that the lunatic could not make a contract; that, being a lunatic, he was without the power of assent, which is an essential element of all contracts. A contract is an agreement between two or more parties, each being capable of assenting to its terms; and as one devoid of reason cannot assent, of course he cannot make an express contract. But there is a large class of legal obligations, arising out of acts where both parties are silent and no positive assent given on either side, denominated in the books as implied contracts, in which parties are sued and held liable in all of the courts. True, in these cases, this has been done in part on the theory that there was a contract between the parties implied by the law. This, however, is a fiction, as in most of such cases it is well understood that there never has been that mutuality of assent which the law lays down as an essential element of any contract. This idea of an implied contract was a fiction invented by the courts, as Mr. Pomeroy, section 512, says, "in order to bring such obligations under the old action of assumpsit."

We find many such fictions in the history of the old pleadings, (notably in the old action of ejectment,) arising out of and made necessary on account of the stringent rules and forms of practice under the former system.

And Mr. Pomeroy further says, section 540, since the adoption of the code: "That it has been settled by an overwhelming preponderance of authority that it is no longer necessary to aver a promise in actions upon what were known at common law as implied contracts. It is enough to state the ultimate facts from which the law raises the duty or obligation to pay. The courts everywhere,

where the code has been adopted, are beginning to deal more directly with the facts

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and substance, and dispensing *more and more with forms and shadows. And when the true ends and objects of courts are considered, this tendency towards settling controversies upon their real merits, is not to be regretted."

If, indeed, an unfortunate lunatic, bereft of his reason so far as to be unable to assent to a contract, is yet able, physically, to labor and does labor to the profit of another, can it be that he must be deprived of all compensation on the ground that he could not make a contract? and, on that account, there is no form of action suited to his case? This would be a burning reproach to any system of pleading, and a stigma upon any country where such a principle prevailed.

There is no reason why the law should not raise an obligation on the part of a recipient of a lunatic's labor to pay for it as fully as it does in cases where the parties are sane. In fact, inasmuch as sane parties can protect themselves and lunatics cannot, there is a greater reason why the law should be more watchful as to the rights of the latter than the former.

No doubt, in this case, that William Ashley, the elder, took the custody of his son without regard to his labor, and with no purpose to avail himself thereof. The unfortunate son, as it appears, was an incurable lunatic, and it was necessary that some one should take him and his estate in charge. No one was more suitable for this purpose than his father, and he was properly appointed. While it is almost an anomaly in nature to suppose that a confirmed lunatic could be able for any steady work, or be expected to perform it; and while it is not the duty of a committee to put such a ward out to labor, and while it can scarcely be believed that a father, appointed the committee of an afflicted son, with his reason gone, would make a regular domestic, menial servant of him, with the view to make profit and personal benefit out of his enforced services, yet if, in any case, where this relation exists, the facts will sustain an allegation that the committee has thus enjoyed the wages of the ward in the way of valuable services rendered, the doors of the court should not be shut upon the poor unfortunate; he and his friends should have the opportunity of a full and fair investigation of

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his claim, and *if the facts warrant such a result, to have it established and enforced.

The order sustaining the demurrer is reversed and the appeal sustained. Let the case be remanded.

McIVER and McGOWAN, A. J.'s, concurred.

15 S. C. 110

(Case No. 1018.)

HELLAMS v. ABERCROMBIE.

(November Term, 1880.)

[1. *Sunday* ⇐13.]

There is nothing in the common law or in the statutes of this state, which renders a mortgage, executed on Sunday, void on that account.

[Ed. Note.—Cited in Mitchell v. Bates, 57 S. C. 52, 35 S. E. 420.

For other cases, see Sunday, Cent. Dig. § 40; Dec. Dig. ⇐13.]

[2. *Pleading* ⇐177, 180.]

While a surety may, in equity, compel the principal debtor to pay the debt and so save him harmless (Norton v. Reid & Sitton, 11 S. C. 593,) yet he cannot recover of the principal until he has himself made payment; but where he holds a mortgage given him by the principal as an indemnity, he may have judgment of foreclosure before any payment by him upon the debt.

[Ed. Note.—Cited in Beasley v. Newell, 40 S. C. 22, 18 S. E. 224.

For other cases, see Pleading, Cent. Dig. §§ 354, 355, 358-384; Dec. Dig. ⇐177, 180.]

[3. *Principal and Surety* ⇐180.]

And in such case, the surety, being liable to the creditor for the payment in full of note and interest, is entitled to foreclose his mortgage for the whole amount of his liability, notwithstanding judgment had been previously obtained by the creditor against the principal debtor for a less sum.

[Ed. Note.—Cited in Noble v. Cothran, 18 S. C. 441, 442.

For other cases, see Principal and Surety, Cent. Dig. § 523; Dec. Dig. ⇐180.]

[4. *Sunday* ⇐11.]

[Cited in Mills v. Williams, 16 S. C. 593, 597 to the point that a contract made on Sunday is valid unless made by the defendant in the exercise of the business of his ordinary calling.]

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 32; Dec. Dig. ⇐11.]

[This case is also cited in Allen v. Cooley, 53 S. C. 444, 31 S. E. 634, without specific application, and in Eason v. Witcofskey, 29 S. C. 244, 7 S. E. 291, as to the legality of notice by publication in Sunday newspapers.]

Before Fraser, J., Pickens, March, 1879.

This action was commenced April 14th, 1875, by John Hellams, surety, against Elihu W. Abercrombie, principal debtor, to foreclose a mortgage given for indemnity, and upon the death intestate of the plaintiff was continued by his administrator, John R. Hellams.

The liability of plaintiff and defendant was on a sealed note to John Woods for $200, which note was executed November 8th, 1858. The mortgage given by Abercrombie to his surety, Hellams, as an indemnity, bore date September 12th, 1859. Woods obtained judgment against his principal debtor, the defendant here, March 25th, 1869, for $165.33,

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and no appeal was *taken. Hellams, the surety, was never sued. The judgment against Abercrombie has never been satisfied.

Upon an attempt by Woods to enforce it, defendant claimed his homestead, and pending this claim this action was commenced.

At the trial the defendant testified that the mortgage was executed on Sunday. It was in proof that the mortgaged premises were worth $800, and that the judgment of Woods was the oldest other lien upon the land.

The presiding judge decreed that the plaintiff was entitled to recover the full amount of the note on which his intestate was surety, and ordered a reference to ascertain the amount due. From this decree the defendant appealed.

Mr. A. Blythe, for appellant.

Mr. J. H. Whitner, contra.

The expression dies dominicus et non dies juridicus, relates only to matters of a judicial character; and, at common law, a mortgage executed on Sunday would have been valid. 2 Bay 232; 3 Burr. 1595; 3 Coke *354; 3 Bl. Com. 375; 4 Strob. 491; 2 Pars. on Cont. 757, note n; 5 Wait's Act. & Def. 114; 74 N. C. 187. Nor is it invalid under the only statute we have, as construed by the English courts. 2 Stat. 396; Gen. Stat. 390, § 1; 1 Taunt. 131; 3 B. & C. 232; 5 Id. 406; 7 Id. 596; 2 Man., Gr. & S. 72; 16 Ad. & E. (N. S.) 48; 1 Cromp., Mees & Ros. 422; 5 Wait's Act. & Def. 116. Giving a mortgage is not a part of a man's ordinary calling.

A surety is endangered, damnified and injured whenever the debt becomes due and the principal debtor fails to pay it; and then, i. e., upon the failure of the principal to pay at maturity, he is entitled to enforce his counter-security, (bond or mortgage of indemnity,) if he has one, or, if he has no such security, to proceed upon his naked equity, and require his principal to relieve him from his liability by paying the debt. 4 Des. 44; 4 Id. 227; 2 Bay 145; 2 Rich. 80; Rice's Eq. 275; 3 Strob. Eq. 65; 11 S. C. 593; 2 Brown's Ch. R. 582; Story's Eq., § 327.

The surety is not relieved from his liability on the note by the judgment recovered

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by the creditor against his principal. *The note, as to him, is not merged in the judgment against his principal; nor could he plead the recovery of said judgment in bar to an action against him on said note. 6 Rep. 46; 1 Bail. 348; 2 Bail. 362.

The creditor's recovery against the principal debtor does not measure or limit the principal's liability to the surety. 1 Hill 234; Cheves 16.

March 31st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This was an action brought by the respondent's intestate, in his lifetime, to foreclose a mortgage given by the appellant to the said intestate to indemnify and save him harmless from all loss or damage by reason of his suretyship on a note of said appellant to one John Woods.

The appellant, by his answer, admitted the execution of the note and mortgage, but insisted that inasmuch as the creditor, Woods, had sued him on said note and recovered judgment against him in said suit for the sum of $165.33, which his property was amply sufficient to pay, that the condition of his mortgage had never been broken, and the respondent's intestate, therefore, could not maintain this action; but even if he could maintain the action he was only entitled to a judgment of foreclosure for the amount recovered by the creditor, Woods, against him as principal debtor; that the said mortgage was executed on Sunday, and was, therefore, illegal and void.

His Honor, T. B. Fraser, who heard the case, adjudged and decreed that the respondent, as the personal representative of the surety, John Hellams, was entitled to have judgment of foreclosure for whatever amount might then be due upon the note to Woods, and ordered a reference to ascertain that amount. The defendant, Elihu W. Abercrombie, appealed from that decision.

Three questions are presented in the appeal in this case:

1. Is a mortgage executed on a Sunday illegal and void on that account?

2. Can a surety who holds a mortgage of indemnity on the principal, enforce it before he pays the debt for which he is surety?

3. If so, can the surety recover from the

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principal a greater *sum than the creditor has reduced to judgment against the principal?

Whatever may be our opinion as to the moral or religious aspects of the first question above, yet this case cannot be decided upon considerations of that character. The question is strictly a legal question and must be determined upon legal principles. As was said in the case of State v. Ricketts, 74 N. C. 187, "what religion and morality permit or forbid to be done on Sunday, is not within our province to decide. In different Christian countries and in different ages in the same country, very differing opinions have prevailed upon these questions." So that in all matters of this kind, when the judgment of a civil court is invoked in reference to a special act, the only question to be considered is, is the act obnoxious to any established principle of the common or statute law?

A contract may be briefly defined to be an agreement between two or more parties to do or not to do some act founded upon a sufficient legal consideration. The two principal elements are—first, the act to be done; and, second, the consideration. If these be both legal, then the contract is binding, unless there is something external to the contract itself which forbids enforcement.

The contract in this case is an ordinary

contract between principal and surety, by which the principal undertook to indemnify and save harmless the surety, as to the debt of the principal, in consideration of obtaining the credit and name of the surety in contracting the debt. The benefit of this credit of the surety the principal has enjoyed for near twenty years, and he now seeks to repudiate his contract, founded upon this as a consideration, on the ground that it was obtained originally on a Sunday. Even if the law allowed him to avoid his responsibility on the ground suggested, the same high morality which prompts him to invoke the law should also prompt him to save his friend harmless. But to return to the question. Is there anything external to this contract which renders it void? In other words, is a contract of this character illegal, either by the common or statute law, because made on a Sunday?

The argument of the respondent's attorney has gone very fully and learnedly into this

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question. The case of Swann v. Broome, *3 Burr. 1595, referred to by him, seems to be the leading case on the subject. In that case it was held by Lord Mansfield that at common law a Sunday was not dies juridicus; that at first, among the ancient Christians, all days were used alike for hearing causes in the courts, "not sparing, as it seemeth, the Sunday itself;" but afterwards certain canons, reaching back to the year 517, were made, taken notice of in Spellman's Original of the Terms, which forbid the use of Sunday for hearing causes or holding pleas. These canons were confirmed, says Lord Mansfield, by William the Conqueror and Henry II., and so became a part of the common law of England. This inhibition of the common law did not, however, extend to fairs, markets, sports and pastimes; these were left to be regulated by statutes.

How far the common law, as thus recognized and announced by Lord Mansfield, has been observed in this state is not material to this case, as the question here is not one involving the powers of the court on a Sunday, but one involving the validity of a contract made on a Sunday.

Parties who may be curious as to the powers of the court in this respect, will find the law in the cases of Shaw v. McCormick and Hiller v. English, the first in 2 Bay 232, and the second in 4 Strob. 488, in the last of which Judge Wardlaw delivered a very interesting and learned opinion, Judge O'Neall dissenting in a masterly argument from the opinion of the majority of the court, thus pronounced by Judge Wardlaw.

It is true that in the case of Shaw v. McCormick this expression is used: "That Sunday is not a day in law—dies dominicus non est dies juridicus—consequently, all temporal business transacted on that day is null and void."

Upon examination of the facts of that case it will be seen that the reporter was not warranted in supposing that the decision reached the conclusion announced in the above extract; on the contrary, this was an inference of his own, not sustained by the facts.

Under these cases, then, it appears there is nothing in the comomn law which renders this contract void. In 2 Pars. on Cont. 757, it is said: "But as to the making of con-

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tracts, and *all other acts not judicial, the common law made no distinction between Sunday and any other day."

Is the contract void by virtue of any statute of the state? The act of 1712 is the only act on the subject. That act forbids tradesmen, workmen, laborers, &c., from exercising any worldly labor, business, or work in their ordinary calling upon the Lord's day under a certain penalty.

The execution of the mortgage now under consideration does not fall within the penalty of this act, and therefore void. It was not an act done within the ordinary calling of the parties. It was a casual and exceptional act, and in no way violated the act of 1712.

The first section of 29 Charles II. was very similar in its terms to the act of 1712. This section was construed in the cases of Drury v. De Fontaine, 1 Taunt. 131, and in Bloxsome v. Williams, 3 B. & C. 232, not to embrace contracts made outside of the ordinary calling of the party. True, in one case decided since a different doctrine was held, the construction above being regarded as too narrow and contrary to the spirit of the act; but in the subsequent decisions, especially in the case of Rex v. Inhabitants of Whitnash, 7 B. & C. 596, the decision in the case of Bloxsome v. Williams, supra, was re-affirmed, and a contract of hiring between a farmer and a laborer for a year, made on a Sunday, was held valid. Such, in our opinion, is the proper construction of the act of 1712, incorporated in the General Statutes, page 390.

2. Can a surety sue the principal before he pays the debt of his principal?

It has been settled as a principle of equity that upon the falling due of the debt a surety is entitled to go into equity and compel payment by the principal, to his relief. Although the surety may not be sued, nor, as yet, has been disturbed, yet as long as the debt of his principal remains unpaid there is a cloud hanging over him, and this he is entitled, in equity, to have cleared away; which right Courts of Equity have always enforced—in the application of remedial justice—by proceedings in the nature of bills quia timet.

In the case of Norton v. Reid & Sitton,

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found at the end of 11 *S. C., this doctrine was fully recognized and applied, and it may be regarded as sufficiently settled in this state, without reference to other authority.

But this does not touch the question under discussion, i. e., as to the right of a surety to sue and recover from the principal the amount of the debt for which he is liable as such surety before he has actually paid the debt himself.

The two questions stand upon different foundations and are governed by different principles. In the one case the object is to enforce payment by the principal of a debt which he contracted to pay. In the other it is to require the principal to pay the surety before any liability attached, and before any cause of action has accrued to the surety. No action can be had until a cause of action has accrued, and the only cause that can ordinarily exist between a principal and his surety, growing out of the suretyship, is payment of the debt by the surety. Until this is done the surety has no basis upon which to stand in court and demand payment to himself. Until this is done his remedy is in equity, as in the case of Norton v. Reid & Sitton, supra.

In De Colyar on Principal and Surety, page 308, it is said: "The most important right which a surety possesses before any payment by him is, that after the debt has become due he may come into a Court of Equity and compel the debtor to exonerate him from his liability by at once paying the debt." "At law, the surety must pay the debt before he can have an action against his principal, but not so in equity. After the debt is due the surety may resort to chancery to compel the principal to exonerate him and pay the debt." Story's Eq. 322, § 327; 2 Id. 35, § 730; King v. Baldwin, 2 Johns. Ch. 554. "As a general rule, as soon as the surety has paid anything for the principal debtor the latter becomes chargeable to him." De Colyar 311.

Though as just stated, the surety must have first paid something for the principal, in order to make the latter chargeable to him, yet it appears "that by express contract the surety may, before payment, be entitled to recover damages." Id. 312. And while it is the general rule that a surety cannot proceed against his principal until he has paid the debt, either in money or by taking it up through the substitution of his own note, as established in many cases—Elwood v. Die-

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fendorf, 5 Bart. 398 *Brandt on Suretyship 235; Stinson v. Brennan, Chev. 16; Peters v. Barnhill, 1 Hill 234—yet it has been held, where the cause of action between them arises out of a bond of indemnity or other collateral security, involving an independent contract, that action may be instituted on that, on its breach, even before payment.

In this case the action is to foreclose a mortgage. The mortgage is not set out in the record; but it is stated to be a mortgage of indemnity and to save harmless.

In the case of Bellune v. Wallace, 2 Rich. 80, where a mortgage had been given of a slave by a principal to his surety to indemnify and save him harmless, it was adjudged by the court that a failure to meet the obligation by the principal was such a breach of the condition of the mortgage as authorized the surety to sue for the slave at once without payment of the debt. Also, in Brandt, Section 193, it is said: "A surety or guarantor who holds a mortgage on the property of the principal, may, after maturity of the debt and before paying it, have the mortgage foreclosed and the proceeds thereof applied to the payment of the debt."

Under this principle this action may be sustained and the judgment below affirmed, in so far as the right of action on the part of the plaintiff is involved before payment of the debt.

The next and last question is, as to the amount to be recovered. The judgment of the creditor against the principal is less than the notes sued on. Why this was so is not explained; but there was no appeal from this judgment, and it is the measure of the debt established against the principal. Can the surety foreclose his mortgage for more?

In the case of United States v. Allsbury, 4 Wall. 186 [18 L. Ed. 321], suit was commenced against the principal and one surety on a paymaster's official bond, and judgment for $10,000 recovered. Afterwards suit was brought against another surety on the bond, claiming a greater recovery. The court held, as the liability of the principal had been fixed at $10,000 by the first judgment, the surety in the last suit could not be held liable for more, otherwise the surety would be held for a greater liability than his principal.

And in the case of Lang v. Brevard, 3 Strob. Eq. 64, Chancellor Dargan said that "the prominent and well-defined distinction that pervades all the cases is that the surety

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will be *discharged by any acts on the part of the creditor of a positive character, whereby the remedy against the principal debtor is lost, so that payment cannot be enforced against him. The case now under consideration would seem at first to fall under the principle of these cases, and but for contra decisions in our own state, which we must regard as authority, I would be disposed to determine this question by that principle."

But in the case of Treasurer v. Bates, 2 Bail. 362, and in other cases in this state, it was decided that a judgment against a principal could not be pleaded in bar to a suit against the surety. And in Day v. Hill, 2 Speers 628 [42 Am. Dec. 390], in an action on a joint and several note, where one of the parties had been previously sued, and, by some mistake, judgment rendered for a less amount than was due, the balance was recovered from the other parties. Peters v. Barnhill and Stinson v. Brennan, supra, were cases where the sureties were held liable, though the creditor had failed to recover judgment

against the principals on suit brought against them, and the sureties were allowed to recover against the principals.

These cases were adjudicated in our own courts, and they are so nearly in point that we cannot but yield to their authority.

The judgment below is affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 118

(Case No. 1019.)

ANCRUM v. WEHMANN.

(November Term, 1880.)

[1. *Appeal and Error* ⇐216.]

Exceptions to the omission by the Circuit judge to charge legal propositions, which he was not, at the time, requested to charge, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⇐216; Trial, Cent. Dig. §§ 627, 628, 629, 630–641, 660, 662–676.]

[2. *Sales* ⇐179.]

A steam yacht having been sold at auction as in perfect running order, in action brought for the purchase money, it was error to charge that "if defendant accepted the boat, that was his own construction of what was meant by perfect running order, and he would be bound by that construction."

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 460; Dec. Dig. ⇐179.]

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*Before Pressley, J., Charleston, February, 1880.

Action commenced January 5th, 1880, by John L. Ancrum against F. Wehmann, for $620, with interest, for a steam yacht, which had been sold to plaintiff at public auction, December 16th, 1879, and purchased by defendant; and that plaintiff had tendered and was still ready to tender the possession and a sufficient bill of sale.. Defendant answered, alleging that the yacht was represented and warranted as in perfect running order, but that it was not in perfect running order, and that no such steam yacht had even been tendered to him.

Evidence was offered by plaintiff at the trial to show that defendant, after inspecting the boat, agreed to accept it. The defendant objected, but the presiding judge overruled the objection upon the ground that plaintiff might introduce such testimony for the purpose of showing that defendant had accepted the vessel, and thus given his own construction of what the contract was, and waived his objections to the vessel's not being in perfect running order.

Other facts are stated in the opinion.

Mr. Isaac Hayne, for appellant.

Mr. J. A. Simons, contra.

March 31st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This was an action brought to recover the purchase money of a steam yacht. The yacht was sold by plaintiff at public auction under this advertisement: "This day, December the 16th, at 11 o'clock, will be sold, at post office, a steam yacht, in perfect running order, measuring," &c., &c. The defendant was the purchaser at $620.

The charge of the judge was as follows:

"Gentlemen of the jury, if there was an acceptance of this boat by the defendant, then that was his construction of what the contract was. And, having put that construction upon it, he is bound by it; and, being bound by it, Dr. Ancrum had the right to notify him that the boat was there at the wharf

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at his risk, *and he would be entitled to recover the amount of the purchase money, with interest. You will, therefore, address your inquiry to that point first.

"If he actually accepted the boat, that acceptance would suffice to transfer the title, without the preliminaries in the custom-house, and the plaintiff would be entitled to recover the purchase money, with interest. Dr. Ancrum says that, after several disputes, it was agreed that the boat should be drawn up on the ways; that he explained to Mr. Wehmann that the equipments were put away for safe keeping, and that Mr. Wehmann told him that if he would draw up the boat and the hull was all right he would be satisfied; that she was drawn up, that the hull was examined, and that he (Dr. Ancrum) said there was another person who wanted to buy her, and that thereupon Mr. Wehmann said he was satisfied and would take her, and gave an order for the painting of the boat. Mr. Wehmann says he did not do so—that he never waived any of his objections to the boat being in perfect running order—but that he did say that if the boat was drawn up he would say what was necessary to be done to her, and he gave it as his opinion that she should be cleaned and painted; but Mr. Wehmann says he never waived his objections to the other matters and never accepted the boat; that is his statement; and that he never saw the equipment and never passed upon their sufficiency whatever.

"It is further contended by the defendant that the letters that are before you corroborate the statements of Mr. Wehmann; that those writings nowhere say 'you have accepted the boat;' that they tender the boat and acknowledge his refusal to accept. These are matters of testimony, and it is your duty to reconcile them. You are to consider the testimony of both sides and answer first the question: Did he accept the boat that morning? I simply charge you upon the law that if he did accept it, that was his own construction of what was meant by 'perfect running order,' and he would be bound by that construction. If he did not accept the boat that

morning, he is entitled to stand on the advertisement, which is his contract. If you come to the conclusion that he did not accept this boat as being in perfect running order, then you will see whether she was in perfect

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run*ning order, and you will be governed by the testimony on that point.

"Capt. Varden says she was in good running order; Capt. Foley says she was not in good running order. Capt. Kirkwood says that she was not in perfect running order; that the bell wire was missing; that the tiller wouldn't work; that the rail was broken, and that the bow was stove in, and that she wouldn't have been given a certificate by him as United States inspector as being a boat in perfect running order. Mr. Hewes says the same thing. It is a question of fact for you to decide. If she was in perfect running order, then the plaintiff is entitled to recover, whether he accepted her or not. If Mr. Wehmann did not accept the boat, then, if she was in perfect running order, the plaintiff is limited in his damages—he can only recover damages for breach of contract, and that is the difference between the bill of sale and what he can get for her now; that you must judge of by the testimony before you; if she was not in perfect running order, then your verdict must be for the defendant, unless he accepted her as in perfect running order."

The jury found for the plaintiff the full amount, with interest from date of sale.

The defendant appealed on the grounds attached:

"1. That testimony was admitted on behalf of plaintiff, after objection thereto by defendant, tending to show that defendant was estopped from denying that the vessel was in proper running order, according to the advertisement, by reason of his acceptance of her after the sale.

"2. That his Honor erred in charging that if the evidence showed that defendant accepted the vessel after the sale he was estopped from denying that she was in proper running order, according to the advertisement.

"3. That his Honor erred in not explaining to the jury what state of facts must have existed to constitute an acceptance by defendant, and estop him from showing that the vessel was not in proper running order, according to the advertisement.

"4. That his Honor erred in not charging that, upon the pleadings and evidence in this

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action, the jury should find for *the defendant if the evidence showed that the vessel was not in proper running order, according to the advertisement.

"5. That his Honor erred in not charging that the plaintiff was estopped by the allegations contained in the complaint from showing that defendant had accepted the vessel.

"6. That his Honor erred in not instructing the jury that the evidence did not show facts sufficient to constitute an acceptance and delivery of the vessel."

It has been decided in several cases in this state, that exceptions assigning error to the presiding judge on account of omission to charge legal propositions claimed by the appellant to be involved, without a request to do so, cannot be considered on appeal to this court. The foundation for these decisions needs no examination at this time. The cases involving this question seem to have been well considered and the judgment of the court deliberately pronounced, and they are binding and conclusive as to this point when invoked by the respondent. Madsden v. Phœnix Ins. Co., 1 S. C. 24; Abrahams v. Kelly & Barrett, 2 S. C. 238; Fox v. Railroad Co., 4 S. C. 544.

This disposes of exceptions of appellant from three to six, inclusive, as in each error of omission is alleged without any request to charge the propositions embraced.

Exceptions one and two present the same question in substance and effect. The judge charged the jury as a matter of law, "that if the defendant accepted the boat, that was his own construction of what was meant by 'perfect running order,' and he would be bound by that construction." The main point in the case, as appears from the pleadings, was whether the vessel sold by the plaintiff was in "perfect running order." The vessel was sold at public auction under an advertisement, stating that it was "in perfect running order." The defendant purchased with this advertisement as descriptive of the property and containing the warranty of its condition. After the sale he declined to comply, on the ground that the yacht did not come up to this description and warranty, and hence the writ. Whether the vessel was in perfect running order was the matter in issue between the parties, and, if found for the defendant, entitled him to decline to receive the property, or, if he had already tak-

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en *possession, to a reduction in the price, as the proof might require; but the main question was the one stated, and this was a question of fact for the jury.

The judge charged that if defendant accepted the vessel as in perfect running order, then he was bound, and the verdict should be for plaintiff for the full amount. This was changing the issue from that made by the parties themselves, i. e., unsoundness, so to speak, to a new issue, i. e., accepting the vessel by defendant. So that the jury, if they were guided by the judge, could not have felt called upon to examine into the question of "perfect running order" at all. The moment they found that defendant had accepted, under the instructions from the judge they had nothing to do but to find for the plaintiff the full amount, whether the vessel was as described and warranted or not. The defendant, relying upon the advertisement, might

have well taken possession the moment the vessel was knocked down to him; but it would be a very stringent law that would preclude him on that account from setting up defects warranted against, which he subsequently discovered, and which, perhaps, he could only discover by taking possession.

The charge of the judge in the main is correct; but we think that the portion excepted to was error. It may have misled the jury, and we think the judgment below should be reversed, especially as the judge, in his order refusing the motion for a new trial, says "that the testimony in the case satisfied him that the steamer sold to defendant was not in proper running order, according to the advertisement." If this be so, the defendant ought not to be required to pay the full amount. Another trial may effect substantial justice.

The judgment below is reversed and a new trial ordered.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. *124

*(Case No. 1020.)

CITY OF CHARLESTON v. BLOHME.

(November Term, 1880.)

[1. *Judicial Sales* ⇐50.]

While there is no warranty at a judicial sale, the rule of caveat emptor does not apply to the same extent as to sales under execution.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 90–94, 96; Dec. Dig. ⇐ 50.]

[2. *Mortgages* ⇐537.]

One desiring to purchase land at a foreclosure sale, examined the records and found a prior mortgage marked satisfied; she then became the purchaser, but afterwards learning that the entry of satisfaction was a forgery and that the prior mortgage was still open, refused to comply with her bid. Upon rule to show cause—*Held*, that she could not be compelled to comply, unless the validity of the title was established under proper proceedings instituted for that purpose.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1558; Dec. Dig. ⇐537.]

[3. *Vendor and Purchaser* ⇐112.]

[Cited in Davenport v. Latimer, 53 S. C. 573, 31 S. E. 630, to the point that a purchaser knowing at the time of sale that title to property is defective, or has means of knowing so, cannot refuse to comply with the terms of his contract.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 199, 200; Dec. Dig. ⇐112.]

[This case is also cited in City Council of Charleston v. Ryan, 22 S. C. 340, 53 Am. Rep. 713, as to facts.]

Before Pressley, J., Charleston, April, 1880.

This case, brought up on appeal under the title of City Council of Charleston v. Dorothea Blohme, was a rule upon Mrs. Blohme to show cause why she had not complied with her bid of $2500 for a lot of land in the city of Charleston, purchased in October, 1879, under a decree of foreclosure rendered in the case of City Council of Charleston v. Mary A. Ryan. She made return as stated in the opinion, the prior mortgage having been given to secure a bond for $3500, dated September 17th, 1866. The Circuit judge discharged the purchaser, as stated in the opinion, saying that it had been the practice in Charleston for forty years and doubtless longer, to allow purchasers at such sale a reasonable time to examine titles and to make objections; and the objections, if valid, were always allowed. Plaintiff appealed.

Mr. G. D. Bryan, for appellant, cited 9 S. C. 197; Jones on Mort., § 1646; 93 U. S. 424; Bank v. Vidal, Charleston, January, 1839, by Chancellor Harper—MSS. Decree Bk. 131.

Mr. J. Ancrum Simons, contra, cited, Rorer on Jud. Sales, §§ 1–68, 155, 190; 2 Jones on Mort., §§ 1608, 1645; 9 S. C. 287; 2 Daniell's Ch. Pl. & Pr. *1276; Thomas on Mort., 358; 8

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How. *548; 63 N. Y. 268; 7 Paige 550; 45 N. Y. 234; 6 Bush 553; 2 Sandf. Ch. 533; 2 McC. 167; 13 S. C. 212.

April 11th, 1881. The opinion of the court was delivered by

McIVER, A. J. Under proper proceedings to foreclose a mortgage, a certain house and lot in the city of Charleston was offered for sale by the master and bid off by the respondent. She declined to comply with the terms of sale, and a rule was issued requiring her to show cause why she should not be required to comply. In the return to the rule the respondent stated that after she had bid off the property she was informed that a prior mortgage on the property, upon the record of which there was an indorsement of satisfaction, had not, in fact been satisfied, and was still a lien upon the property; the allegation being that the entry of satisfaction on the record, though purporting to be signed by the mortgagee, was a forgery. This return was supported by an affidavit of the person whose signature to the endorsement of satisfaction was alleged to have been forged.

The Circuit judge discharged the rule and ordered that respondent "be discharged from her said purchase unless proceedings be instituted, with proper parties, to test the validity of the title."

From this decision the plaintiff appeals, upon the ground "that the rule of caveat emptor applies to judicial sales under foreclosure of mortgages."

While it is true that there is no warranty at a judicial sale, (Commissioner v. Thompson, 4 McC. 434; Mitchell v. Pinckney, 13 S. C. 203,) it is equally true that at such sales the rule of caveat emptor does not apply. (Tunno v. Fludd, 1 McC. 121; Commissioner

v. Smith, 9 Rich. 515; Bolivar v. Zeigler, 9 S. C. 287.) at least not to the extent which it does at sales under execution. At a sale under execution the sheriff only sells the interest of the defendant in execution, whether it be much or little, or whether it be anything at all, but at a judicial sale the court orders and the officer sells the property which is the subject matter of the suit; and the interest of all parties to the action, but none others, are concluded by such sale. Hence, under an action for the foreclosure

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of a mortgage of real estate, which is *covered by prior or by subsequent mortgages, the holders of which are not made parties, the property which is the subject matter of the suit—the thing sold—is, in the one case, the equity of redemption, and in the other is the mortgaged property, subject to the right of the subsequent encumbrancers to redeem. If, therefore, these encumbrancers are not made parties, the purchaser at such sale takes the property subject to the lien of the prior mortgage, or subject to the right of the junior mortgagees to redeem, provided he has notice, either actual or constructive, of such encumbrances.

Still, while there is no warranty at a judicial sale, yet if, when the purchaser is sued for the purchase money he can show that at the sale there were misrepresentations as to the thing sold, whether willful or not, he may set up such misrepresentations as a defense to the action. State v. Gaillard, 2 Bay 11 [1 Am. Dec. 628]; Means v. Brickell, 2 Hill 657; Adams v. Kibler, 7 S. C. 58; Mitchell v. Pinckney, 13 S. C. 203.

The real question, however, in this case is, not whether the purchaser at a judicial sale can set up defects in the title, or encumbrances upon the thing sold, as a defence to an action for the purchase money, but whether one who has bid off property at such a sale will be compelled by the court to complete the contract of sale and accept a title to property encumbered by a prior mortgage, when the records showed at the time of the sale that such encumbrance had been removed.

Even in Rorer on Judicial Sales, where the rule of caveat emptor is applied to such sales much more vigorously than in this state, it is said in Section 150 that a purchaser at a judicial sale cannot be compelled to complete the sale if the title be defective, and the defect be discovered before the sale is consummated, "and, therefore, if a rule be made against him with a view to enforcing compliance with his bid, he may, on appearance thereto, have an order of reference to inquire into and report the state of the title to the property, and if the title prove to be doubtful and incurably defective, he will not be coerced into completion of the purchase." So, in 2 Jones on Mort., § 1645, it is said: "If there be a defect in the title, unknown to the purchaser at the time of the sale, the court will not ordinarily compel him to

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*take a deed and complete the purchase." Again, in Section 1648, this author says: "While the purchaser under a judicial sale submits himself to the jurisdiction of the court and may be compelled to carry out his contract, he is also entitled to the protection of the court in respect to the avoidance of the purchase, if, by reason of imperfection in the title or otherwise, he is freed from his agreement. He may apply for a reference to inquire into the title. * * * If the report be against the title, the purchaser may move to be discharged and for a return of his deposit and for costs." And again, in Section 1651: "Judicial sales must be conducted with the utmost fairness and * * * it will be set aside where the purchaser thought he was buying an absolute title to the land and not one subject to the first mortgage." If, however, the purchaser, at the time of the sale, knows of the defects in the title, or has the means of knowing of them, and fails to avail himself of such means, he cannot, afterwards, refuse to comply upon the ground of such defects. 2 Jones on Mort., § 1646.

Applying these principles to the case under consideration, we think it clear that the Circuit judge was not in error in discharging the rule. The purchaser had a right to suppose from an examination of the records, and the respondent says under oath that she did suppose that the property was free from any encumbrance, and if, afterwards, it was made to appear that a prior mortgage, which appeared upon the records to be satisfied, was not, in fact, satisfied, it is manifest that the purchaser was misled by a resort to the very source of information to which the law invited her to look, and made her bid under a misapprehension induced by the misrepresentations spread upon the record. In such a case there is no ground upon which the powers of a Court of Equity could be invoked to compel her to complete the purchase, but, on the contrary, it would be altogether inequitable to require her to do so.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. *128

*(Case No. 1021.)

ADICKES v. LOWRY.

(November Term, 1880.)

[1. *Execution* ⇐53; *Judgment* ⇐787.]

Land in possession of a vendee under a valid contract to purchase, cannot be sold as the property of the vendor under judgments

which did not obtain liens until after the contract was made.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 129; Dec. Dig. ⟸53; Judgment, Cent. Dig. § 1361; Dec. Dig. ⟸787.]

[2. *Assignments for Benefit of Creditors* ⟸50.]

Quere: If a debtor puts his land beyond the reach of his creditors by a contract which binds the vendee to apply the proceeds to the debts of the vendor, can the vendor rescind this contract without the consent of his creditors?

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 180, 488–490; Dec. Dig. ⟸50.]

[3. *Execution* ⟸280.]

L., in possession of land under bond for titles given by B., became the purchaser of B.'s interest in this land at sale under execution, and paid in part his bid, but failing to pay balance, the land was re-sold by the sheriff as the property of B., and purchased by A. In action by A. against L. for recovery of this land—*Held*, that L. was not estopped from claiming his rights under his contract with B.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 809; Dec. Dig. ⟸280.]

[4. *Vendor and Purchaser* ⟸232.]

Possession of land for four years and forbidding a sale, are sufficient to charge a purchaser with notice of claim to the land, and, no inquiry being made, of the nature of the claim.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540–545, 548–562; Dec. Dig. ⟸232.]

[5. *Judgment* ⟸252.]

Under a complaint which demands recovery of real property purchased at sheriff's sale, no judgment can be given for the unpaid balance of purchase money due at the date of the levy to the execution debtor under a contract by the defendant to purchase—the pleadings raising no issue as to the time when the purchase money was paid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. ⟸252.]

[6. *Judgment* ⟸779.]

The judgments could acquire no lien upon the land which was in possession of the vendee under his contract to purchase, nor could the unpaid balance of the purchase money be reached, as, before notice of any claim thereto, it had been paid out by the vendee under his contract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1340, 1342; Dec. Dig. ⟸779.]

[7. *Assignments for Benefit of Creditors* ⟸7.]

The vendee being bound to apply the purchase money to the individual debts of the vendor, the contract operated as an equitable assignment in favor of the vendor's separate creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 6; Dec. Dig. ⟸7.]

[8. *Assignments for Benefit of Creditors* ⟸314.]

Quere: Would not separate creditors be entitled, in equity, to the separate assets of the debtor, and be preferred to creditors of a partnership of which the debtor was a member?

[Ed. Note.—Cited in Hutzler Bros. v. Phillips, 26 S. C. 149, 1 S. E. 502, 4 Am. St. Rep. 687; Blair v. Black, 31 S. C. 358, 9 S. E. 1033, 17 Am. St. Rep. 30.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 921–925; Dec. Dig. ⟸314.]

Before Wallace, J., York, November, 1879.

Action for recovery of land commenced June 17th, 1876, by H. F. Adickes, William McGill and Thomas McGill, against John T. Lowry and Fenton Diggs. The case may be

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found *reported in 12 S. C. 97. At the second trial the defendant was allowed to amend his answer, so that it might set up the defence of possession since January, 1872, under a contract then made for the purchase of the land in dispute here.

To the case, as stated in the opinion, it is not necessary to add anything, except as follows: The receipts of Sheriff Glenn to J. T. Lowry, in December, 1873, were expressed to be "in part payment of J. R. Bratton's interest in a tract of land sold by me." William McGill testified that "Lowry told witness that he had paid, or would pay, $400, and come back in two weeks and he should have the last dollar of it." This witness was a plaintiff in one of the judgments against Allison & Bratton, and is also plaintiff here. Lowry testified that he might have said to McGill that he would get his money, as Allison had promised to pay $1000 on the judgments in the sheriff's office.

After the testimony was closed, the following special issues of fact were submitted to the jury, whose findings are given at the end of each question:

1. Was there a contract of purchase and sale of the land in dispute between J. R. Bratton and J. T. Lowry? Answer. Yes.

2. If there was a contract of purchase and sale, was there an agreement to rescind? Answer. Yes.

3. What amount of money was paid by J. T. Lowry for J. R. Bratton up to the sale of the land by the sheriff in 1873? Answer. $369. And what was the whole amount paid? Answer. $769.

4. What was the amount of the value of the yearly rent of the land? Answer. $40 per annum.

5. Was notice of claim to the land given by Lowry at the first sale in 1873? Answer. No.

The points raised by the exceptions, so far as they were considered by the court, are sufficiently stated in the opinion.

Messrs. C. E. Spencer and J. S. R. Thomson, for appellants.

Messrs. J. F. Hart and G. J. Patterson, contra.

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*April 11th, 1881. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover possession of a tract of land, the title to which was claimed by both parties, through one J. R. Bratton, who was conceded to have been, at one time, the legal owner. The plaintiffs claimed as purchasers at sheriff's

sale under executions against Bratton, and the defendant, Lowry, under a contract to purchase from Bratton, under which he went into possession and paid a part of the purchase money, prior to the time when the executions through which the plaintiffs' claim were levied on the land in question, the balance of the purchase money having been paid and a deed executed to Lowry after those executions had been levied, but before the sale by the sheriff. These executions were issued to enforce judgments obtained after the adoption of the code and prior to the amendment giving judgments a lien on real estate before levy.

A brief statement of the facts of this case will be necessary to a proper understanding of the questions arising under this appeal, referring to the "case" as prepared for argument here, for a full statement of the facts.

On October 15th, 1871, Bratton, being about to leave the state, requested Lowry to collect such claims as were due to him, pay his debts, amounting to some $1500, and, in the event of his not collecting enough to pay his debts, to sell the land in controversy. He afterwards, in the month of November or December of that year, wrote to Lowry proposing that he should take the land and pay the debts. This offer was accepted by Lowry, and, accordingly, on January 1st, 1872, he went into possession and has ever since remained in possession, making considerable improvements on the land. In June, 1872, Lowry, having paid a part, but not all of the debts, Bratton gave him a bond to make titles when all the debts should be paid. Subsequently, to wit, on April 30th, 1875, Bratton, having been furnished with satisfactory evidence that the debts above referred to had been taken up by Lowry, executed to him a deed for the land. It seems that Bratton, in addition to these debts, which were his individual debts, was also liable as one of the firm of Allison & Bratton for the debts of that firm, but as he had seen a statement, made out and certified by Allison, showing

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that the *partnership assets were more than sufficient to pay the partnership debts, he made no provision for them, and the arrangement with Lowry was made solely for the purpose of providing for his individual liabilities. Bratton also gave to Lowry on January 1st, 1872, a general power of attorney, which, among other things, provided that he should settle all claims against him in his individual capacity, but, doubtless for the reason above indicated, made no provision for his partnership liabilities. It turned out, however, that the partnership assets proved insufficient for the payment of the partnership debts, and various judgments were recovered against Allison & Bratton, among which are the judgments through which the plaintiffs claim, which were levied on the land in dispute in September and November, 1873. Under these levies the land was offered for sale in December, 1873, and bid off by Lowry at the sum of $1405. He, however, only paid $400 on his bid, and the land was resold by the sheriff in July, 1875, and bid off by the plaintiffs for $1000, who, having complied with the terms of sale, received a deed from the sheriff. It also appeared that at the time when the land was first offered for sale by the sheriff, Lowry had written to Bratton, asking him to release him from his agreement to purchase the land, on account of the proceedings against it by the sheriff. After the sale he got a letter from Bratton, saying: "If you will not carry out the contract, don't let the land be sacrificed." But there was no other evidence tending to show a rescission of the contract.

All the issues in the action were, by consent, referred to the judge for trial, who, being informed that there would be conflict in the testimony, empaneled a jury to aid him in his findings of fact, as in cases of chancery. Various issues of fact were submitted to the jury and their findings are set out in the "case." The Circuit judge held that there was a valid contract of purchase and possession under it by Lowry prior to the time when the executions through which the plaintiffs claim were levied; that this contract had never been rescinded, and that Lowry had thereby acquired such an interest in the land in question prior to any liens that could have attached to it as prevented it from being taken under executions against Bratton. He, therefore, dismissed the complaint. To

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this judgment various exceptions *were taken which we do not propose to consider in detail, inasmuch as we think that the real issue in this case lies within a very narrow compass.

It is too clear for argument under the authority of Massey v. McIlwain, 2 Hill's Eq. 421, which was recognized and affirmed when this case was heard in this court before, (Adickes v. Lowry, 12 S. C. 97,) that if Lowry was in possession of the land under a valid contract to purchase before the judgments through which the plaintiffs' claim became a lien, the plaintiffs cannot recover the land unless this contract had been rescinded prior to the time when the sale under which the plaintiffs' claim was made, or unless there is something in the case to estop Lowry from setting up his equity.

The Circuit judge has determined, and we fully concur with him, that there was no rescission of the contract. The most that can be said is, that there were negotiations looking to that end, but the possession was not surrendered by Lowry, nor was that part of the purchase money which had been paid, refunded. But even were the evidence of rescission stronger, it would be a very grave question whether the parties could rescind the contract without the consent of the creditors of Bratton, for whose benefit it was manifestly made. If Bratton, by this con-

tract, had put this land beyond the reach of his creditors, with the declared purpose of applying the proceeds of the sale to the payment of his debts, and had contracted with the vendee so to apply the purchase money, it might admit of serious question whether he could, afterwards, without the consent of such creditors, annul the contract which was really made for their benefit.

We will next inquire whether there is anything in the case by which Lowry is estopped from setting up the defence relied upon by him. The fact that Lowry bid off the land at the first sale by the sheriff cannot operate as such estoppel, for the plaintiffs, so far from being injured, were rather benefited by this act of Lowry's, inasmuch as the amount paid by him on his bid was applied to the reduction of the liens upon the property, to which they looked for the payment of their debts. It seems to us, therefore, that aside from the fact testified to by Lowry, that he bid off the land at the sale in 1873 under a

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mistaken idea that *he could not hold it under the bond for title, his bidding off the land at that sale cannot have the effect of estopping him from setting up his rights under the bond for title after he was better informed. So, too, as to the receipts taken from the sheriff on account of his bid, stating that the money paid was for Bratton's interest in the land. The sheriff can only sell the interest of the defendant in execution, and if the defendant has no interest then the purchaser takes nothing. It does not, by any means, follow that, because a person bids off at sheriff's sale property to which he has a claim, he thereby waives or abandons his previous claim. He may do this for the purpose of quieting his title and avoiding litigation, and in pursuit of this purpose he may, as in Davis v. Hunt, 2 Bail. 412, buy his own land and be compelled to pay for it.

Nor do we think that what occurred between Lowry and McGill, after the first sale, can operate as an estoppel; for it is susceptible of the explanation given by Lowry, and while it is true that there is conflict of testimony as to this matter, we certainly cannot base a judgment of reversal upon a fact about which there was a conflict of testimony. But in addition to this, McGill, though examined as a witness, does not pretend to say that he was induced by what had passed between himself and Lowry in 1873, to buy the land at the sale in 1875.

Neither can it be said that Lowry is estopped by his failure to give notice of his claim at the last sale, for the Circuit judge has found, as matter of fact, that "Lowry gave public notice of his purchase and claim," and while the evidence is somewhat conflicting as to what exactly occurred at the sale, we think we are bound to adopt the conclusion reached by the Circuit judge, as there certainly is evidence to sustain it. But in addition to this, Lowry's possession for more than four years was sufficient notice. Besides, Lowry forbid the sale, and this, as was held in Reeves v. Sims, 10 S. C. 308, was sufficient notice. Even if the fact be, as testified to by the sheriff, that Lowry claimed the land under his deed, and said nothing about the bond for titles, that does not negative notice to the purchaser that Lowry claimed the land. If it had appeared that the plaintiffs, upon receiving notice of this claim, which they were bound to inquire

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into, had *made inquiry, and Lowry had concealed from them the facts that he made a contract to purchase the land more than four years before, under which he had, ever since, retained possession, had received a bond for titles, and, having paid all of the purchase money, had obtained the deed which the sheriff says he exhibited to him, then the case would have presented a very different aspect. But there is not the slightest evidence that the purchasers made any inquiry at all, and they must take the consequences of their failure so to do; for, in the absence of any evidence to the contrary, we are bound to assume that, if they had prosecuted such inquiry, they would have learned all these facts and saved themselves from buying property to which they could get no valid title. It is very clear, therefore, that the plaintiffs are not entitled to recover the land sued for.

It is contended, however, that if the plaintiffs cannot recover the land, they have an equity to subject, to the payment of their judgments, so much of the purchase money as remained unpaid at the time their executions were levied on the land, whereby, as they claim, they acquired a lien on the land.

The first difficulty which the plaintiffs must encounter in endeavoring to maintain this position is, that unless their pleadings are framed in such a way as to enable them to demand this kind of relief, they cannot obtain it. The complaint is not set out in the "case," but, from what is said of the nature of it, we infer that it is in the ordinary form of a complaint to recover possession of real estate, and that it does not state such facts as would be necessary to entitle the plaintiffs to a judgment that the unpaid portion of the purchase money should be subjected to the payment of their debts. For while it is true that a plaintiff is not confined to the particular relief demanded in his complaint, yet he can only obtain such relief as is appropriate to the case made by his pleadings and sustained by his proofs; and if, as we understand the fact to be, the complaint in this case contains only the usual allegations of a complaint to recover possession of real estate, it does not state such facts as would entitle the plaintiff to a judgment subjecting the unpaid purchase money to the payment of their claims. Nor do we see how the defence set up by the answer

can, in this respect, supplement the allega-

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tions of *the complaint; for the answer, as amended, sets up title in defendant under a deed dated prior to the sale under which plaintiffs claim, though subsequent to the levy of the executions under which such sale was made, which deed was, however, made in pursuance of a contract of sale and possession thereunder, prior in date to the levy of the executions. Whether the purchase money had been fully paid prior to the levy of the executions, does not appear from the pleadings, and no issue as to that fact is presented, either in the complaint or answer, or in both combined, and this, unquestionably, is an issue, the determination of which would be essential to this claim on the part of the plaintiffs.

But even if this difficulty were out of the way, it seems to us that the plaintiffs would encounter several obstacles to the successful maintenance of their position. The first obstacle is, that if there was a valid contract of sale by Bratton to Lowry, under which the latter went into possession and paid a part of the purchase money, the plaintiffs could not acquire a lien upon the land as against Lowry. All that they could do would be to assert their equity to subject the unpaid purchase money in the hands of Lowry to the satisfaction of their debts, or reach the unpaid purchase money in the hands of Lowry by proceedings supplementary to the execution, under the provisions of the code. But if Lowry, before notice of such claim, had paid over the purchase money to Bratton, or applied it according to his order to the payment of his debts, even this remedy of the plaintiffs would be lost. In this case there certainly was no evidence of any notice to Lowry of any such claim before he had paid over the purchase money, for the plaintiffs were making a totally different claim against Lowry—a claim for the land—and no claim of this kind seems ever to have been asserted by the plaintiffs until the case reached this court.

Another obstacle would be that, under the contract between Bratton and Lowry, the latter was bound to apply the purchase money to the payment of Bratton's individual debts, and that this operated as an equitable assignment in favor of that class of Bratton's creditors, and placed the purchase money beyond the reach of other creditors, is,

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we think, fully shown by the cases *cited by the counsel for the respondent. Prime v. Yates, 2 Tr. Const. R. 770; Dargan v. Richardson, Cheves 197; Shubar v. Winding, Cheves 218; Tennant v. Stoney, 1 Rich. Eq. 222 [44 Am. Dec. 213]; Walker v. Arthur, 9 Rich. Eq. 397.

But even if this were not so there would still remain the very important and interesting question, whether the separate creditors of Bratton would not have, in equity, a preference over the partnership creditors to the separate assets of Bratton. From what is said in the case of Kuhne v. Law, 14 Rich. 26, this question seems yet open in this state, notwithstanding the decisions in Wardlaw v. Gray, Dud. Eq. 112; Fleming v. Billings, 9 Rich. Eq. 149; Gadsden v. Carson, 9 Rich. Eq. 257 [70 Am. Dec. 207]; Wilson v. McConnell, 9 Rich. Eq. 510; which, however, seem to have ignored the previous cases of Woddrop v. Ward, 3 Desaus. 203; Sniffer v. Sass, reported in a note to 14 Rich. 20.

But inasmuch as this question was not raised in the court below and has not been argued here, we do not propose to enter upon a consideration of it now, as it is not necessary to the decision of this case that it should now be determined.

The judgment of the Circuit Court is affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. 136

(Case No. 1022.)

SMITH v. GRANT.

(November Term, 1880.)

[1. *Appeal and Error* ⇐1008.]

Where a jury case is submitted by consent to the Circuit judge to be decided by him, his judgment, dismissing the complaint, is, in effect, a verdict for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⇐1008.]

[2. *Appeal and Error* ⇐1176.]

If, in such case, this court finds error of law in the decision of the Circuit judge, it will declare the error and remand the case for correction, but cannot order an original judgment for the plaintiff.

[Ed. Note.—Cited in Kennedy v. Adickes, 37 S. C. 178, 15 S. E. 922.

For other cases, see Appeal and Error, Cent. Dig. §§ 4588–4596; Dec. Dig. ⇐1176.]

[3. *Wills* ⇐836.]

A devisee is the legal owner of the lands devised, and has as full power of alienation as had the testator himself, subject only to the rights given to creditors by the statutes 3 and 4 W. & M., c. 14, and 5 Geo. II., c. 7. These statutes and the cases thereunder considered.

[Ed. Note.—Cited in Small v. Small, 16 S. C. 71; Earle v. Harrison, 18 S. C. 337; Galloway v. Galloway, 76 S. C. 526, 57 S. E. 528.

For other cases, see Wills, Cent. Dig. §§ 2139, 2140, 2150–2155; Dec. Dig. ⇐836.]

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[4. *Bankruptcy* ⇐196.]

*After judgment obtained by A against executors upon a debt of their testator, a devisee of land under the will, who was also one of the executors, filed his petition in bankruptcy and included in his schedules this land, and also as debts for which he was liable, the judgment of A and a debt due by his testator to B. By order of the Bankrupt Court but without notice to B this land was sold and the proceeds

applied to A's judgment. *Held*, that the bankruptcy proceedings were a bona fide alienation, and the sale thereunder transferred a good title, notwithstanding B had recovered judgment against the executors before such sale was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 308; Dec. Dig. ⟸196.]

[5. *Wills* ⟸836.]

The alienation must be bona fide and before action brought against the devisee to charge the lands devised, but knowledge by the devisee of a debt of his testator does not invalidate the conveyance.

[Ed. Note.—Cited in Warren v. Raymond, 17 S. C. 197.

For other cases, see Wills, Cent. Dig. §§ 2139, 2140, 2150–2155; Dec. Dig. ⟸836.]

[6. *Deeds* ⟸17.]

Payment of debts for which the devisee, as such, is liable, is a sufficient consideration to support an alienation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 26–37; Dec. Dig. ⟸17.]

[7. *Descent and Distribution* ⟸126.]

[Cited in Fogle v. St. Michael Church, 48 S. C. 94, 26 S. E. 99, to the point that at common law the heir was not liable for the debts of the ancestor, except by bonds and specialties, wherein there was a stipulation binding the heirs, and then only to the extent of the lands descended, but the devisee was not liable even to the extent of lands devised.]

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 466–469; Dec. Dig. ⟸126.]

[8. *Trial* ⟸162.]

[Cited in Summer v. Kelly, 38 S. C. 512, 17 S. E. 364; Gandy v. Orient Ins. Co., 52 S. C. 226, 29 S. E. 655, to the point that there is no particular time in the trial of a case when a motion for nonsuit *must* be made.]

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 370; Dec. Dig. ⟸162.]

[This case is also cited in Stackhouse v. Wheeler, 17 S. C. 91, and distinguished therefrom, and in Hendrix v. Seaborn, 25 S. C. 485, 60 Am. Rep. 520, as to definition of "alienation."]

Before Fraser, J., Georgetown, March, 1880.

This action was commenced March 8th, 1879, by E. B. Smith against James E. Grant, for the possession of a tract of land known as Richmond Hill, and for damages. The answer was a general denial. By consent a trial by jury was waived and all issues of fact and law were to be tried by the court, "whose decision shall be given in writing, and have the full force and effect of a verdict by a jury."

The following is the judgment of the Circuit Court:

This case was heard by me at the term of the Court of Common Pleas for Georgetown county, held in March, 1880. It is an action for the recovery of real estate, and, by consent of counsel in writing, was heard by the court without a jury. The facts are these: The action was brought for the recovery of a tract of land, described in the complaint as situated in Georgetown county, "on Waccamaw river, known as Richmond Hill Plantation," containing two hundred acres of rice land, more or less, and six hundred acres of upland, more or less, bounded, &c. Both parties claim through John D. Magill, the elder, who died in the latter part of 1863, leaving a will, in which John D. Magill, the younger, and William J. Magill, were appointed executors, and by which will the said plantation was devised to John D. Magill.

The testator owned, at his death, other

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real estate and some *personalty. There were two specialty creditors of the testator—the Bank of Charleston and Charles Betts—whose claims were sued to judgment against the executors. The Bank of Charleston recovered judgment on April 3d, 1868, for $7009.50, and costs. Charles Betts recovered judgment June 29th, 1869, for $1120, and costs. Execution was issued on the first of these judgments at its date; on the other, June 30th, 1869. There were also two creditors of the testator by simple contract, but their claims were not put into judgment. At this point the Bank of Charleston and Charles Betts pursued different remedies for the collection of their claims. The plaintiff claims under the latter, the defendant under the former. On September 16th, 1868, John D. Magill, the devisee of the Richmond Hill plantation, and one of the executors of testator's will, was, on his own petition, adjudicated a bankrupt. About this time William J. Magill, the other executor, was also, on his own petition, adjudicated a bankrupt. Robert E. Fraser was appointed assignee of both estates. In the schedule of John D. Magill is included the Richmond Hill plantation, with the remark, "inherited from my father, the late John D. Magill." In the schedule of debts of John D. Magill is included the two specialty debts of the testator, and three debts due by the bankrupt; one of which is a bond for $5000, due to Susan and Caroline Shields, secured by a mortgage of Richmond Hill plantation, executed by the bankrupt. In reference to the debt due by the testator to the Bank of Charleston, it is stated in the schedule that the same is in judgment against the executors; and in reference to the other debts of the testator, it is stated that the bankrupt is presumed to be liable as one of the executors of the estate. After these proceedings in bankruptcy were commenced, a petition was filed in the Bankrupt Court by the Bank of Charleston for the use of E. M. Beach, assignee, in the matter of the bankrupt estate of John D. Magill and William J. Magill, asking the court to set up the judgment above referred to obtained against the executors as a lien on Richmond Hill plantation and other property of the testator.

After reference the register in bankruptcy made a report, that the said judgment was "a valid and subsisting lien" on all the property of testator, and that it had priority over

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all others. On *this report an order of sale was made on June 18th, 1869, for the sale of all the property included in the schedules, and known as a part of testator's estate, and for the payment of this judgment of the Bank of Charleston. Two orders were subsequently obtained in the Bankrupt Court, one by Messrs. Simonton & Barker, and one by Messrs. Porter & Conner, attorneys for "other creditors," modifying the terms and time of sale. There is no evidence before me to show who were those "other creditors;" and there is no evidence before me to show that either Charles Betts or Susan or Caroline Shields were made parties to this petition of the Bank of Charleston, or in any way consented to the proceedings. Four creditors of the testator were named in the schedule of John D. Magill and four of his individual creditors, and the receipt of the marshal for eight notices served by him, may be taken as notice of the application of the bankrupt for his adjudication as a bankrupt and discharge, as to all who were named in the schedule as creditors. Under the order of sale and modifications above referred to, a sale was made by the assignee, R. E. Fraser, after due advertisement, of Richmond Hill plantation and other property, on November 15th, 1869. At this sale the Richmond Hill plantation was purchased by Robert Chisholm, and conveyed to him the same day by the assignee. Upon the assignee's report of sales the same was confirmed, and an order passed that the net proceeds be paid to the judgment of the Bank of Charleston. Charles Betts purchased at a sale in May, 1869, from the assignee, one gray horse at $75; but it does not appear by any evidence that he received from the assignee anything on account of his claim against the testator's estate. Robert Chisholm conveyed to William J. Magill February 13th, 1872. William J. Magill conveyed to James E. Grant, the defendant, in July, 1874. After these proceedings in the Bankrupt Court, under which defendant claims, Charles Betts issued a summons, had the same served on W. J. Magill, one of the defendant executors in his judgment, and obtained from the Court of Common Pleas for Georgetown county, of date April 4th, 1878, an order "that the execution set forth in the summons be renewed, revived and continued against the defendants, according to the force, form and

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effect of the former *recovery."† Under this order an execution was issued, dated April 18th, 1878, in which the judgment of Charles Betts against the executors was properly recited, except as to the date of the judgment, which was June 29th, and not June 30th, 1869; and the sheriff was commanded to "satisfy the said judgment and his fees out of the personal property of the defendant within his county, or if sufficient personal property cannot be found, then out of the real property in his county belonging to such defendants, in whose hands soever the same may be." In reciting the judgment, it is described as a judgment rendered between Charles Betts, plaintiff, and W. J. Magill and John D. Magill, executors of John D. Magill, deceased, defendants, in favor of the plaintiff and against the defendants, for the sum of $1120, as appears by the judgment-roll. On the original execution was endorsed, "Renewed by order of court April 4th, 1878." On the renewal execution above described was endorsed, "Levied on Richmond Hill plantation 11th Nov. 1878," which was signed by the sheriff. On January 6th, 1869, Richmond Hill plantation was, after due advertisement, sold by the sheriff and bid off by E. B. Smith, the plaintiff, executor of Charles Betts, for $1120. E. B. Smith paid the costs, and gave receipt for the balance of the purchase money, and on January 14th, 1879, the sheriff conveyed to him Richmond Hill plantation. It was admitted that James E. Grant went into possession in July, 1874, and has continued in possession until the commencement of this action. The rental of the premises was worth $100. These are the facts which seem to me to be material to the case.

The plaintiff in this case must show that his chain of title is good, and also that the defendant, who claims by an older title from the common source, is not in under a good title. The plaintiff, so far as the facts have been made to appear to me, has proceeded regularly until the issuing of the execution of April 18th, 1878. The first execution in

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this case was dated June 30th, *1869, and the judgment under which it issued was dated the day before, viz., June 29th, 1869. The execution had, therefore, lost its active energy, and could not be renewed as a matter of course, when the proceedings were instituted, under which the execution was issued under which the land was sold. Under the practice before the code, it was allowable either to bring an action of debt on the judgment or to revive by scire facias. In either there was a judgment, and under this judgment a new writ of execution was issued. The proceedings did not, in either case, give new life and energy to the old execution, but a new precept to the sheriff was necessary. By Section 306 of the code, all executions on judgments then existing, or thereafter to be obtained, are to be issued in conformity to the code. By the act of 1873, page 499, Section 15, the mode of renewing executions is prescribed, and, as I construe the section, upon failure to show cause after service of a summons,

† It should be noted here that Charles Betts and John D. Magill, the bankrupt, both died before the proceedings for renewal of the Betts execution, which was renewed at the instance of E. B. Smith, the executor of the estate of Charles Betts, against William J. Magill, the surviving executor defendant, of the estate of John D. Magill, the elder.

the plaintiff may obtain an order to renew the execution. While this section seems to operate directly on the execution, and not indirectly by reviving the judgment, as formerly, I do not see how it can be so construed as to give new life and energy to an old execution which had become dormant. The meaning of the word "renew," I take it, is to issue a new execution under the seal of the court, under the authority of the order to renew, and that the mere entry of the word "renewed" on the old execution cannot have the effect of giving it new life and active energy, though its lien may be preserved. If this view is correct, then the only authority of the sheriff to sell was derived from the execution issued under the order to revive, and under which the sale was made. The well-established rule is, that the judgment must authorize the execution or it will be void. Freem. on Executions, § 43. The original judgment in this case authorized the collection of the debt out of the assets of the testator. The execution under which the sale was made authorized the collection out of the individual property of the executors. The execution said nothing about the levy on the goods or lands of the testator. Subdivision 2 of Section 312 of the code, directs that when a levy is to be made of real and personal property in the hands of personal representatives, * * * it shall require the officer to satisfy the judgment out of such prop-

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*erty. If an execution issued against property of individuals under Subdivision 1, could authorize a levy of property of a decedent under Subdivision 2, I do not see any reason for these distinctions in the different Subdivisions of that section, or why an execution against the property under Subdivision 1 would not justify an arrest of the person under Subdivision 3. It is true that the defendants are styled "executors," but this has been held, time and again, to be a mere "descriptio personæ." Beazley v. Dunn, 8 Rich. 346; Ab. Forms 140, note; Olmstead v. Vredenburgh, 10 How. Pr. 217.

There may have been a good reason for establishing such a rule, though I cannot see now any valid reason for retaining it, and it seems to be against the whole spirit of the code. It is not the practice in these days to add any words of description to the names of parties to an action who are sued individually; and it seems to me that such words ought to be held to show the character in which the defendant is sued. Yet I do not think that I am at liberty, in the face of these cases, to hold this to be any other than an execution against the executors individually.

Besides this, the judgment described in this execution bears date June 30th, 1869; and the judgment offered in evidence as the foundation of these proceedings, bears date June 29th, 1869, and may or may not be the same. If these views be correct, then the plaintiff's case fails.

I will therefore dispose very briefly of the defendants' title, as it is perhaps better to rule on all the points which may be material to the case.

It is claimed that John D. Magill, who was adjudicated a bankrupt, and who puts this tract of land on his schedule, was a devisee of the testator; that the debt under which the land was sold by order of the Bankrupt Court constituted a lien, and that court had a right to sell it for the purpose of extinguishing the lien; and that the transfer of title to the assignee in bankruptcy amounted to an alienation, such as is contemplated by 3 and 4 W. & M., and which is sufficient to protect the purchaser who holds under it. I take it to be law that the heir or devisee holds real estate descended or devised as assets of the deceased, and subject to the payment of his debts, with full power of bona

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fide *alienation before action, which belonged to the executor or administrator before the power of sale was restrained by statute. If the sale was for value, and without any circumstances to show a misapplication of the fund, the purchaser is protected and the fund may be followed. The presumption is, when a fair sale is made or money raised on mortgage which is foreclosed, that it is for the purpose of the trust. This does not give a right to use it for the payment of individual debts of the heir, devisee or personal representative, or to execute an assignment to another, who is to assume his duties on the payment of the decedent's debts. There should be not only a complete conveyance of the legal title, but there should be some such new consideration passing to the heir, devisee or personal representative as will, of itself, raise the presumption that the transfer of title is for the purpose of the trust. 2 Bl. 244; Richardson v. Chappell, 6 S. C. 158; Rhame v. Lewis, 13 Rich. Eq. 296; Warren v. Raymond, 12 S. C. 9; Lanier v. Griffin, 11 S. C. 566.

Now, the transfer of title to the assignee in this case was for no new consideration, such as would impress upon the transaction the character of a sale for the purposes of the trust. If I am correct in this view, that the land was held as a trust with a power of sale, the devisee, John D. Magill, had no power to transfer this power, either directly or indirectly, to another; and in this respect his power over the assets is analogous to the power of the personal representative over the choses in action which he may sell or alien bona fide. Rhame v. Lewis, supra. If, then, the devisee stood in relation to this land as a trustee, there was no such lien as the Bankrupt Court had a right to foreclose by sale. In this view there was no more jurisdiction over the subject matter than there would be over the choses in action of an estate which

a personal representative should see fit to include in his schedule in bankruptcy. In one aspect of this case, perhaps the Bankrupt Court could have ordered a sale and made good title under it. The bond of Susan and Caroline Shields for $5000, which was the individual debt of John D. Magill, the devisee, was secured by a mortgage of the "Richmond Hill Plantation;" and I am not prepared to say that a sale under this mortgage, by the Bankrupt Court, would not have

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perfected the *title. But the only party known to this proceeding under which the sale was made, was the Bank of Charleston. There is nothing to show who were the "other petitioners" or other creditors, represented by Messrs. Porter & Conner, and Simonton & Barker. There is no evidence that Charles Betts was in any way made a party to this proceeding, or that Susan and Caroline Shields were served with notice or were in any way represented in the case. The assignee had no power to sell property under lien without an order of the court, made at the instance of or with due notice to the lien creditor. As no such notice appears in the case, I do not think the title of the defendant is in any way strengthened by the fact that Susan and Caroline Shields, who were individual creditors of the bankrupt, held a mortgage of the Richmond Hill plantation. I have already said, however, that in my view of this case the plaintiff has failed on account of the insufficiency of the execution under which he holds, to connect him with the judgment on his sealed note against the testator.

It is therefore ordered and adjudged that the complaint be dismissed, with costs.

Plaintiff appealed.

Mr. Joseph T. Walsh, for appellant.

Mr. Richard Dozier, contra.

April 18th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action for the possession of a plantation in Georgetown county, known as "Richmond Hill." A trial by jury was waived, and the case was heard and decided by Judge Fraser. The facts are somewhat complicated, but are so clearly stated in the Circuit judgment that it is unnecessary to repeat them here, except so far as to make this opinion intelligible. The plantation originally belonged to John D. Magill, Senior, under whom both parties claimed. He died in the latter part of 1863, leaving a will, in which John D. Magill, Junior, and William J. Magill were appointed executors, and by which the said plantation was de-

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vised to John D. Magill, Junior, and, *we suppose, went into his possession, soon after his father's death. Two judgments upon debts of the testator were afterwards recovered against the executors.

On April 3d, 1868, the Bank of Charleston recovered judgment for $7009.50.

On June 29th, 1869, Charles Betts recovered judgment for $1120.

The plaintiff claimed Richmond Hill under a sale by the sheriff January 6th, 1879, by virtue of a renewed execution in the case of Charles Betts, insisting that Charles Betts, as a creditor of John D. Magill, Senior, by judgment obtained against his executors after his death, had the right to sell the land devised by the debtor, the father, to his son, wherever the officer might find it, in the possession of the son, or of any other person.

The defendant claimed under a sale made in bankruptcy in the manner following: In 1869 John D. Magill, devisee in possession of Richmond Hill, went into bankruptcy, and included the plantation in his schedule. The assignee in bankruptcy sold it. The sale was confirmed, and the proceeds paid to the judgment of the Bank of Charleston, which had been proved as the oldest lien against John D. Magill, Senior, in the bankrupt proceedings in the matter of John D. Magill, Junior. In the schedule of debts of John D. Magill are included the two specialty debts of the testator above referred to. In reference to the debt due the Bank of Charleston, it is stated in the schedule that the same is in judgment against the executors. At the assignee's sale, Robert Chisholm purchased Richmond Hill and conveyed it to W. J. Magill, and he to James E. Grant, the defendant, February 13th, 1872, who is still in possession. The defendant insisted that a creditor having recovered judgment against the executors of John D. Magill, Senior, after Richmond Hill had gone into the absolute and exclusive control of John D. Magill, Junior, the devisee, could not buy and sell it without an action against him as devisee; but that if he could, the assignment and sale in bankruptcy amounted to a bona fide alienation by the devisee before action brought against him, and Charles Betts could not follow the land thus alienated by the devisee. He also insisted that the renewed execution

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upon the judgment *of Charles Betts, under which the plaintiff purchased, was fatally defective, and for that reason the sheriff's deed conveyed no title.

Judge Fraser held that the plaintiff could not recover, the execution under which he purchased being fatally defective, and ordered the complaint dismissed; but he went on and held the other questions for the plaintiff, who, conceiving that the merits had been decided in his favor, filed no regular exceptions. He seeks now to correct the judgment as to the alleged irregularities in the form of the execution and to obtain from this court an order to enter judgment for him, the plaintiff, upon the following "questions made by plaintiff's appeal:"

"1. When a case, strictly a jury case, is sub-

mitted by consent to be heard by a judge as by a jury, can the judge, in the absence of a motion to that effect at the close of the plaintiff's testimony (and after the defendant has submitted his testimony), dismiss plaintiff's action or order nonsuit?

"2. Was the renewal execution in this case so materially defective as to render the sale and deed under the sale to the plaintiff void as being made without authority?

"3. Having found the material points of law and fact in favor of plaintiff, acting as a jury as well as judge, should he not have rendered a verdict for plaintiff?

"4. If the Supreme Court holds that the defects in the renewed execution are not fatal to plaintiff's title, can it not reverse the judgment of the Circuit Court wherein it dismisses the action only on account of said defects, and order judgment to be entered for plaintiff?"

In addition, however, to these interrogatories, there is an agreement in the case that all the questions made below may be heard in this court. We shall, therefore, consider the interrogatories as regular exceptions.

1. We do not know that there is in the trial of a case any particular time at which a nonsuit must be moved for. In a trial before a jury it is usually done when the plaintiff closes his testimony. This case was heard by the court. When the plaintiff closed his evidence the defendant made no motion for a nonsuit. The judge took the papers, and afterwards delivered his judgment, in which he ordered the complaint dismissed.

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If *the judge's decision must be regarded as strictly the verdict of a jury, it was, in effect, a verdict for the defendant; and the form in which it was made does not alter the case.

2. All the authorities agree that a purchaser at sheriff's sale is not required to look closely for mere irregularities in the forms of process under which property is sold, and the court is always reluctant to decide a case involving valuable rights upon such grounds. But, from the view taken of other questions, it will not be necessary to consider the alleged defect in the renewed execution.

3. An execution in proper form to authorize sale by the sheriff was necessary, especially in a case like this, where land in the possession of one man was to be sold to pay the debt of another. If the judge conceived that the sheriff held no such process, he could not have rendered a verdict or judgment for the plaintiff.

4. The appeal court in a law case has only authority to consider alleged errors of law, and has no right to order an original judgment for plaintiff. If the Circuit judge committed error in reference to the execution or otherwise, this court would perform the whole measure of its duty by declaring the error and remanding the case for correction below.

5. Judge Fraser decided that a devisee holds his devise as a trustee with power of sale for the creditors of the testator, and can make no bona fide alienation of the devise without new consideration, which must enure to the benefit of the testator's creditors; and that, therefore, the assignment and sale in bankruptcy of Richmond Hill for the benefit of the creditors of the devisee, including those of the testator, for which he had become liable, was not a bona fide alienation so as to place it beyond the reach of a judgment recovered against the executors of the testator. Was this error?

We do not think that, as a rule, the devisee holds his devise as a trustee for the creditors of the testator. He is the legal owner of the land, which is not charged with the testator's debts, and has the same right to sell as had the testator himself, subject only to the rights given to the creditors, by the statutes 3 and 4 W. & M., c. 14; Gen.

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Stat. 463; and that of 5 Geo. II., *c. 7; 2 Stat. 570. By the common law land was not liable at all for debts. Fieri facias only reaches goods and chattels. Levari facias reaches the profits of lands. A debt of itself gave the creditor no right to take land; but if the debtor made a specialty, and stipulated to bind "his heirs," &c., the heir was bound as by his own obligation. He was not answerable at all under an execution against the executor, but as of his own obligation he was bound to the extent of lands he inherited; the plea of riens per descent, if true, excused him. If he took land and aliened bona fide before action brought he was released, and stood as if he had received nothing by descent. This rule of making the heir liable for the obligation of his ancestor to the extent of lands received by descent did not include the case of a devisee. After the statute of wills it was competent for any one seized in fee to devise land, but the devisee was not bound to pay the debt of testator, even to the extent of lands received, for the double reason that he was not named in the bond of the debtor, and because the devise was in the nature of a direct conveyance; 3 Bl. Com. 418; Shep. Touch. 369; Hurls. on Bonds 103; 2 Jarm. on Wills 509; Drayton v. Marshall, Rice's Eq. 387 [33 Am. Dec. 84].

The law stood in this way for two hundred years, when a desire to enlarge the rights of creditors induced the statute of W. & M., putting a devisee on the same ground with an heir. This statute makes a devisee liable "in the same manner as the heir-at-law, notwithstanding the lands, tenements and hereditaments to him or them devised shall be aliened before action brought." By the fifth section the heir, as in regard of lands descending, which he has sold before any process was issued against him, such heir shall be accountable for such debt to the value of said lands so aliened, "saving that

the lands bona fide aliened before action brought shall not be liable to such execution."

There was no other law upon the subject from W. & M., A. D. 1682, to 5 Geo. II., 1732, when parliament passed a law for the colonies, styled "An act for the more easy recovery of debts in the colonies," by which lands were made assets for the payment of debts. This statute provides that land shall

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be liable *to, and chargeable with, all just debts, and shall be assets for the satisfaction thereof, in like manner as real estate in England is liable for bonds, &c. It gives as to land "the like remedy and process" as before existed in reference to chattels.

Under these statutes necessarily construed together important questions soon arose. It was difficult to reconcile the statute 5 Geo. II., with the doctrine that land descended to the heir or went direct to the devisee and was not assets in the hands of the executor for the payment of debts. The courts for a time hesitated, as will be seen by reference to the old rule of court as to what was necessary in a plea of plene administravit. 22d Rule of Court; Miller 414, 422; Ashe v. Drennis, 2 Bay 329. The most important of these questions were the following: As to when an execution against executors could levy and sell land devised or descended; and as to what was and what was not a bona fide alienation before the action brought, so as to place the lands beyond the reach of a judgment against the executors of ancestor.

It was early held that under the statute of 5 Geo. II., executors, whose duty it is to provide for debts, must have some qualified right to control lands, so far as creditors are concerned, and in that view it was decided "that under a fi. fa. against the executor lands in his possession to be administered might be sold, provided the fi. fa. directed levy of the lands, goods and chattels of the testator in the hands of the executor to be administered." D'Urphey v. Nelson, 1 Brev. 289; Martin v. Latta, 4 McC. 128; Gregory v. Forrester, McC.'s Eq. 318; Jones v. Wightman, 2 Hill 579; Rogers v. Huggins, 6 S. C. 359. It will not be necessary to consider this question here, for the reason that Richmond Hill had been transferred by the devisee, John D. Magill, Junior, before Charles Betts recovered his judgment; and possibly, for the additional reason that he was one of the executors of the testator's will. It has been held by this court that a devise to one who is also executrix, is leviable while it remains in her possession. Simons v. Bryce, 10 S. C. 354.

The important question in the case is, whether the proceedings in bankruptcy—the

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assignment and sale thereunder and the *application of the proceeds to the judgment of the Bank of Charleston—amounted to a bona fide alienation before action brought, under the statute of W. & M., so as to place Richmond Hill beyond the reach of the Betts judgment. In 1863, John D. Magill, Junior, got possession of his devise, when, probably, the personal property was sufficient to pay all the debts. The end of the war, with its disastrous results, came on. In March, 1866, he mortgaged Richmond Hill to the Misses Shields to secure a debt of his own. In April, 1868, after he had been in exclusive possession for some five years, upon his own application he was adjudged a bankrupt. In his schedule he included Richmond Hill, as "inherited from his father;" and among the debts were included that of Charles Betts and the judgment of the Bank of Charleston against the executors of his father.

On February 6th, 1869, the assignment was made to R. E. Fraser, assignee; and on April 18th an order for sale was made in the Bankrupt Court. All this occurred before the judgment of Betts was rendered against the executors of John D. Magill, Senior; but the actual sale was not made until November, after Betts had recovered judgment.

Was this an alienation within the meaning of the statute? An alienation is the conveyance of an estate. The legal definition of the term is "the act by which the title to an estate is voluntarily resigned by one person and accepted by another, in the forms prescribed by law." 2 Bouv., § 1992; Simons v. Bryce, supra. John D. Magill, Junior, voluntarily went into bankruptcy and Richmond Hill was assigned for the payment of his debts, and those of his testator for which Richmond Hill was liable. As to the effect of that act, the bankrupt law declares "that as soon as said assignee is appointed and qualified, the judge, or when there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, * * * and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, * * * and all his rights of action for property or estate, real and personal, and all his rights of redeeming such

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*property or estate shall, in virtue of the adjudication in bankruptcy and the appointment of an assignee, be at once vested in such assignee." Bump (6th ed.) 352. This was a transfer of all the title to the land which was in John D. Magill, Junior. If not so considered, the immediate result would be a conflict of jurisdiction. Southern v. Fisher, 6 S. C. 346.

Was this transfer bona fide in the sense

of the statute? No action had been brought against John D. Magill, Junior, as devisee; and we think the mere fact that the alienation was made through the forms of the Bankrupt Court, cannot change its character. He transferred property which was his own, not impressed with the character of any trust, but subject only to the rights of creditors given by statute. The defence of the purchaser from a devisee under the statute of W. & M., differs in several important particulars from the equitable defence of a purchaser for valuable consideration without notice. To sustain the latter plea according to principles of equity, the purchaser must be without notice, and the consideration must be valuable and actually paid. But under the statute of W. & M., which created the liability of the devisee, and must, therefore, be looked to as measuring its extent, the only conditions are that the alienation must be bona fide and before action brought.

"If the devisee shall alien or make over" the land without fraud, it may be with notice and upon a good consideration, such as marriage. Sprackman v. Timbrill, 8 Sim. 253; (11 E. Ch. 424); Richardson v. Horton, 7 Beav. 124; (29 E. Ch.) In both these cases the settlement was made in consideration of marriage, and in both there was actual notice of the debts; but the provision made for their payment proved inadequate. Held, not sufficient to make the settlement fraudulent. In the latter case, Lord Langdale, master of the rolls, said: "I am of opinion that these circumstances thus barely appearing, do not afford any proof of fraud, or a want of bona fides in the execution of the settlement. The point decided is thus stated: 'A devised land to his son. The son, upon his marriage, settled the land upon his wife and children. Held, that the statute of 3 and 4 W. & M. does not charge the real

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estate descended or devised *with the creditor's debts, but makes the heir or devisee personally liable to the value of the land.'"

No new consideration was necessary to support the alienation other than the payment of the debts for which the devisee, John D. Magill, Junior, was liable.

In our own late case of Warren v. Raymond, 12 S. C. 9, it was held that a mortgage to secure a debt of the devisee was a conveyance competent to work an alienation under the statute of W. & M., when the mortgagor was out of possession. In discussing this case, Willard, C. J., took occasion to explain the cases of Haynsworth v. Bischoff, 6 S. C. 159, and Richardson v. Chappell, Id. 146. In regard to the case last named, he says: "This court held that bona fide alienation by the devisee defeated the claims of creditors of the testator against the land devised; but the referee is inaccurate in stating that case as deciding that the alienee must show that the alienation was for valuable consideration and without notice, in order to come within the statute of 3 and 4 W. & M."

We may add another feature of that case analogous to this. One of the devisees who aliened was a qualified executor of the will of the testator, yet it was held that he conveyed as devisee, and that it was a bona fide alienation.

We conclude that the assignment of Richmond Hill in bankruptcy, by John D. Magill, Junior, as a devise to him by his father before judgment was rendered on the debt of Charles Betts and before action was brought against Magill as devisee, was an alienation in the sense of the statute: and that it was bona fide, notwithstanding he had notice of the debt of Betts, and there was no other consideration than the payment of his debts, including those of his testator, for which Richmond Hill was liable. This view is confirmed by the fact that the purchase money of the sale made by order of the Bankrupt Court, was applied to the judgment of the Bank of Charleston, which was the oldest lien upon the estate of John D. Magill, Senior, the deceased debtor, and had been recovered before alienation by the devisee.

The judgment below is affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. *153

*(Case No. 1023.)

STATE v. HOPKINS.

(November Term, 1880.)

[1. *Criminal Law* ⇨918.]

The statement of a juror on his voir dire in the hearing of the jury that "he had said he thought the prisoner was guilty and ought to be hung," and the volunteered opinion of a witness for the state from the stand that he would not believe the prisoner on his oath, are no grounds for a new trial of one convicted of murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2163; Dec. Dig. ⇨918.]

[2. *Clerks of Courts* ⇨6; *Criminal Law* ⇨264.]

The prisoner was arraigned in open court, in the presence of the clerk, by one who had been appointed deputy clerk and was acting as such, although he had not formally complied with all the requisites of a legal appointment. *Held*, that the arraignment was valid.

[Ed. Note.—Cited in State v. McGraw, 35 S. C. 289, 14 S. E. 630.

For other cases, see Clerks of Courts, Cent. Dig. § 12; Dec. Dig. ⇨6; Criminal Law, Cent. Dig. § 618; Dec. Dig. ⇨264.]

[3. *Homicide* ⇨286.]

While the law presumes malice from the mere fact of intentional killing, yet when all the facts are brought out, there is no room for presumption, and the state, who affirms the

malice, must prove it. State v. Coleman, 6 S. C. 185, approved.

[Ed. Note.—Cited in State v. Jones, 29 S. C. 235, 7 S. E. 296; State v. Ariel, 38 S. C. 224, 16 S. E. 779; State v. McDaniel, 68 S. C. 312, 47 S. E. 384, 102 Am. St. Rep. 661; State v. Rochester, 72 S. C. 201, 51 S. E. 685.

For other cases, see Homicide, Cent. Dig. § 590; Dec. Dig. ⇐286.]

Before Mackey, J., Chester, March, 1880.

Indictment against Scott Hopkins for murder. The case is fully stated in the opinion.

Messrs. S. P. Hamilton and J. J. Hemphill, for appellant.

Mr. Solicitor Gaston, contra.

April 18th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. The defendant, Hopkins, was indicted for the murder of James R. Stroud. C. C. Macoy was clerk of the court for the county of Chester, but the prisoner was arraigned and called upon to plead, and the jury were sworn and charged by G. W. Curtis, who was acting as deputy of the clerk, but, as it is alleged, without proper authority to perform these duties. Macoy had been clerk for more than one term. In May, 1876, he had appointed Curtis his deputy, but he had ceased to act as such. On March 8th, 1880, shortly before the trial of Hopkins, Macoy again appointed him deputy,

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and at the trial he acted as *deputy clerk, although the written appointment made had not been communicated to him, approved by the judge, or recorded. Macoy, the clerk, was present, superintending the arraignment, which was conducted by Curtis, acting as deputy.

During the arraignment a juror, Lewis Burdett, was presented to the prisoner, and the solicitor had him to stand aside without peremptory challenge—the challenges allowed the state being exhausted. To this the prisoner objected, and the objection being overruled, he excepted. The juror was afterwards recalled and sworn by the prisoner.

J. F. Green, a juror, on his examination on his voir dire, said, in the presence of the panel, that he had said "Scott Hopkins was guilty and ought to be hung." The juror was excluded.

The facts, shorts and simple, were about as follows: Defendant went to Chester, to sell cotton. He sold to Gunhouse & Co. After the money had been placed upon the table for defendant, and he was in the act of putting it in his pocket, deceased, Stroud, came up and said: "You owe me $5.50, but I will take $5, and call it square;" and, retaining $5, moved towards the door. Defendant denied the debt, and protesting against deceased taking his money, caught him by the lower part of his vest. They then took hold of each other by the lapel of the coat. Deceased said twice, "let me loose;" and the second time he said this he struck defendant in the face, and about the same time the pistol was fired. The defendant claimed that the pistol was discharged from his pocket accidentally. The homicide occurred on the first Monday in March, 1880, and in a few days the prisoner was tried. The jury found a verdict of guilty. The prisoner's counsel moved for a new trial, and that being refused, he appeals to this court, upon the following exceptions:

"1. Because J. F. Green, one of the jurors of the panel, presented to the prisoner and examined upon his voir dire, if he had 'expressed or formed any opinion as to the guilt or innocence of the prisoner at the bar,' said, in presence of the whole panel of the jury, that 'he had said Scott Hopkins was guilty, and ought to be hung.'

"2. Because William McAlily, a witness examined in reply by the state, volunteered

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to say from the stand 'that he would *not believe Scott Hopkins on his oath,' when the character of said Scott Hopkins for truth and veracity was never put in issue. And, as matter of law outside the motion for a new trial, the said Scott Hopkins makes the following exceptions:

"1. Because the said Scott Hopkins was arraigned for trial by George W. Curtis, an unauthorized person, and not the clerk or deputy clerk of the court, but being, at the time of such arraignment, the Probate judge of Chester county.

"2. Because his Honor charged the jury as follows: That if they found that Scott Hopkins caused the death of the deceased by the use of a deadly weapon, that they might infer malice from that fact, when the situation of the parties, the shortness of time and the circumstances occurring at the time of the killing rebutted every presumption of malice, and the charge of his Honor tended to mislead the jury on that point.

"3. Because, in the presentment of the juror, Lewis Burdett, the solicitor ordered the juror to stand aside without peremptory challenge or challenge for cause, which was objected to by accused and objection overruled by the court."

The first two exceptions are not well taken. On being examined on his voir dire the juror, Green, stated in emphatic terms, that he had formed and expressed an opinion, and, of course, he was excluded. The witness, McAlily, simply volunteered the statement that he would not believe Scott Hopkins on his oath.

The first exception as "to matter of law," charges that the prisoner was arraigned for trial by George W. Curtis, an unauthorized person, and not the clerk of the court. The law does not indicate any particular person to conduct an arraignment, the purpose

of which is simply "to take care that the prisoner do appear to be tried, and hold up his hand at the bar for the certainty of the person, and plead a sufficient plea to the indictment." In practice it is usually, but not always, done by the clerk. The whole proceeding is under the immediate direction of the court. The plea is the important matter, and that is the act of the party himself.

The clerks' act (Gen. Stat. 174) provides that the "clerk may appoint a deputy, to be approved by the Court of Common Pleas,

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*a record of whose appointment shall be made in the clerk's office." George W. Curtis had been an old deputy of the clerk and was familiar with his duties. He was reappointed deputy for the March Term of the court for Chester, 1880, and in that capacity conducted the arraignment of the prisoner, Hopkins. The written appointment had not been given to Curtis, or approved by the judge, or recorded, but he acted as deputy in good faith, and the fact that all the requirements had not been complied with did not make void the acts done by him as deputy.

"One in office and transacting its duties is supposed to be rightfully there, and, so far as third persons are concerned, that presumption legalizes his acts." State v. Hill, 2 Speers 160; McBee v. Hoke, Id. 138; Kottman v. Ayer, 3 Strob. 92.

"The authority of a judge de facto cannot be called in question collaterally. His title to the office can be considered only in some proceedings instituted for that purpose." State v. Anone, 2 N. & McC. 27.

Besides, the arraignment was, in fact, the act of Macoy, the clerk. Both Curtis and Macoy state that the latter was present. Macoy swears that "during the whole of the arraignment of the said Scott Hopkins for murder, the said Charles C. Macoy, as clerk aforesaid, was present conducting the said arraignment, and the said George W. Curtis, as deputy as aforesaid, only assisted the said clerk in the arraignment."

The second exception makes the objection that the judge committed error in charging as to the presumption of malice. He charged the jury, among other things, as follows: "In every case of intentional homicide the presumption of malice arises, and the fact of killing intentionally by the use of a deadly weapon being shown in any case, the burden of proof is thereby imposed upon the defendant to rebut such presumption, unless the facts and circumstances shown in the testimony in behalf of the state incidentally rebut it." There is no doubt whatever of the isolated proposition that the law presumes malice from the mere fact of homicide, but there are cases as made by the proof to which the rule is inapplicable. When all the circumstances of the case are fully proved there is no room for presumption. The question becomes one of fact for the jury, under the

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general prin*ciple that he who affirms must prove, and that every man is presumed innocent until the contrary appears. We cannot distinguish this case from that of State v. Coleman, 6 S. C. 185. In that case the facts were not contained in so small a compass nor as fully proved as they were in this. In that case the judge's charge was substantially, indeed almost identically, the same as in this, viz.: "That all homicide is presumed to be malicious and amounting to murder until the contrary appears from circumstances of alleviation, excuse or justification, and that it is incumbent on the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him." In that case the court set aside the verdict, and in the judgment express the view which we adopt as applicable to this case. The court says:

"This presumption is not applicable when the facts and circumstances attending the homicide are disclosed in evidence so as to draw a conclusion of malice or want of malice, as one fact, from the evidence. Presumptions of this class are intended as substitutes in the absence of direct proof, and are in their nature indirect and constructive. The best evidence of the state of mind attending any act is what was said and done by the person whose motive is sought for. The motive that impels to the taking of human life is no exception to this rule, and the importance of the consequences that depend on the accurate ascertainment of its nature in such cases, affords the strongest ground for limiting indirect and constructive proofs to the narrow grounds within which they belong. * * * It appears, from the record before us, that the proofs embraced a statement of the origin of the difficulty between the parties: their conduct towards each other down to the time of the killing, and, to some extent, the subsequent conduct of the prisoner. When the evidence is of such a character, it must be presumed to be sufficient to enable the jury to draw from it a conclusion of fact one way or the other. Under such circumstances there was no necessity, and, therefore, no propriety, in resorting to any general presumption arising by operation of law. * * * When the circumstances preceding and attending an act of this character are full, as in the present

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case, the prisoner is entitled to the *benefit of any doubt that may arise, and cannot be deprived of such benefit by any presumption of guilt arising by operation of law from the naked fact of homicide. A charge may be erroneous, although the propositions of which it is composed may severally be conformable to recognized authority, if in its

scope and bearing in the case it was likely to lead to a misconception of the law."

The judgment below is set aside, and the case remanded for a new trial.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 158

(Case No. 1024.)

PHINNEY v. JOHNSON.

(November Term, 1880.)

[1. *Dower* ⇐63.]

Under judgment against an administratrix, who was also widow, the unimproved lands of the intestate were sold, and the purchaser erected thereon valuable buildings, after which the widow brought her action for dower. *Held*, that she was entitled to her dower of the lands so improved, and that it should be estimated according to the value of the premises at the time of assignment.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 202; Dec. Dig. ⇐63.]

2. The question of the widow's estoppel by her laches to claim dower in the value of the improvements was adjudicated in her favor on the former hearing of this case. 13 S. C. 25.

[3. *Dower* ⇐56.]

But the widow being practically in possession of the bare lot until the sheriff's sale, and having forborne for a long time to assert her claim, interest was allowed only from the date of the possession by the last purchaser—the defendant here.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 179; Dec. Dig. ⇐56.]

Before Mackey, J., Fairfield, February, 1880.

Action commenced in the Court of Probate by Mary T. Phinney against William Johnson, for dower. The opinion states the case.

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*Mr. J. H. Rion, for appellant.

Mr. John S. Reynolds, contra.

April 18th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. James Phinney, the husband of respondent, died intestate May 31st, 1862, seized of a lot in the town of Winnsboro', containing one half acre. The widow administered upon the estate and sold the personal property. March 13th, 1868, the sheriff levied upon this lot under a fi. fa., on a judgment obtained against the administratrix, upon a debt of the intestate, January 21st, 1868. The sheriff sold the lot April 6th, 1868, for $400, and conveyed to Seigler March 8th, 1869. Seigler sold to W. R. Robertson for $600, and in May, 1869, he built on the lot a fine double storebuilding and other improvements, costing at least $3500. W. R. Robertson conveyed to Thomas R. Robertson, who sold February 2d, 1877, to William Johnson, the defendant, for $5000.

April 5th, 1878, this action was commenced in the Probate Court, which decreed dower. An appeal was taken to the Circuit Court and thence to the Supreme Court, where the judgment was affirmed and the case remanded to the Probate Court to determine the measure of respondent's dower.

It was admitted that the lot could not be divided, and that respondent's dower must be one-sixth in money. It was also agreed that the Probate judge, instead of commissioners, should allot dower. He assigned dower upon the value of the lot at the time of assignment, including all improvements ($4200), with interest from date of defendant's possession, February 2d, 1877. From this decision of the Probate judge both sides appealed. Judge Mackey affirmed the decree of the Probate Court, so far as related to the value upon which dower should be assessed; and modified the same as to the matter of interest, holding that respondent was entitled to interest upon the sum assessed from the date of her husband's death, 1862. From this decree the defendant appealed and submits several exceptions, which present to this court the following propositions: First. That the demandant is not entitled to dower in any improvements put

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upon the *land since the sale by the sheriff; but it should be assessed upon the value of the land either, 1st, at the time of the husband's death; or, 2d, at the time of the sale by the sheriff. Second. That she is estopped by her conduct, laches, delay, negligence, course of conduct as administratrix, and her silence while the improvements were being placed on the lot, from now claiming any share in said improvements. Third. That in any event the defendant is liable only for rents and profits (or interest in lieu thereof) only for the time he has been in possession.

1. Is the demandant entitled to dower in the improvements placed upon the land after the sale by the sheriff? The general rule certainly is that a dowress is entitled to dower in the land as found at the time of assignment. This results from the very nature of the right, which is to be put in full possession of one-third part of the land itself, which carries everything on the land. The principle is not changed where a sum of money is assessed in lieu and bar of dower under the act which declares "when the same cannot be fairly and equally divided, without manifest disadvantage, then they shall assess a sum of money to be paid to the widow in lieu of her dower by the heirs-at-law, or such other person or persons who may be in possession of the said land." Gen. Stat. 530. This view is fully supported by authority as against the heir. In the case of Stewart v. Pearson, 4 S. C. 7, the court says: "The seizin in the premises by the husband during the coverture, and his death

being admitted, we concur with the Circuit judge in holding that the dower is to be estimated according to the value of the land at the time of assignment. If, in lieu of the assignment to her of land, a sum of money is substituted or its value, we cannot perceive the reason which would refer such value to the time of his death." In 2 Scrib. on Dower 557, the authorities are cited, and the result stated, as follows: "It seems to be settled that if the heir, after the husband's death, improves the land and its value is thereby enhanced, the widow will be entitled to her dower of the lands so improved, without any allowance to the heir on account of his expenditures or labors."

But, admitting the general rule, it is insisted that there is an important exception, and that this case, in principle, falls within it. That exception is, "that the widow is

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not entitled to dower *according to the improved value of the land, in case of alienation by the husband." In such case there is a general concurrence of the authorities, that as to improvements the principle of betterments should be applied in favor of the purchaser. This just modification of the rule is as well-established as the rule itself, and in our state it has been embodied into the law of 1824, which provides "that on all assessments of dower against a purchaser in behalf of a widow of a former owner, the value of the land at the time of alienation by the husband, with interest from the accrual of the right of dower, shall be taken and received by the courts of this state as the true value on which to assess the said dower." Gen. Stat. 530.

It is earnestly urged, and with much force, that this is not a case against the heir but a purchaser; that the purchaser here does not hold the title of the heir, but of the executor, which is paramount to that of the heir; and although the land was sold by the sheriff after the husband's death, the sale was substantially an alienation by the husband, not, of course, strictly and literally, but within the spirit and meaning of the act of 1824. At the time of the husband's death he was seized of the lot, and, upon that event, the title was cast upon his heirs, subject, however, to the payment of his debts. He was then in debt, and it was afterwards sold by the officer of the law as his property, under a judgment recovered upon a debt of his, without regard to the nominal title of the heirs. If the sheriff's sale had been in the lifetime of the husband, it would have been considered an alienation by the husband. "A purchaser under execution occupies the same position in regard to improvements made by him as if the premises had been conveyed by deed directly from the husband." 2 Scrib. on Dower 579, and authorities cited. It is not clearly perceived in what particular, as to improvements by the purchaser, a sale by the sheriff to satisfy a debt of the husband, made after his death, differs from one made for the same purpose before his death. But the words of the act are "alienation by the husband," and we cannot, in its face, extend the remedy it provides so as to include a case not within its terms, the sale by the sheriff being after the death of the husband. The court may desire to prevent a hardship, but its duty is plain

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not to *make but to declare the law. It is the province alone of the legislature to amend the law so as to make the terms include all cases which fall within the mischief intended to be remedied. This case not being within the terms of the act of 1824, it was not error to assign dower in the land as it was found at the time of the assignment.

2. It is further contended that the plaintiff is estopped by her laches, conduct, delay, negligent course of administration and her silence, while the improvements were going up, from now claiming dower in those improvements. The doctrine of estoppel applies to claims for dower, (2 Scrib. on Dower 251–253); but we regard this question as res adjudicata by the former judgment of this court, which declared the right to dower. The same question was made there, "that the plaintiff, by her conduct, course of administration of her husband's estate, retaining the personal property and her silence while the improvements were being erected, is estopped in equity from claiming dower in the value of such improvements."

The judge of probate held that the petitioner herein has not, by any conduct upon her part, estopped herself from setting up her claim of dower, and that judgment was affirmed by this court, which declared that "the foundation of equitable estoppel is the ignorance of the party asking its benefit, induced by the conduct of the party against whom it is asserted. The Probate judge has found that the purchasers who successively took titles under the sheriff's deed, had knowledge of the existence of the petitioner's claim of dower in the land sold. In addition to this finding it must be assumed that the parties knew of the nature of the title they held, and consequently that the lands held by them were those of which the decedent died seized. Knowledge of the demandant's claim of dower is presumable from this fact. * * * The possession of the personal estate unadministered is immaterial to the present question. The appellant has no concern in the administration of the estate, as far as appears, and it is of no importance to him whether the estate was well or ill administered." We have held that the improvements go with the land, and the widow gets her share of their value as an incident to her right of dower. The whole question

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of estoppel, not only as to *the right of dower, but also as to the improvements, has been adjudged.

3. It is still further contended that the plaintiff is not entitled to interest from the death of her husband upon the value of improvements not in existence until years after. We have seen that the widow is entitled to dower in the land as it is found at the time of assignment, because she is entitled to a third of the land itself. For the same reason she is entitled to the rents and profits of that land for the time she has been deprived of its use. Keith v. Trapier, Bail. Eq. 64; Mey v. Mey, Rich. Eq. Cas. 379; Woodward v. Woodward, 2 Rich. Eq. 23. But, as we understand it, that does not mean theoretical rents and profits upon the basis of the improved condition in which the land may be when dower is assigned, estimated retrospectively over the whole period back to the time of the husband's death, but the actual rents and profits for each year according to its then capacity to produce rents as to a portion of which the statute of limitations might be applied. When the widow is in possession of the land she is allowed one-third of rents, but must account for the other two-thirds. Gordon v. Stevens, 2 Hill's Eq. 429. When interest is given it is as a substitute for rents and profits, and it would seem to follow that the amount should be as nearly as possible in conformity with what an actual accounting for the different years would produce. But this is not practicable, and interest is adopted as a convenient substitute, but interest being the same each year, the Court of Equity (rents and profits are not given at law) being bound by no positive law on the subject, does not adhere to any fixed rule as to the time interest shall run, but gives interest according to the equities of the case. In Henagan v. Harllee, 10 Rich. Eq. 288, Chancellor Dunkin says: "In this court the widow, when right of dower is established, is also entitled to an account of the rents and profits. But the extent of the right may be modified and restricted, according to the circumstances of the case. In Bullock v. Griffin, 1 Strob. Eq. 60, the account was limited to the filing of the bill." Also, in the case of Henagan v. Harllee, supra, the court limited the account to the filing of the bill, partly, at least, as stated,

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upon *the ground that "the widow forbore to set up her claim until more than a year after testator's death." In the case at bar the widow forbore to set up her claim for fifteen years after intestate's death, and nearly ten years after the sale by the sheriff. From the death of her husband, in 1862, until it was sold by the sheriff, in March, 1868, the bare half-acre lot, in no condition to yield rents and profits, was practically in the possession of the widow administratrix as assets of her intestate, "to be administered," and we concur with the judge of probate, that she has no equity to have interest as a substitute for rents and profits of the improved value of the lot, charged against the defendant beyond "the time he has been in possession," viz., February 2d, 1877.

As to the interest, the decree is modified according to the views herein expressed, and in all other respects it is affirmed, and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 164

(Case No. 1025.)

BEARD v. STANTON.

(November Term, 1880.)

[1. *Trusts* ⇐104.]

A married woman being entitled, under her father's will, to a certain sum of money for life, with remainder over, in the hands of B., executor, she and her husband petitioned the Court of Equity for the appointment of S. as trustee. S. was so appointed, "upon his giving bond, &c., and that upon the execution of said bond, the executor, B., be authorized to deliver to such trustee" this trust fund. S. never gave such bond, but received the trust money from B., and at once paid it over to the life-tenant, who was then on the eve of removing to Florida, where she died, in 1863. *Held*, that S. was not the trustee of an express trust, but was a trustee by construction.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 155; Dec. Dig. ⇐104.]

2. This case distinguished from Chaplin v. Givens, Rice's Eq. 154.

[3. *Limitation of Actions* ⇐102.]

The statute of limitations runs in favor of a trustee of a trust raised by operation of law, or a constructive trust, and is, therefore, a bar to this action, brought in 1878 by the remaindermen to recover from S. the money received from B.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 502; Dec. Dig. ⇐102.]

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[4. *Limitation of Actions* ⇐102.]

*If it were an express trust, the statute would be a bar, the office of trustee having been disavowed by the act of parting with the trust properly, and the cestuis que trust having knowledge of such disavowal.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 505; Dec. Dig. ⇐102.]

[5. *Limitation of Actions* ⇐102.]

[Cited in Montgomery v. Cloud, 27 S. C. 191, 3 S. E. 196, to the point that an administrator is as to assets a quasi trustee, and as between him and the distributees the statute of limitations does not apply, except where he does some act purporting to be an execution of the trust.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494–505; Dec. Dig. ⇐102.]

Before Hudson, J., Fairfield, September, 1880.

Action by James M. Beard, George F. Beard, Sarah E. Beard, Joel A. Beard, and

James M. Beard, administrator of W. W. Beard, against John D. Stanton. The case is fully stated in the opinion of this court.

Mr. J. H. Rion, for appellant.

Messrs. A. S. Douglas and H. A. Gaillard, contra.

April 18th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. About January, 1846, James Beard, late of Fairfield county, died, leaving a will, of which James M. Beard is the surviving executor. The legatees under the will were his children, James M. Beard, George F. Beard, Joel A. Beard, Sarah King, and W. W. Beard, deceased, the plaintiffs, and Elizabeth C. Stanton, deceased. The shares of the daughters, respectively, were limited to their sole and separate use for life, and, in default of issue, "to be equally divided among his other children." In 1851 Elizabeth C. intermarried with one Isaac Stanton, and January 12th, 1852, Isaac Stanton and Elizabeth, his wife, petitioned the Court of Equity for the appointment of John D. Stanton as trustee of the petitioner, Elizabeth. It does not appear that either the proposed trustee or any of the "other children," were made parties. The court passed an order that John D. Stanton be appointed trustee of the petitioner, upon his giving bond to the commissioner of the court, &c., conditioned for the faithful execution of the trust, and that upon the execution of said bond the executor, James M. Beard, be authorized to deliver to such trustee the portion in his hands to which the petitioner is entitled."

This order was never complied with, and the Circuit judge finds as a fact "that John

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D. Stanton never became, by order of *the court, trustee of said property, he having failed or refused to give the required bond and accept the office."

But, notwithstanding such non-compliance, Stanton and wife being anxious to remove to Florida, James M. Beard, the executor, paid Mrs. Stanton's share of money (no question is made as to the negroes) to John D. Stanton, her husband's father, on November 24th, 1852, and took his receipt therefor in the words following:

"$1,314.91. Received of James M. Beard, executor of James Beard, deceased, the slave Esther, specifically bequeathed to Elizabeth C. Stanton by the will of James Beard. I have also received of said James M. Beard one thousand three hundred and fourteen 91-100 dollars in full of the balance due Elizabeth C. Stanton as legatee of the estate of James Beard, deceased.

(Signed) "John D. Stanton." [L. S.]

This money was received, it seems, with the view of paying it to Mrs. Stanton, the life tenant, who was, as stated, on the eve of removing to Florida, and a few hours after its receipt was so paid to her.

In 1863 Mrs. Stanton died without leaving issue, and September 4th, 1878, this action was commenced by the plaintiffs, remaindermen under the will, against John D. Stanton to account as trustee for the corpus of the legacy paid to Mrs. Stanton. Respondent answered, denying that he ever accepted the appointment of trustee, admitting that he received about $700 for Mrs. Elizabeth Stanton, but that he received the same as agent, and at once delivered it to her, and pleading the statute of limitations.

The case came on to be heard before Judge Hudson, who held that, although he never complied with the order of court appointing him trustee, John D. Stanton having received the property, with the knowledge that it was the legacy of his daughter-in-law, became trustee by operation of law and liable to account for the same, yet, as no disability existed on the part of the plaintiffs at that time or since, they were barred by the statute of limitations, Stanton having committed

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a breach of trust, as *far back as 1852, by paying to the life-tenant the whole corpus, and permitting her to carry it beyond the jurisdiction of the court; that this was an abandonment of his trust, of which the plaintiffs had notice, and for which they could have sued, certainly, at any time after 1863, when the life-tenant died. He dismissed the complaint.

The plaintiffs appeal to this court upon the following exceptions:

"1. For that his Honor held that the act of John D. Stanton, in paying to the life-tenant the whole corpus of the estate, money and negroes, and permitting her to carry the same beyond the jurisdiction of this court, was a clear abandonment of his trust.

"2. For that his Honor held that plaintiffs have slumbered too long over their right of action against the defendant, and are barred by the lapse of time."

Upon the receipt of the legacy of his daughter-in-law by John D. Stanton, what relations existed between him and the plaintiffs, who had a remainder in the same, contingent upon the death of Elizabeth without issue? By receiving that legacy, did he become trustee for them as to that contingent interest, and if so, was that an express, or an implied trust? He did not accept the appointment of trustee, nor give the bond, upon the execution of which he was to be trustee and entitled to receive the legacy. He was then certainly not trustee under the appointment of the court. The executor, Beard, had no right to pay the money to Stanton until he had executed the bond and clothed himself with the trust. It does not change the legal effect of the transaction that Stanton, as the executor states, promised to perfect the appointment, and that the money was paid to him upon the faith that he would do so. The bond was not given. Stanton was not trustee by the appointment of

the court, and his receipt was no discharge to the executor, who committed a breach of his trust when he paid the legacy of his sister, Elizabeth, to one not authorized to receive it, and which he knew would be immediately paid to her, then on the eve of removing to Florida. Clark v. Smith, 13 S. C. 585.

But, whilst John D. Stanton was not trustee under the appointment of the court, he

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received the money with the knowl*edge that it was part of the legacy of his daughter-in-law under the will of her father, James Beard, and that fixed upon him the responsibilities of trustee—not trustee by the act of the parties, but by operation of law—not an express, but a constructive trustee.

It is laid down that "a person may also become a trustee by construction of law, where a trust is created, but if no trustee is appointed, or the trustee named is incapable of taking, or refuses to act, or dies, or the office becomes vacant in any other way, in all such cases every person to whom the trust property comes, by reason of there being no trustee, will be treated as a trustee, and may be ordered to account. * * * A person may become a trustee by construction, by intermeddling with and assuming the management of property without authority." Perry on Trusts, §§ 217, 240, 245.

Chancellor Dunkin states the doctrine clearly in the case of Joyce v. Gunnels, 2 Rich. Eq. 259: "Express trusts are those which are raised and created by the act of the parties, and implied trusts are those raised and created by act or construction of law. Express trusts are declared either by word or writing, and those declarations appear either by direct and manifest proof, or by proof of circumstances creating a violent and necessary presumption that such declarations were made either by word or writing, though the plain and direct proof thereof be not extant."

The trust imposed upon John D. Stanton by his receipt of the money, being in its nature an implied or constructive trust, constitutes no exception to the operation of the statute of limitations. "To cases of express or declared trusts the statute of limitations is inapplicable, but implied trusts constitute no exception to the operation of the statute." Joyce v. Gunnels, supra, and authorities. In that case it is said that an executor is an express trustee. He holds an express or declared trust, and as between him and the cestui que trust the statute is inapplicable. Not so of a purchaser from an executor. He, also, to certain intents, is a trustee, but this is an implied or constructive trust.

In Beckford v. Wade, 17 Ves. 95, Lord Eldon said: "It is certainly true that no time

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bars a direct trust as between cestui *que trust and trustee; but if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be." John D. Stanton stood like a purchaser from the executor. He was affected by an equity. It was necessary for the parties to pursue that equity in a reasonable time, and the court adopts the statute of limitations as a convenient rule of restriction. The plaintiffs being under no disabilities, and their right of action having certainly accrued in 1863, upon the death of the life-tenant, about fifteen years before the commencement of the action, we agree with the Circuit judge that they were barred.

It is urged for the plaintiffs that this is the case of an express trust, for the reason that after John D. Stanton knew that he had been appointed trustee he received the subject matter of the trust, which will be considered as evidence of an acceptance of the appointment by the court, under the authority of Conyingham v. Conyingham, 1 Ves. 522, followed by our case of Chaplin v. Givens, Rice's Eq. 154, holding the doctrine "that a trustee, with notice of his appointment as such, interfering with the subject matter, cannot repudiate the trust and say he acted merely as a factor or agent." We do not consider this case as like that of Chaplin v. Givens. In that case Charles Givens was appointed trustee in a deed inter partes, executed by his brother, John Givens. He was not required to give bond before he assumed the office of trustee, and he had acted as trustee in applying to the court for certain orders then made with his sanction and concurrence. In this case the appointment was by the court, and by the terms of the order could not take effect until the bond was executed, and the bond not being given, John D. Stanton could not be trustee or have title to the property. In such case a refusal or neglect to qualify, by giving bond, will be considered a refusal or disclaimer of the trust. 1 Perry on Trusts, § 262.

If the act of John D. Stanton in receiving the money, although he did not give bond or receipt for the money as trustee, made him a party to the appointment by the court and an express trustee, what was the trust?

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The terms of such trust usually *appear in the condition of the bond; but here no bond was given, and the precise character of the trust proposed does not appear. It seems that the petition was ex parte—the prayer was for the appointment of "trustee of separate estate of Elizabeth Stanton." None of the plaintiffs were made parties or reference made to remainder or remaindermen. From all that appears the trust contemplated may have been only to protect the separate estate of Mrs. Stanton from the marital rights of her husband, without undertaking to provide for the payment over to the remainder-

men on the falling in of the life estate. At the death of the life-tenant the rights of the plaintiffs, attached discharged of all trust. Jones v. Cole, 2 Bail. 330.

But, even in the view that John D. Stanton, by his act, made himself a party to the appointment of the court, and an express trustee for the remaindermen, we think the plaintiffs are barred. It is true, as a general rule, it takes twenty years to bar an equity, but the court often applies the bar of the statute in cases of demands analogous to legal demands, although the remedy may be only in equity. The possession of a trustee is not adverse, but is the possession of his cestui que trust, and the statute will not run. But the trustee may determine that character. When he does an act purporting to be an execution of his trust he shakes off the character of trustee and thenceforward stands in an adverse relation. If the cestui que trust supposes that the trust has not been faithfully and fully performed, he is put upon the assertion of his right. Moore v. Porcher, Bail. Eq. 195; Roberts v. Lesly, S Rich. Eq. 35; 1 Wait's Act. & Def. 271; Perry on Trusts, 864; Clarke v. Boorman's Ex'rs, 18 Wall. 493 [21 L. Ed. 904].

In the case of Clarke v. Boorman's Ex'rs, supra, it is said:

"When a trustee has closed his relation to the property, and parted with all control of the property, the statute of limitations runs, notwithstanding it is an express trust." The Circuit judge found that "as far back as 1852 John D. Stanton had committed a clear breach of trust by paying to the life-tenant the whole corpus of the estate—money and negroes—and permitting her to carry the same beyond the jurisdiction of this court, viz., to the State of Florida. This was certainly known to Beard, the executor, and must have been likewise known to his broth-

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ers and *sisters, the co-plaintiffs. Under the circumstances, I hold that the plaintiffs have slumbered too long over their right of action, and are barred by lapse of time." We cannot say that this was error.

The judgment below is affirmed, and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 171

(Case No. 1027.)

WILLIAMS & CO. v. PAYSINGER.

(November Term, 1880.)

[1. *Mortgages* ⇐564.]

Land was mortgaged by A to B for the purchase money, B assigned his notes and mortgage to C, and C assigned to D. This mortgage was duly recorded, but not the assignments. Afterwards, A not knowing of the assignment to D gave new notes of same amounts, and payable at same time and new mortgage to C, in satisfaction of the original notes and mortgage, which were not surrendered, C saying they were at his home. Failing to pay the first note to C at maturity, A gave up possession of the land to C, and C afterwards mortgaged it to other parties. The land having sold for enough to pay the first mortgage only—*Held*, that D was entitled to the entire proceeds of sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1627; Dec. Dig. ⇐564.]

[2. *Mortgages* ⇐231.]

An assignment of a mortgage is not required by law to be recorded.

[Ed. Note.—Cited in Singleton v. Singleton, 60 S. C. 235, 38 S. E. 462.

For other cases, see Mortgages, Cent. Dig. § 599; Dec. Dig. ⇐231.]

Before Wallace, J., Newberry, May, 1880.

Action by George W. Williams & Co. against Thomas M. Paysinger, David H. Wheeler, David B. Werts and James M. Sanders. The case is fully stated in the opinion. The facts appear only in the report of the referee. He reports that at the time the new notes and mortgage were given by Sanders to Paysinger, these securities were intended to satisfy the old mortgage, and that the clerk of the court was requested to mark the former mortgage satisfied; but it nowhere appears in the brief whether such entry of satisfaction was ever made.

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*Mr. T. S. Moorman, for appellant.

Mr. L. J. Jones, contra.

April 18th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This action was commenced against Thomas M. Paysinger alone for the purpose of foreclosing a mortgage of a tract of land known as the "Santee Place." Before sale, D. H. Wheeler and D. B. Werts, who claimed to hold other mortgages on the same tract of land, were made parties. It appears that one Stephens sold the land to James H. Sanders for $1550, November 22d, 1869, and took from Sanders three notes and a mortgage to secure the purchase money. The mortgage was recorded January 19th, 1870. Stephens assigned the notes and mortgage to Paysinger, and he assigned them to defendant Wheeler January 20th, 1870, as collateral security for a debt due by Paysinger to Wheeler. The mortgagor, Sanders, wished to cultivate the place in the year 1870, and, to enable him to do so, Paysinger stood as his surety for supplies, and, on February 3d, 1870, in consideration thereof, Sanders executed new notes and mortgage to Paysinger, the notes being for the same sums and payable at the same times as the originals assigned to Wheeler, which were not taken up, (Paysinger stating that they were at his house, which seemed to satisfy Sanders,) but they were to have the original mortgage satisfied.

This second mortgage was recorded February 15th, 1870. Sanders failed to make the first payment on these new notes, and in satisfaction of the debt delivered to Paysinger the title deed for the land which he had received from Stephens and also surrendered to him possession, but did not make a deed to Paysinger. There is no evidence that Sanders had notice of the assignment of the first mortgage to Wheeler. Having taken possession, Paysinger, March 22d, 1871, mortgaged the land to D. B. Werts, and, June 23d, 1871, executed another mortgage to George W. Williams & Co., and it was under this last mortgage that these proceedings were instituted and the land sold as stated.

The issues were referred to Thomas M.

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Lake, as special *referee, who held that the second notes and mortgage given by Sanders to Paysinger did not operate as a satisfaction of the first notes and mortgage assigned to Wheeler, and that Paysinger did not have such title in the land as to enable him to give a legal mortgage to Werts or George W. Williams & Co., to the detriment of the claim of Wheeler, who was entitled to the proceeds of sale on the mortgage assigned to him.

Judge Wallace confirmed the referee's report, and Sanders and Werts appeal to this court on the following exceptions:

"Because the presiding judge erred—

"1. In overruling the exceptions of these defendants to the report of the referee herein and confirming said report.

"2. In deciding 'that the proceeds of the sale of the tract of land covered by D. H. Wheeler's mortgage be paid over to him,' when it appeared that Sanders had made satisfaction to Paysinger of said mortgage without notice of its assignment to Wheeler, and that Werts, knowing of such satisfaction, accepted from Paysinger a mortgage of this land.

"3. In refusing to order, as a part of his decree, that the said mortgage and the notes thereby secured be canceled and delivered up to Sanders, while, as the presiding judge held, Sanders was fully discharged from them when, for the express purpose of paying them, he surrendered to Paysinger, without notice from Wheeler, the land, with possession."

When Paysinger, for valuable consideration, assigned to Wheeler the first notes and mortgage of Sanders, he transferred the title and placed it beyond his control. He could not, afterwards, receive payment on the notes or enter satisfaction on the mortgage. "An entry of satisfaction by a mortgagee after he has parted with his interest in the security, will not discharge the mortgage in favor of one who has acquired an interest in the land before the discharge was made." 2 Jones on Mort. 957; Hill. on Mort. 517; Muller v. Wadlington, 5 S. C. 346; Lynch v. Hancock, 14 S. C. 66.

But it is said that Sanders had no notice of the assignment to Wheeler; that at least he is an innocent party who had the right to deal with Paysinger as the owner of the first mortgage, and he must be protected. If it is

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meant by this that in order to protect *the rights of Sanders the second notes and mortgage must stand as against Wheeler, it is difficult to understand how this transaction can be good as to Sanders while it is bad as to Paysinger. Notice to the mortgagor of the assignment is not necessary to its validity. There is no law requiring the assignment of a mortgage to be recorded, and if it had been put on record it would not have amounted to constructive notice. "The doctrine of constructive notice by recording, is not to be extended to all papers which are, in fact, recorded, but only to those which are authorized or required to be recorded." 1 Story's Eq. Jur. 404; Harper v. Barsh, 10 Rich. Eq. 149. Besides, if it had been necessary to record this assignment, the time for recording had not expired when the new notes and mortgage were executed—only fourteen days after the assignment was made.

Although there is no proof that Sanders had actual notice, we do not consider him as without fault in the matter. The circumstances were enough to put him on the inquiry. The first mortgage had been given by Sanders to Stephens, who had assigned to Paysinger, and he to Wheeler. Neither the notes nor the mortgage were before the parties at the time of the execution of the new notes and mortgage. * * * Sanders knew that it was an unusual proceeding to replace old notes secured by mortgage by others for precisely the same amounts, and another mortgage by the same party on the same tract of land, and that should have suggested inquiry as to the purpose. As was said in the case of Lynch v. Hancock, supra: "Common prudence would have suggested the propriety of an inquiry as to whether all the bonds had been paid or the lien to secure their payment properly released."

Sanders executed the new notes and mortgage in the place of the old ones, without taking up the latter, or, indeed, seeing them. The referee states that Paysinger said "they were at his house, which seemed to satisfy Sanders." It seems to us he was too easily satisfied. "On making a payment upon a mortgage, the debtor should always require the production of the note or bond secured by it, otherwise it may turn out that this evidence of the debt has been assigned." 2 Jones on Mort. § 956. "Where a recorded mortgage is discharged by a person other

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than the *mortgagee, the person paying the money, and all subsequent purchasers as well, are bound to inquire what authority he

had to discharge it, and are chargeable with the notice of such facts as, by proper inquiry, might have been ascertained." 2 Jones on Mort. § 959; Sworthout v. Curtis, 5 N. Y. 301. Paysinger was not the mortgagee. There was enough to put Sanders on the inquiry, and he must be held to have had notice of everything that due diligence would have discovered. But if he had no notice, actual or constructive, as he paid nothing, we do not see how he can be injured by the order directing the proceeds of the tract of land to be paid towards satisfaction of the original notes given for the purchase money. It seems to be conceded that this is all that will be realized.

The second notes and mortgage of Sanders, given for the purpose of discharging the original notes and mortgage after they were assigned to Wheeler and without his knowledge, are without consideration and void; and the original notes and mortgage assigned to Wheeler being unaffected thereby and the oldest lien, must be first paid out of the proceeds of the sale of the land.

It appears that it will require the whole net proceeds of sale to satisfy the mortgage assigned to Wheeler. It will, therefore, be unnecessary to consider whether Paysinger had such title as to enable him to execute good and legal mortgages to Werts and George W. Williams & Co.

The judgment below is affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 175

(Case No. 1028.)

REEDER & DAVIS v. DARGAN.

(November Term, 1880.)

[1. *Mortgages* ⇐199.]

A mortgagor died in possession of the mortgaged land, which continued in possession of his widow and son, as his heirs-at-law, until sale under foreclosure of two mortgages, the older of which was assigned for value to the widow after her husband's death, and received

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all of the proceeds of sale. *The junior mortgagees, by amended complaint served some time before the sale, demanded an accounting by the widow for rents and profits, without allegations that the land was insufficient to pay this mortgage, or that the mortgagor was insolvent, and without prayer for the appointment of a receiver or other like relief. *Held*, that this demand for rents and profits could not be sustained.

[Ed. Note.—Cited in Hardin v. Hardin, 34 S. C. 80, 82, 12 S. E. 936, 27 Am. St. Rep. 786.

For other cases, see Mortgages, Cent. Dig. § 513; Dec. Dig. ⇐199.]

[2. *Mortgages* ⇐3.]

The difference between a mortgage at common law and under the act of 1791 (5 Stat. 170), stated.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 3; Dec. Dig. ⇐3.]

[3. *Adverse Possession* ⇐43.]

[Cited in Blackwell v. Ryan, 21 S. C. 123; McSween v. McCown, 23 S. C. 351, to the point that when there is no new entry, but the heir is in as of his ancestor's possession, the possession of the heir is that of the ancestor.]

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213–224; Dec. Dig. ⇐43.]

[This case is also cited in Warren v. Raymond, 17 S. C. 200, without specific application.]

Before Hudson, J., Darlington, March, 1880.

Hon. A. P. ALDRICH, judge of the Second Circuit, sat in the place of Mr. Associate Justice McIVER, who had been of counsel.

The case is stated in the opinion, and other facts will be found in the Circuit decree.

The amended complaint was as follows:

"The plaintiffs, by way of further amendment to their complaint herein, by permission of the court, allege—

"That the defendant, Ann D. Flinn, has remained in possession of the mortgaged premises described in the complaint since the death of her husband, H. K. W. Flinn, early in the year 1872, and has received the rents and profits therefor and applied them to her own use and behoof, and has also permitted the turpentine trees to be boxed and used for the making of turpentine, stave timbers and small wood to be cut for the making of hoops and staves, and has received and applied to her own use the rents, incomes and profits arising therefrom. And plaintiffs allege that said defendant is responsible to them as mortgagees for all such rents, profits and incomes since the death of the mortgagor, the said Henry K. W. Flinn.

"Wherefore plaintiffs demand judgment that the said Ann D. Flinn do account for said rents, profits and incomes, and for the costs hereof."

The answer admitted the facts stated, but alleged that the possession was retained and the acts done as heir-at-law of her husband, and denied accountability for rents and profits. She further alleged that she was not the mortgagor, and had never been the tenant of the mortgagor.

The Circuit decree was as follows:

The history and character of the main con-

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tention in this action *is fully set forth in the case as reported in 6 S. C. 216, and a new recital is unnecessary here. Under that judgment all questions are put at rest except the right of Ann D. Flinn, widow of H. K. W. Flinn, to dower in the mortgaged premises, and the question of her liability for rents and profits.

By a subsequent decree of the Circuit Court, her right to dower has been adjudged to her, an assignment made, and the mortgaged premises sold under a decree or order conformable to the judgment of the Supreme Court. The only remaining question to be

adjudged is that of her liability to account to the plaintiffs for the rents and profits of the mortgaged premises.

To sustain this claim much stress is laid by plaintiffs' counsel upon the fact that, pending the suit to foreclose this mortgage, Ann D. Flinn, during the life of her husband and subsequent to his death, claimed the lands adversely to the plaintiffs' mortgage. In this claim her husband acquiesced, and, to support it, had executed a declaration of trust in favor of his wife. It is insisted that by this course of conduct, H. K. W. Flinn became a mortgagor out of possession; and that being such, the fee vested in the plaintiffs under the proviso of the act of 1791; and that the mortgage thenceforth became as a mortgage at common law, conferring upon the mortgagees the right of possession, and the right to sue for the rents and profits.

To this it is sufficient reply to say that during the lifetime of H. K. W. Flinn, he remained in undisturbed possession of the mortgaged premises, and, after his death, his widow and child continued in possession until sale made under judgment of foreclosure. They were thus actually in possession, and cannot be said to have been ever constructively out of possession.

The claim of the wife to a title paramount to that of the mortgagor, her husband, and to the right of the mortgagees, does not and cannot change the fact of actual possession and occupancy. This remained in Flinn until death, and continued in his heirs-at-law until sale made. The claim of Mrs. Flinn was decreed invalid by the Supreme Court, and the land was sold as the property of her husband. In answer to the claim for rents and profits, Mrs. Flinn admits that she received the same, but alleges that she did so as heir-at-law of her husband, and is not

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account*able to plaintiffs therefor. And upon this issue thus presented, we think the decision of the question must turn, regarding the mortgage, not as one at common law, but the usual statute mortgage under the act of 1791, a mere security for the debt.

Under this view we are to answer this question: Has a mortgagee, after condition broken, and pending action to foreclose, a right to demand of the mortgagor or his heirs-at-law compensation for their use and occupation, or rents and profits?

In England, and those of the United States which retain her law of mortgages, the mortgagee could, under proper proceedings and sufficient allegations pending foreclosure, obtain the appointment of a receiver empowered to collect of tenants the rents and profits of mortgaged premises to be accounted for at the termination of the suit. But even under that law, if the mortgagee suffered a decree of foreclosure and a sale to be had without this precaution, his remedy was gone.

Much of the learning appertaining to the law of mortgages, and the relative right of mortgagor and mortgagee, and especially relating to rents and profits, found in text books and judicial decisions, is inapplicable to mortgages in this state, because the nature and legal effect of the conveyance is radically changed by statute. A mortgage with us is a mere security for debt, and the mortgagee is, as against the mortgagor or his heirs in possession, never entitled to possession upon forfeiture, but only by becoming a purchaser at a foreclosure sale. The right to possession and entry is, under the common law, the foundation of the claim to rents and profits.

This fundamental basis of the claim does not and cannot exist under our statute, which gives the right to the use and occupation, rents and profits, to the mortgagor, in whom remains the legal estate, and to the mortgagee is given the right to the money and interest. Yet under our law a case may arise where a mortgagee might subject the rents and profits to the payment of his debts. For example, if the premises be actually let to rent by the mortgagor, and the plaintiff allege that the land is inadequate for the payment of his debt, upon a proper showing made, he might have a receiver appointed to collect the rent from the tenants; but it will be difficult to find a single case in which

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it *is held that a mortgagee has been allowed in his foreclosure action to demand against a mortgagor in possession an account for rents and profits, and to recover judgment therefor after foreclosure and sale.

This would be equivalent to a recovery for use and occupation against the mortgagor, which use and occupation is guaranteed to him by our law, unless otherwise stipulated for in the instrument of conveyance. Until sale made, the land and usufruct is the property of the mortgagor, whilst the debt and interest belong to the mortgagee.

In the present case the mortgage has been foreclosed and the land sold; the rents and profits, if any, have been received by the heir-at-law, Mrs. Flinn, whilst the plaintiffs omitted to make the proper allegations in the complaint upon which to found a rightful claim to rents, and failed also to take proper steps to arrest the payment of rents by the tenant to their landlord. Under this state of things we do not think a judgment can go against the widow, Ann D. Flinn, for the value of the rents. She is not accountable.

We think we are fully supported in this view of the law by the doctrine of Mathews v. Preston, reported in note to Boyce v. Boyce, 6 Rich. Eq. 307; and by the law as laid down in Jones on Mort., vol. 1., §§ 669, 670. This judgment might be enlarged by copious extracts from these authorities, but we deem it sufficient to point to the source of doctrine.

We deem these authorities conclusive of the question.

It is therefore adjudged that Mrs. Ann D. Flinn is not accountable to the plaintiffs for the use and occupation, rents and profits of the mortgaged premises; and that this cause of action in the complaint be dismissed.

Plaintiffs appealed.

Mr. B. W. Edwards, for appellant.

1. From the time of the execution of the trust by H. K. W. Flinn in favor of his wife, Ann D. Flinn, she held adversely to the title of the mortgagee: and the issue raised in her answer was that of adverse title and adverse possession. And the plaintiffs having prevailed in the issue, are entitled to

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recover rents and *profits. 1 Jones on Mort., § 710; 1 Strob. Eq. 354, 355; 5 Rich. Eq. 268.

2. When Flinn declared himself in possession of the mortgaged premises as his wife's separate estate, by the solemn formalities of a deed, he declared himself out of possession as mortgagor, and holding as tenant of the trust estate: and Mrs. Flinn, holding the possession after his death under the adverse claim, was liable to suit for the possession by the mortgagees, and also for rents and profits. 1 Jones on Mort., § 672; 1 Hill's Eq. 497, 499; 11 Rich. 686; Rice's Eq. 387; 2 S. C. 483.

And though at law this principle only enures to the benefit of the first mortgagee, yet, while she held adversely to all the mortgagees, the plaintiffs have a right, in equity, to demand rents and profits in payment of the first mortgage for the relief of the land, which was the only source from which they could receive payment. 6 Rich. Eq. 307, 321-2.

3. After Ann D. Flinn became the purchaser of the Edwards mortgage, she was a mortgagee in possession, and had a right to rents and profits in extinguishment of her mortgage; and, having two funds from which she could satisfy her mortgage, plaintiffs could require her first to resort to the rents and profits in relief of the lands. 1 Hill. on Mort. 335, 344, 439, 442, 444; 1 Jones on Mort., § 728; 2 Id., §§ 1114, 1119.

And having received the entire amount of her mortgage, principal and interest, from the sale of the lands and the administrator of the mortgagor, she must account to plaintiffs for rents and profits received by her and not applied to her mortgage, upon the principle of subrogation. McM. Eq. 13; 1 Hill. on Mort. 338; 1 Jones on Mort., § 725; 2 Id., § 1118.

4. By every act of Ann D. Flinn she has claimed adversely to the heir-at-law—first, claiming the fee under the declaration of trust and independent of it; second, claiming as mortgagee while the mortgagor was out of possession; and again, claiming dower concurrent with her answer claiming to hold as heir-at-law. And, by all rules of equity, she is liable to account to the plaintiffs—the rule in equity being different from the rule of law in respect to the right of a junior

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mortgagee to claim an account *of rents and profits. 1 Hill. on Mort. 170, 326, 329, 464; 2 Bail. 103; 4 Rich. 516; 13 S. C. 174.

5. And this action is sufficiently formal for the recovery. It meets all necessary requirements; and all necessary parties are before the court. Ann D. Flinn brought herself into the cause, seeking of the court equitable relief. She had notice of our demand years before she abandoned the claim of holding adversely to the mortgagor, and she does not profess to have paid the incomes to the mortgagor. Her receipt of them makes her a trustee of a fund applicable to the mortgage creditors' claims. 1 Hill. on Mort. 446, 467, 469; 1 Jones on Mort., § 775; 2 Id., §§ 1115, 1516, 1517, 1523.

She voluntarily interposed the only obstacle to the plaintiffs' recovery of foreclosure six years before the sale was made; gets the interest on her mortgage debt that was running during that period; actually commits waste; and appropriates all incomes from the land to her own use, without giving credit upon her mortgage. And she cannot be permitted in a Court of Equity to gain this double advantage, and inflict upon the plaintiffs double injury, by shifting positions and double resorts. 6 Rich. Eq. 308, 309; 1 Hill. on Mort. 223, 227, 230, 465; 1 Jones on Mort., §§ 671, 684, 687, 696; 2 Id., §§ 1120, 1121.

Mr. R. W. Boyd, contra.

April 18th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. On April 23d, 1870, H. K. W. Flinn executed a mortgage of twenty-four hundred acres of land to the plaintiffs to secure a debt of $5500. In 1871 Ann D. Flinn, the wife of H. K. W. Flinn, having set up some claim to the land, was made a party to the complaint for foreclosure which had been instituted. A. F. Edwards held a prior mortgage, and he also was made a party. Pending action H. K. W. Flinn died, January, 1872, and the suit was continued against his administrator, T. George Dargan. Soon after the death of Flinn, Ann D. Flinn became the owner of the Edwards mortgage. The plaintiffs amended their complaint November 5th, 1873, claiming of Ann D. Flinn rents and profits of the mortgaged premises.

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*The case came up on appeal, and this court decided that the land mortgaged belonged to H. K. W. Flinn, the mortgagor, and decreed foreclosure against him; but the right which had been set up for rents and profits from Mrs. Flinn was reserved. Reeder & Davis v. Flinn, 6 S. C. 242.

The sale under the decree of foreclosure was made December, 1877, and the proceeds of sale paid to Mrs. Flinn, the owner of the

Edwards mortgage, but they were not sufficient to satisfy the mortgage. From the death of her husband, in 1872, Mrs. Flinn and her infant son continued to reside on the land and received the rents and profits thereof until the sale under the order of foreclosure, 1877, and the plaintiffs, junior mortgagees, claim that she should account for the rents and profits towards satisfaction of her mortgage. The case was heard by Judge Hudson, who decreed that Mrs. Flinn was not bound to account for the rents and profits prior to the sale under the order for foreclosure, and the appeal comes to this court upon the single question of her liability.

The points made, arising out of the fact that Flinn and his wife in the litigation claimed that the latter was really the true owner of the land mortgaged, will not be considered. Claims set up and not established cannot alter the rights of the parties. This court decided that the land belonged to H. K. W. Flinn, and had never been the property of his wife. That fixed the relative positions of the parties from the beginning, and their respective rights must be determined only upon that view. H. K. W. Flinn was the mortgagor in actual possession, and Ann D. Flinn was his wife, living with him until his death, in 1872. After his death she and her son simply remained as heirs-at-law of the deceased mortgagor. When there is no new entry, but the heir is in as of his ancestor's possession, the possession of the heir is that of the ancestor. King v. Smith, Rice 15; Dillard v. Philson, 5 Strob. 215. So that the single point is whether a mortgagor (or, after his death, his heirs) in possession of the mortgaged premises, is liable to the mortgagee for rents and profits upon a complaint for foreclosure which makes no allegation that the land is insufficient for his security without resort to the rents and profits, or that the

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mortgagor is insolvent, and *which contains no prayer for the appointment of a receiver or other relief of that character.

At the common law a mortgagee was, immediately after the execution of the mortgage deed, seized of an estate in fee, and the mortgagor was considered in the language of some of the cases as his tenant at will. The mortgagee was deemed the absolute legal owner, and had the right to enter, and could maintain a possessory action against the mortgagor. If there were covenants in the mortgage deed, by which the mortgagor was entitled to retain the possession, the Court of Equity would protect him in the enjoyment of such right.

But under our act of 1791 a mortgage in this state is a very different thing from the mortgage at common law. That act declares "that no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by mortgage is elapsed, but the mortgagor shall still be deemed owner of the land and the mortgagee as owner of the money lent or due, and shall be entitled to recover satisfaction for the same out of the land," &c. Gen. Stat. 536. The effect of this act was to change a mortgage from being a conveyance on condition to a mere lien as a security for a debt. State v. Laval, 4 McC. 340; Mitchell v. Bogan, 11 Rich. 703. It is not stated that the mortgage of plaintiffs has any special stipulation upon the subject of rents and profits. Assuming it to be in the usual form and subject to the act of 1791, we do not see upon what ground the plaintiffs can claim to have any legal right either to the possession of the premises or rents and profits thereof before the sale under the decree in foreclosure. Such claim rests upon the right of entry and possession at common law, and, if allowed, would be in the very face of the act that "the mortgagor shall still be deemed owner of the land."

But it is urged that upon this subject the doctrine of equity is different, and that this is a proceeding in the nature of a bill in equity on the part of mortgages whose security is not adequate to make the mortgagor account for rents and profits as auxiliary to the land in paying the debt. The general rule certainly is that equity follows the law,

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and we suppose that the *authorities relied upon to support the alleged equity doctrine are taken from those states where the mortgage still retains all its common law characteristics. The case cited from our own reports of Stoney v. Shultz, 1 Hill's Eq. 499 [27 Am. Dec. 429], was a case falling under the exception in the act of 1791, where "the mortgagor was out of possession." Johnson, J., in delivering the opinion of the court, said: "I take it, therefore, as clear, that Shultz, the mortgagor, being out of possession, the rights and powers of Brooks as mortgagee, in respect to the purchases of the lots in possession under Shultz must be determined according to the rules of the common law, and according to that he had a right to receive and retain the rents, having given notice of the mortgage to the tenants in possession." It is true that in the case of Matthews v. Preston, note to Boyce v. Boyce, 6 Rich. Eq. 307, something is said which would seem to indicate that under some circumstances the Court of Equity might decree rents and profits in the land as incident to, and part of, the security given. The court says: "The mortgagee in this court [equity], claiming an account of the rents and profits must stand upon the general doctrine laid down by Coote on Mort. 342, that although in equity the mortgagor remains the actual owner of the land until foreclosure, entitling

him while in possession to the receipt of the rents and profits without account, yet equity regarding the land, with all its produce, as a security for the mortgage debt will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee." Yet in the same case the view we entertain is expressed in terms which we are content to adopt. "The mortgagor in possession is not liable to the mortgagee on account of the rents. There is no case that goes so far, and the authorities establish a contrary doctrine, and I should have no difficulty in adopting the conclusion that the purchaser of the equity of redemption in possession occupies the same relations to the mortgagee and upon the same principle must be equally exempt. No tenancy in either case exists or can be implied. In such a case the rent as an auxiliary fund to aid in the satisfaction of the debt is beyond the reach of the mortgagee, though his security from the corpus of the estate may be inade-

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*quate. At least it is so in the form of proceeding which has been adopted in this case."

Jones on Mort. § 771, states the principle as we understand it: "A mortgagee has no specific lien upon the rents and profits of the mortgaged land unless he has in the mortgage stipulated for a specific pledge of them as part of his security. He has no claim upon them until he has the right to take possession of the premises under his mortgage."

The Circuit decree is affirmed, and the appeal dismissed.

SIMPSON, C. J., and ALDRICH, A. A. J., concurred.

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15 S. C. 185

(Case No. 1030.)

COOKE v. PENNINGTON.

(November Term, 1880.)

[1. *Mortgages* ⇐449.]

Where the two plaintiffs alleged that they were executors of the mortgagee, and the answer did not properly deny this allegation, and the original letters testamentary of one executor were put in evidence by consent, and a certified copy of the letters of the other executor were introduced without objection, the court will not consider the objection made at a late stage of the case, that there was no proof of the plaintiffs' capacity to sue.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1313; Dec. Dig. ⇐449.]

[2. *Mortgages* ⇐489.]

Where action to foreclose a mortgage is brought after default in the payment of interest due, but before the principal debt is payable, and such principal debt becomes due before decree rendered, the judgment should be for the whole amount of debt and interest.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1429; Dec. Dig. ⇐489.]

[3. *Taxation* ⇐788.]

He who claims title under a tax deed must prove his title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559–1569; Dec. Dig. ⇐788.]

[4. *Taxation* ⇐761.]

The recitals in a tax deed for five hundred and eighty-six acres, stated that the land had been sold two days before the time advertised for sale, and that only one acre was bid in by the purchaser. *Held*, that the deed which was prima facie but not conclusive evidence of good title, showed on its face that there had been no valid sale or transfer of title.

[Ed. Note.—Cited in State v. Pinckney, 22 S. C. 509; Shell v. Duncan, 31 S. C. 560, 572, 10 S. E. 330, 5 L. R. A. 821; Dixon v. Hockady, 36 S. C. 64, 15 S. E. 342; Heyward v. Christensen, 80 S. C. 149, 61 S. E. 399.

For other cases, see Taxation, Cent. Dig. § 1510; Dec. Dig. ⇐761.]

[5. *Taxation* ⇐739.]

One made a party defendant to an action for foreclosure, as a claimant of the land under tax titles, cannot be required to account for the rents and profits while he was in possession of the mortgaged premises, the complaint making no such demand.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1476; Dec. Dig. ⇐739.]

[6. *Costs* ⇐13.]

This court refused to disturb the order of the court below as to the costs of this action on Circuit and former appeals—costs in an equity case being largely in the discretion of the Circuit judge.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 21; Dec. Dig. ⇐13.]

[7. *Taxation* ⇐819.]

[There is no warranty in tax sales, and the doctrine of caveat emptor applies to such sales in its fullest extent.]

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1619; Dec. Dig. ⇐819.]

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*Before Mackey, J., Richland, November, 1879.

To the case as stated in the opinion, it will be necessary to add very little. The complaint alleged the death of the mortgagee, that he had left a will appointing the plaintiffs executors, and that they had duly qualified, &c. Neither the will nor any copy of it was offered in evidence, and the only evidence submitted of its existence and proof, is that contained in the recitals in the letters testamentary.

The tax deed is as follows:

State of South Carolina, Richland county. Whereas, by the provisions of Section 17, Chapter XIII, Title III., General Statutes of the said state, the county auditor of each county in the said state is authorized and required, annually, to cause the list of delinquent lands in his county to be published weekly for two weeks in one newspaper in his county, and to which list there shall be attached a notice in the following form, to wit: Notice is hereby given that the whole of the several parcels, lots and parts of lots of real estate, described in the preceding

list, or so much thereof as will be necessary to pay the taxes, penalties and assessments charged thereon, will be sold by the treasurer of Richland county, South Carolina, at his office in said county, on the 7th day of May, A. D. 1873, unless said taxes, assessments and penalties be paid before that time; and said sale will be continued from day to day until all of said parcels, lots and parts of lots of real estate shall be sold or offered for sale.

And whereas, there appeared on the tax duplicates of Richland county, for 1872, lot, buildings, five hundred and eighty-six acres of land, valued at $1500, assessed in the name of John M. Pennington, the tax, cost and penalties on the same being $34.29. And whereas, the above John M. Pennington neglected to pay to C. H. Baldwin, treasurer of Richland county, the above tax, cost and penalties as prescribed by law, and in accordance with an act of the general assembly, "providing for the extension of time for the payment and collection of taxes for the fiscal year commencing November 1st, 1872, approved January 16th, 1873," the above real estate was duly advertised as de-

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lin*quent, in the Daily Union and Herald, to be sold as above required.

And whereas, at the aforesaid sale, so held by C. H. Baldwin, treasurer of Richland county, on May 5th, 1873, one William Price promised to and did pay to said C. H. Baldwin, county treasurer, the sum of $34.29, being the tax, cost and penalties on the above-described property, and assessed in the name of the said John M. Pennington, for the least quantity bid by any person then and there present, viz., one acre, and to whom a delinquent land certificate was issued, specifying the above fact.

And whereas, in accordance with an act of the general assembly entitled "An act to amend an act entitled 'An act providing for the assessment and taxation of property,'" passed September 16th, 1868, and all acts amendatory thereto, approved March 12th, 1872, it is the duty of the county auditor to make and deliver to any purchaser, his heirs or assigns, a deed of conveyance for real estate so sold, and not redeemed in accordance with law by the party in whose name it was assessed, or any other person interested therein, within ninety days from date of said sale, on payment of the legal fee and surrender of the aforementioned delinquent land certificate.

And whereas, the real estate so sold as aforesaid has not been redeemed within the time and in the manner so as aforesaid prescribed by law. Now, therefore, I, A. L. Solomon, county auditor of the county of Richland, in the state aforesaid, in consideration of the premises, and in further consideration of the sum of $2, good and lawful money of the United States, to me in hand paid by the said William Price, for and in behalf of the State of South Carolina, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said William Price, all that certain lot, tract or parcel of land, bounded and described as follows, to wit: Five hundred and eighty-five acres in Lower township; all the plantation or four several tracts of land, viz., tract "G," containing one hundred acres; tract "H," containing one hundred and fifty acres; "I," containing three hundred acres; and "K," containing thirty-six acres. Four said tracts contain, in the whole, five hundred and eighty-six acres, more or less, as is more fully described in a

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*plat made thereof in April and May, A. D. 1843, by John N. Barrillon, deputy surveyor, to which reference is hereby made, and to be taken as part of these presents; said land being bounded on the north by lands of William Braddy, formerly owned by Moses Braddy, south by the Congaree river, east by the New Congaree river and the Old Congaree river, separating it from Butler's island, and on the west by the Congaree river. The same being situate and lying in the county of Richland, in the state aforesaid.

Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining.

To have and to hold all and singular the premises before mentioned unto the said William Price, his heirs and assigns forever.

And I, A. L. Solomon, county auditor as aforesaid, do hereby bind the State of South Carolina to warrant and forever defend all and singular the said premises unto the said William Price, his heirs and assigns, against the said State of South Carolina, and against every person and all persons whomsoever, lawfully claiming or to claim the same or any part thereof.

Witness my hand and the seal of the state, August 23d, in the year of our Lord 1873, and in the ninety-seventh year of the independence of the United States of America.

A. L. Solomon.

A. R. C.

T. H. Blackwell.

E. J. Terry.

This deed was duly probated and recorded.

Judgment for plaintiffs. Defendants appealed.

Mr. J. E. Bacon, for appellants.

Messrs. Baxter & Seibles, contra.

April 18th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action by Thompson H. Cooke, executor, and Jane M.

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Zeigler, executrix of Daniel *Zeigler, deceased, against John M. Pennington and William

Price, for foreclosure of a mortgage of real estate, given by John M. Pennington to the testator and to the said Jane M. Zeigler, bearing date February 26th, 1872. Price was made a defendant, on the ground that he claimed to have purchased the land at a sale for taxes in May, 1873, and was in possession. The case has been to this court twice before upon preliminary questions as to the effect of admissions and the manner of taking the testimony, &c. 7 S. C. 385; 9 S. C. 83.

After the case was remanded the last time it was heard by Judge Mackey, who overruled the defences; held that the alleged tax title set up by the defendant, Price, was absolutely null and void, and that he should account for rents and profits, pay costs, &c., and decreed against the defendant, Pennington, foreclosure and sale of the premises towards satisfaction of the debt, $2385.53.

The defendants appeal to this court. The exceptions are long and numerous, and will not be considered seriatim, but according to subject matter.

1. It is urged that the plaintiffs had not legal capacity to sue, neither the will of Daniel Zeigler nor the qualification of the executors having been proved. It appears in the case that the attorney for the defendants consented that the original letters testamentary of Jane M. Zeigler, as executrix of the will of Daniel Zeigler, deceased, issued by the judge of probate for Orangeburg county, August 12th, 1872, might be regarded as in evidence. It also appears that a certified copy of the letters testamentary of Thompson H. Cooke, as executor of the will of Daniel Zeigler, was offered in evidence without objection at the time. These correspond, in all respects, except that one stated that the will was proved at Orangeburg, August 12th, 1872, and the other August 12th, 1873. This was manifestly a clerical mistake. The answer of defendants did not deny, in terms, that the plaintiffs were, as they claimed to be, executors, but stated that they "knew nothing of the will or the appointment and qualification of the plaintiffs as executors thereof." That was not such a denial as the code requires of "each material allegation controverted by the defendant." Be-

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sides, this litigation has *been going on for years, and this objection, so far as we can see, is now made for the first time.

2. The objection is made that no right of action had accrued to the plaintiffs at the date of the summons and complaint; that at that time they had no right to elect the whole mortgage debt to be due, and sue for and recover the same. The bonds were due and payable January 1st, 1876, with interest from January 1st, 1872, "to be paid annually." The interest for the year 1872 had been paid, but the interest for the year 1873, $105, was in arrear on January 23d, 1874, when the complaint was filed, which prays judgment for the whole debt, as follows: "That as more than twenty days has elapsed since said interest became due and payable, the plaintiffs elect the whole principal sum to be immediately due and payable," and demand judgment for the whole principal and interest. When the final decree of foreclosure was rendered, April 15th, 1880, both bonds were past due, and the judge rendered his decree for the whole amount of principal and interest. Was that error?

Usually the terms of the mortgage itself determine when the right to foreclosure accrues. No copy of this mortgage is in the case; but assuming that it was in the usual form, failure to pay a year's interest, which was payable annually, was a default upon which a right to foreclose, at least for the year's interest in arrear, accrued, and all the bonds being due at the time of the final hearing, it was not error to give judgment for the whole then due. "When a mortgage or trust deed authorizes a sale to be made upon the happening of any default, a failure to pay interest when due is a default within the meaning of the deed, although this does not show when the interest is payable, or what the rate of it is, except by reference to the note secured. * * * Unless so provided, the foreclosure can extend no further than to enforce satisfaction of such part of the debt as is due at that time, and for that purpose to sell as much of the mortgaged property as may be necessary. Courts of Equity, without the aid of any statutory provision to that effect, may generally retain jurisdiction of the case until the subsequent installments become due and then decree a further sale; and, under the general doctrine and practice of equity, may direct a sale of

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the whole mort*gaged estate. * * * If other installments become due after the suit is commenced and before final hearing, these may be included in the decree without filing a supplemental bill if they are set out in the original bill and are included in the prayer for decree." 2 Jones on Mort., §§ 1174, 1181; Magruder v. Eggleston, 41 Miss. 284.

3. The defendant, Price, set up what purported to be a tax deed of the mortgaged premises, "as a complete bar to the plaintiff's claim." A copy is in the case. From the deed itself and its recitals, the Circuit judge finds, among others, the following facts, which, from a careful inspection of the paper, we think are well sustained.

8. "That if said list was free from the defects mentioned, the 'notice' attached thereto declared that the land therein described would be sold on May 7th, 1873, whereas the only proof before the court shows, and the court so finds, that the alleged sale, under which the defendant, William Price, claims, was held on the fifth day of May, 1873.

9. "That at said alleged sale only one acre

of land was bid off by and knocked down to the defendant, the said William Price.

10. "That a certificate for said acre of land was issued by A. L. Solomon, auditor of Richland county, to said defendant.

11. "That on August 23d, 1873, the said William Price surrendered his certificate to said A. L. Solomon, auditor of Richland county, and applied for a deed of the real estate alleged to have been sold as aforesaid.

12. "That thereupon, to wit, on the said August 23d, 1873, the said A. L. Solomon, auditor of Richland county, signed and delivered to the said defendant an instrument purporting to grant, bargain, sell and release unto him, with the usual covenants of warranty, a tract of land therein described, as follows, to wit: 'Four said tracts, embracing in the whole five hundred and eighty-six acres.' And that said instrument was duly made, signed and delivered by said Solomon, county auditor as aforesaid, but that he omitted to seal the same."

From these and other defects, apparent on the face of the deed, the judge held, as matter of law, that the alleged sale by C. H. Baldwin, treasurer of Richland county, on

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May 5th, 1873, was *not a delinquent land sale, and was illegal and void. It is charged that this was error, principally upon the terms of Section 116 of the act of 1874, (15 Stat. 773), which declares that "the deed so made by the county auditor for any real estate sold at delinquent land sale, shall be prima facie evidence of a good title in the grantee," &c. It is insisted that this changed the rule of evidence and thereby shifted the onus upon the plaintiffs to show irregularity in some of the proceedings anterior to the sale; that it was incumbent on the plaintiffs to prove something dehors the deed in order to defeat it. The general rule, certainly, is that he who claims title must prove it. This is, for many reasons, especially true as to tax titles. "The party claiming under this power [to sell land for taxes] is chargeable with notice of every irregularity in the proceedings of the officers. He purchases at his peril, the maxim caveat emptor being rigidly applied to him. The reasons are obvious. The law imputes to every purchaser knowledge of all facts appearing at the time of his purchase upon the muniments of title, which it was necessary for him to inspect in order to ascertain the sufficiency of it. More especially is this doctrine applicable to the purchaser at a tax sale. For, knowing the land to have been sold under color of an authority given by law to a public officer, who is not the proprietor thereof, he is bound to inquire and take notice whether that officer, and all others whose agency is required by the law in the conduct of the proceedings, have proceeded with regularity in the discharge of their duty." Blackwell 66.

The provision in the act of 1874 means no more than what it says, that the deed shall be prima facie evidence of good title; that is, good until the contrary appears, and we know of no reason why the contrary may not be made to appear by recitals in the deed itself as well as from other proof. The deed must be of land "sold at delinquent land sale." The fact that it was so sold cannot be assumed from the existence of the deed itself, but must appear before the law can apply or the party have the benefit of the presumption. It would be intolerable if a bare deed, purporting to be given by an auditor, conveying the land of one man to another, could not be shown, by its own

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terms, to *have no connection with a delinquent land sale, but, on the contrary, to have been executed without proper authority.

The courts have given strict construction to laws of the character of the provision in our act of 1874, and have not extended their operation beyond the very words of the statute. In Illinois an act declared that the deed should "vest a perfect title in the purchaser unless the land should be redeemed according to law or the former owner shall show that the taxes for which it was sold had been actually paid according to law, or that the land was not legally subject to taxation." The Supreme Court of that state, in giving construction to this statute in the case of Garrett v. Wiggins, 1 Scam. 335, "deny that the statute will, by any fair construction, warrant the opinion that the auditor, selling land without authority, could, by his conveyance, transfer the title of the rightful owner. They say that to consummate his authority the law imperatively requires him to publish notice of the time and place of sale; that the publication of this notice is not one of the facts which can be inferred from his conveyance, and, without proof of the fact, the auditor's deed is not evidence of the regularity and legality of the sale, and, consequently, conveyed no title to the purchaser." Blackwell 88.

Without going into the various defects found in this alleged tax sale, it is enough to state that the deed itself contains evidence that the notice of sale was for the seventh, and the actual sale was on the fifth of May, 1873. Speaking of the power of the officer appointed by law to make the sale, the Supreme Court of the United States say: "He may not do anything of himself, and must do all as he is directed by the law under which he acts. He may not, by any misconstruction of it, anticipate the time for sale, within which the owner of the property may prevent a sale of it by paying the demand against him and the expenses which may have been incurred from his not having done so before. This the law always presumes that the owner may do until a sale has been made. He may arrest the uplifted hammer of the auctioneer when the cry for sale is made, if it be done before a bona fide bid has

been made." Early v. Doe, 16 How. (U. S.) 610 [14 L. Ed. 1079].

At the sale Price purchased one acre and

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paid the taxes, costs *and penalties, $34.29, and received his certificate as purchaser of one acre, but on August 23d, 1873, he surrendered his certificate and received title, not for the one acre but for the whole lands, "five hundred and eighty-six acres, more or less." There is no evidence whatever that any of this land, except the one acre, was ever sold at all at delinquent land sales or any other, or offered for sale after the one acre was sold. It would be a reproach to the administration of justice if a deed, executed under these circumstances, should be held to prove itself conclusively, and to transfer the title of one man's property to another.

The complaint did not ask an account for rents and profits, and although the defendant, Price, according to the view taken, was a mere trespasser, we think he cannot be held to account for rents and profits in this proceeding.

In equity suits costs are largely in the discretion of the court. One-half the costs and expenses of the action was directed to be paid out of the proceeds of sale. In the exercise of the discretion vested in him, the Circuit judge directed Price to pay the other half, and we cannot say that this was error.

So far as the decree orders an account for rents and profits, it is reversed, and in all other respects it is affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 194

(Case No. 1031.)

EASON v. MILLER & KELLY.

(November Term, 1880.)

[1. *Judgment* ⇐256.]

Defendants purchased at a foreclosure sale a foundry, in which were certain patterns which the mortgagor claimed, and brought action to recover, alleging and proving their value to be $5000. Defendants claimed that they were embraced in the mortgage and in the foreclosure sale. The trial judge charged the jury that defendants were the purchasers of only such "patterns" as were on the premises at the date of the mortgage. The verdict was: "We find for plaintiff patterns the value of $100."

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*Plaintiff entered up judgment and issued execution for the patterns which were on the premises on the day of sale, or $100 damages. *Held*, that the judgment should be vacated as not being in conformity with the verdict. McIver, A. J., dissenting.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 446; Dec. Dig. ⇐256.]

[2. *Trial* ⇐136.]

[Cited in Hume, Small & Co. v. Providence-Washington Ins. Co., 23 S. C. 200, to the point that where a pleading raises questions of law and of fact the questions of law must be decided by the court.]

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323–327; Dec. Dig. ⇐136.]

[This case is also cited in McMakin v. Fowler, 34 S. C. 287, 13 S. E. 534, as recognizing the right to resort to the judge's charge to ascertain the issues submitted to the jury, and cited and followed in Duren v. Kee, 41 S. C. 171, 19 S. E. 492.]

Before Thomson, J., Charleston, July, 1880.

The case is stated in the opinion, to which should be added the decision of the Circuit judge, which, after a statement of the facts, was as follows:

It is to be observed that it does not appear that any objection was made to the complaint, on the ground that the description of the articles sued for was indefinite, or that any motion was made requiring amendment in this particular.

It has been held, in an action of replevin, to be certain enough to declare for fourteen skimmers and ladles, without saying how many there were of each. Bourne v. Mattaire, 2 Strange 1015, and in the note to this case, referring to other cases, it is said the principle is this, "that the pleading had supplied the defect, because the avowant having avowed the taking, had thereby taken upon himself the knowledge of what the goods were."

Late cases have been decided upon the same principle. In a declaration in replevin, an insufficient description of the goods taken, or of the locus in quo, is cured by the defendants avowing or making cognizance; and it makes no difference that the plaintiff has demurred to the avowry or cognizance. Banks v. Angell et al., 34 E. C. L. 241.

The reason for a definite description is given in the following case, in which it was declared "that in replevin it is extremely material the declaration should inform the sheriff what goods were taken. That a count for taking, quandam parcellam lintei et quandam parcellam papyri, was good, inasmuch as it guided the party as to the nature of the goods taken." Pope v. Tillman, 2 E. C. L. 243.

No damages were given under the instructions of the judge, but patterns described by the plaintiff and admitted by the defendants, were found for plaintiff the value of $100.

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This is not *a verdict for patterns and $100, but a verdict stating the articles and their value.

In this case it was not necessary, as in Bardin v. Drafts, 10 S. C. 497, that an alternative should be stated, from which to imply a value. Here the verdict contains, though in condensed language, an answer to all the issues made; right in the plaintiff to recover the patterns and their value. It is not to be taken as admitted from the above,

that the description of the patterns in the complaint, and the findings of the verdict, are regarded as defective and insufficient. Cases have been quoted in the argument, which support the verdict as sufficient. 10 Mass. 66; [Graff v. Smith's Adm'rs] 1 Dall. 485 [1 L. Ed. 232]; [Laber v. Cooper] 7 Wall. 570 [19 L. Ed. 151].

The verdict, which is but an answer to the issues made, certainly need not be more certain than the description in the pleadings, and in construing a verdict, the court will keep in mind the issues in the pleadings. 3 Wait's Pr. 197.

The case of the City Council against Weikman presents this principle; the opinion of the court states the connection between the issues and the verdict. 2 Spears 375.

The conclusion of the court is, that the verdict in connection with the pleadings, gives the answer required from the jury, in cases of claim and delivery of personal property.

There is no doubt but in the present case the court had the right to direct the jury to find a special verdict. But was the verdict special in fact, or special according to the code? Though called special, it is the common verdict in cases of claim and delivery, when the property is claimed by a defendant.

The instruction of the judge who tried the case, was that, if they, the jury, found for the plaintiff, they should find for the return of certain patterns, assess the value thereof at so much money. The judge then explains what he means in the next sentence, "that gives," he says, "the defendants the right to return the patterns, and pay nothing but costs, or if they think it will be best to keep, they will do so, and pay for them at your assessment."

The verdict answered to his charge, and no exception thereto was taken by any party. When a special verdict is found, the jury submit a statement of facts to the court, for-

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mally or sub*stantially, as follows: "Upon these facts, the jury respectfully leave the 'judgment to the court,' and in a verdict subject to the opinion of the court, the jury state the facts found, subject to the opinion of the court, at a ——— term, upon the questions of law." 3 Comm'rs Code 179.

Nothing of this kind appears in the case, or was required by the charge of the judge. The verdict is special only in the sense that it is peculiar to the actions of detinue replevin, or claim and delivery. In these actions it is required that the verdict for plaintiff should state the property found and its value, instead of a simple finding for plaintiff or defendant, as is the case generally in other actions. The practice for such mode of finding in replevin is old. In detinue, says Tidd, the language of the judgment being in the alternative, that the plaintiff "do recover the goods or the value of them, it is incumbent on the jury to find their value." 2 Tidd's Pr. 887; Impey's Pr. 765.

But where a special finding is required by the judge, it may be waived. The rendering of a general verdict by the jury, and its reception by the court, without objection, either by the judge or the parties, is good, notwithstanding the failure of the jury to find upon certain special questions of fact, upon which the court, in the course of its charge, directed them to find. 3 Wait's Pr. 190; Moss v. Priest, 19 Abb. 314.

The conclusion of the court is that the verdict was general as given in actions of claim and delivery, and that the clerk of the court was not in error in entering and docketing in this case, the judgment according to the verdict.

The statement of the defendants in their answer, lead to the conclusion that the commingling of property was their act, if, in fact, there was commingling. They state the patterns were a part of the property which came into their possession with other goods, and which they kept. In their answer there is no objection that they could not distinguish between the plaintiff's patterns and their own. If the commingling of goods were the act of the plaintiff, it might be a defence to a recovery, unless the plaintiff identified his goods, but such a fact could have little weight in vacating a judgment.

The motion to set aside the judgment and entry thereof, made by the clerk, and quash the execution, is dismissed.

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*Defendants appealed.

[For subsequent opinion, see 18 S. C. 381.]

Mr. J. P. K. Bryan for appellants.

Mr. S. Lord, Jr., contra.

April 25th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The plaintiff, James M. Eason, brought this action (claim and delivery of personal property), and alleged—

1. That he was "owner of —— patterns, of the value of $5000, which goods were, on May 11th, 1879, stored on the premises known as Eason's foundry, Columbus street, Charleston, S. C."

2. That on April 24th, 1879, the defendants, Miller & Kelly, purchased the premises, and on May 11th, 1879, entered into possession of the same, and took possession of said patterns.

3. He alleges unlawful detention, &c.

And prays judgment for recovery of the said patterns, or $5000, their value, in case a delivery cannot be had.

The defendants, Miller & Kelly, answering—

1. Deny ownership of plaintiff.

2. Admit, as alleged, that they purchased premises, and took possession of the patterns mentioned in complaint, and have refused to deliver them.

3. They deny unlawful detention.

They further allege, as new matter, the source of their title: that the patterns mentioned in complaint are their property, through purchase at foreclosure sale, on April 24th, 1879, of Eason's foundry, together "with all the working implements, machinery and tools connected therewith now thereon," the mortgage bearing date April 2d, 1866. And they allege that the patterns mentioned in complaint were a part of the tools and working implements on the premises on the day of sale, April 24th, 1879, and they hold the same through such sale by virtue of the deed of the master.

The case was tried February Term, 1880, Judge Pressley presiding. After evidence was heard and argument, the judge charged the jury in brief, that it was his duty to construe the mortgage. That in law, he held, a pat-

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tern was a "tool or work*ing instrument;" and that the mortgage did cover the patterns used in the foundry when the mortgage was given. And the defendants, Miller & Kelly, bought under the foreclosure sale all the patterns under the mortgage, and those patterns are their property. Further, the court held, as matter of law, that the patterns put on premises after date of mortgage are Mr. Eason's (plaintiff) property.

After deciding these issues of law raised in the pleadings, the judge submitted to the jury the issue for them, as follows:

"The question, therefore, is, how much of the property of this plaintiff, which was not mortgaged, is now in possession of Miller & Kelly. Mr. Kelly says that he values those patterns at $5000. Mr. Lambley (plaintiff's witness) says he values them at $5000. What portion of that $5000 applies to the patterns which Mr. Eason has a right to claim? He has no right to claim any which were there prior to the making of the mortgage. What portion of that $5000 belongs to Mr. Eason? The testimony is conflicting. Mr. Lambley (plaintiff's witness) says the greater proportion of the patterns and the greater proportion in value were there at the time of the execution of the mortgage. Mr. Eason (plaintiff) differs from him and says that the greater portion were put there afterwards. You must decide for yourselves which of these witnesses you will follow. Your verdict must be a special one, as follows: If you find for the plaintiff you will say: 'We find that the plaintiff is entitled to the return of such of the patterns claimed as were not on the premises at the date of the mortgage, and we assess the value thereof at so much money.' That gives the defendants the right to return those patterns and pay nothing but the costs or, if they think it will be best to keep them, they will do so, and pay for them at your assessment. In making your assessment you will settle the matter according to the testimony. You will have to reconcile the testimony of Mr. Eason and Mr. Lambley."

The jury rendered the following verdict: "We find for plaintiff patterns the value of one hundred dollars.

"W. Preston Dowling, Foreman."

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*There was no objection to verdict by court or counsel. No action was taken by either party until the court adjourned, when the plaintiff entered up judgment for "the possession of the personal property described in the complaint, to wit, the patterns which were on the premises on the north side of Columbus street in the city of Charleston, and known as Eason's foundry, on the 11th day of May, 1879, or one hundred dollars in case a delivery cannot be had." An execution was issued for the delivery of possession to James M. Eason of "the patterns which were on the premises, &c., on the 11th day of May, 1879, or one hundred dollars in case a delivery cannot be had."

The defendants thereupon moved, before Judge Thomson, to set aside judgment and quash execution on the grounds—

1. That the judgment was not entered in conformity with the verdict.

2. That the judgment was entered up and execution issued by the clerk without authority of law.

Judge Thomson dismissed the motion, on the grounds stated in his decision.

The defendants appeal to this court on the grounds that his Honor, the Circuit judge, erred—

1. In deciding that the judgment herein was entered in conformity with the verdict.

2. In deciding that the clerk had authority of law to enter up the said judgment on said verdict.

3. In dismissing the motion to set aside judgment and quash execution.

The appeal of the defendants raises, substantially, but one question, and that is: Was the judgment entered by the clerk in conformity with the verdict? If so, then the clerk had authority of law to enter it, (Lynch's Code, § 288,) and the judge would have erred had he set it aside and quashed the execution. If not, then the judge was in error in refusing appellant's motion.

The word "conformity" means agreement —congruity with something else—and, as applied to cases of this kind, its use was intended to convey the idea that the judgment should carry out the intent of the verdict.

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In fact, no other judgment but one *in conformity with the true intent of the verdict would be legal.

The conclusion to be reached, then, in this case, involves the examination of three questions:

First, What does the judgment mean? Second, What does the verdict mean? and, Third, Is there conformity between the two? If so, then this appeal must be dismissed, otherwise the order of the judge must be reversed.

The meaning and intent of the judgment seems to be very clear. Its language is plain and unambiguous. It declares that the plaintiff shall recover the possession of the personal property described in the complaint, to wit, the patterns which were on the premises on the north side of Columbus street, in the city of Charleston, known as Eason's foundry, on May 11th, 1879.

There is no division of the patterns into classes, or numbers, or portions, or as to the different times when these patterns reached the premises, but the whole is embraced—the patterns, which were on the premises on May 11th, 1879. This covers all that were there. There can be no doubt about this; and if the verdict was as unambiguous as the judgment, the case would be free from difficulty.

Now, did the jury intend by their verdict to give to the plaintiff all of these patterns, which, according to the undisputed testimony, were worth, in the aggregate, $5,000? The verdict is very concise and compact in its terms; it is very short, and is in these words: "We find for the plaintiff patterns the value of one hundred dollars."

Now, when we find by the complaint that the plaintiff instituted his action to recover patterns of the value of $5000, and that the testimony offered on the trial proved that the patterns on the premises at the time mentioned, viz., May 11th, 1879, were worth that sum, and yet the verdict limits the recovery of the plaintiff to patterns of the value of $100, it would be difficult to believe that the jury intended by their verdict that plaintiff should recover all of the patterns on the premises, as is expressed in the judgment. The very fact that the jury fixed the value of the portion which they intended the plaintiff to recover at $100, shows, conclusively, as an independent fact, that they did not

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*intend that plaintiff was entitled to the whole, which, according to admitted proof, was worth $5000.

But can this intent of the jury be reached by a legal construction of the verdict, or will such a construction lead to a conclusion contrary to this manifest purpose of the jury, and give to the plaintiff the entire patterns, in violation of the justice of the case, the evident intent of the jury and the charge of the judge?

A verdict is the finding of the facts of a case by the jury. It may be either general or special. In either case it is the response of the jury to the issues of fact submitted to them by the court. To ascertain, then, the intent and meaning of a verdict, we must look back to the issues submitted.

Generally, the issues of fact involved in a case will be found contained in the allegations of the plaintiff in his complaint, and the denials or other statements of the defence as stated in the answer, and where there is nothing more in the complaint and answer but questions of fact, then an examination of these pleadings will present the true issues submitted to the jury, and to which their verdict will be understood to be responsive. But the pleadings, in addition to questions of fact, may also raise questions of law. In such case the questions of law do not go to the jury, but must be decided by the court before the case is submitted to the jury. In other words, in such case it would be the duty of the judge to eliminate from the pleadings the questions of law, and to submit to the jury only the questions of fact. And in such case the charge of the judge (subject, of course, to appeal,) and not the complaint and answer, would contain the real issues of fact, by which the verdict, should any doubt arise as to its true intent and meaning, ought to be construed.

Now, in this case, the plaintiff instituted suit for the recovery of patterns of the value of $5000, stored on the premises in question on May 11th, 1879. The answer of defendants admitted that they took possession of the premises on the day mentioned, and, also, of the patterns then on the place; but they claimed that these patterns were embraced in a mortgage under which they had bought these premises, and that therefore the title was in them.

This answer raised two questions, one of

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fact and one of law. *The question of fact was that all of the patterns on the premises at the time mentioned were embraced in the mortgage, and the question of law was, that, being so embraced, they, as purchasers under said mortgage, were the legal owners.

The Circuit judge decided at once the legal question, and held, no doubt correctly, that such portion of the patterns as were on the premises at the date of the execution of the mortgage belonged to the defendants, and such portion as was placed there after the execution of the mortgage belonged to the plaintiff. And he submitted to the jury, as the true issue for them to pass upon, what portion of the patterns described in the complaint had been placed there after the execution of the mortgage.

The plaintiff, in his complaint, had claimed all of the patterns in the place at the time mentioned. The charge of the judge, however, as he had the right to do, in deciding the legal question raised, limited the claim to only a portion, and the amount of this portion was the real issue to the jury. How, then, can the verdict be construed to embrace all, when it was admitted that a portion had been withdrawn by the charge of the judge, and only the remainder was involved; and when the jury was instructed by the judge in his charge that it was as to this remainder only, and its value, that they were to inquire?

We do not think that the jury intended by their verdict to declare title in the plaintiff

to all the patterns, and inasmuch as the judgment covers all, that the judgment is not in conformity with the verdict and should be vacated, and the execution issued thereunder quashed.

The order below is reversed and the appeal sustained.

McGOWAN, A. J., concurred.

McIVER, A. J., dissenting. Being unable to concur in the conclusion reached by a majority of the court, I propose to state briefly my views of the questions presented by this appeal.

The action was brought to recover possession of certain personal property, and in case a delivery could not be had, then for the value thereof. The complaint, in the first paragraph, alleged that the plaintiff "was and

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still is the owner of ——— patterns of *the value of five thousand dollars, which goods were then stored on the premises * * * known as Eason's foundry." In the second paragraph the allegation is, that the defendants, on April 24th, 1879, purchased the premises where the said patterns were stored, and on May 11th, 1879, entered into possession of the same and took possession of said patterns, and although demand has been made upon the defendants to deliver said patterns to the plaintiff they have refused so to do, but, on the contrary, still unjustly detain them, to the damage of the plaintiff $5000. These allegations are followed by a demand for judgment, "for the recovery of said patterns, or for the sum of five thousand dollars, the value thereof, in case a delivery cannot be had." The answer sets up two defences: First. A denial of the allegations in the first paragraph of the complaint, with an admission of all the allegations in the second paragraph, except the allegation that the defendants "unjustly detain the said patterns from the said plaintiff, to his damage five thousand dollars." For a second defence the defendants set up a claim to "the patterns mentioned in the complaint," derived from a sale under a mortgage given by plaintiff to one Hannah Euston. The issues thus presented by the pleadings came on for trial before the Hon. B. C. Pressley and a jury, when the following verdict was rendered: "We find for plaintiff patterns the value of one hundred dollars." Upon this verdict judgment was entered "that the plaintiff recover of the defendants the possession of the personal property described in the complaint, to wit, the patterns which were on the premises * * * known as Eason's foundry, on the 11th day of May, 1879, or one hundred dollars in case a delivery of the said property cannot be had," and an execution issued conforming to the judgment. On the day after the entry of the judgment the defendants, by their counsel, gave notice that they would move before his Honor Judge Thomson to set aside the judgment and quash the execution on the following grounds, to wit:

"1. Because the judgment was entered not in conformity to the verdict in said cause.

"2. Because the judgment was entered up by the clerk of said court without authority of law.

"3. Because the execution on said judgment was issued without authority of law."

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*Judge Thomson dismissed the motion, and from his decision this appeal now comes up.

The code (§ 288) provides: "If a different direction be not given by the court the clerk must enter judgment in conformity with the verdict;" and as it appears that no directions were given by the court in this case, I agree with the majority of the court that the real question in this case is, whether the judgment entered is "in conformity with the verdict." It will not be denied that it is generally, if not universally, true that the same amplitude and exactness of phraseology is not to be found in a verdict as in the judgment entered upon it. The fact, therefore, that in this case the judgment gives a more detailed and specific description of the property referred to than is found in the verdict can have but little weight in determining the question. The real inquiry is, does the verdict, properly construed, relate to the same property more particularly described in the judgment? It seems to me that a verdict must be regarded as responsive to the issues presented by the pleadings, and that to determine its scope and effect, it is oftentimes, if not always necessary—certainly permissible—to resort to the pleadings. The object of all pleadings is to shape and define the issues which arise between parties litigant, and when these issues present questions of fact, it is the province of the jury, by their verdict, to decide them. Hence, to ascertain exactly what a verdict does mean, there can be no better resort than to the pleadings. Testing this verdict in this way, it seems to me clear that the only construction which can be given to it is that found in the judgment. What were the issues presented by the pleadings in this case? First. Whether the plaintiff's allegation of ownership of the property described in the complaint was true; for that allegation was distinctly made in the complaint and expressly denied in the answer. Second. What was the value of said property; for the plaintiff alleged, in the first paragraph of the complaint, that the value of the property was $5000, and this was denied in the answer. These, so far as I can see, were the only issues presented by the pleadings, for there was no issue raised by the defendants as to their taking and retaining possession of the patterns. On the contrary, that was expressly admitted and

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*justified under a claim of right. The second defence set up in the answer did not, in

fact, present any new issue, but only gave the real ground upon which the denial of plaintiff's title rested. It is true that the allegation of the complaint is indefinite as to the number of the patterns sued for, but there was no issue raised between the parties as to the number of the patterns—the only dispute being as to the title or ownership of the articles sued for. These being the issues presented by the pleadings, to wit, whether the property sued for belonged to the plaintiff or to the defendants, and what was its value, how ought the verdict to be construed? It certainly has not found the property in question, or any part of it, to be the property of the defendants, and, with equal certainty, it may be said that the verdict does find certain property to be the property of the plaintiff. But what property? Undoubtedly that about which the parties were litigating—that which is claimed in the complaint by the plaintiff and in the answer by the defendants. It will be observed that, while the plaintiff in his complaint claims ——— patterns on the premises referred to, without giving the number which he claims, the defendants likewise set up in their answer a claim to all the patterns on the premises, without giving the number which they claimed, upon the ground that they were all covered by the mortgage under which they bought. There is nothing, therefore, in the pleadings which would suggest to the jury that they were to discriminate, in their verdict, between some of the patterns and others.

It is argued, however, that for the purpose of determining the proper construction of this verdict, it is necessary to consider the charge of Judge Pressley, in which he stated to the jury what were the issues which they were called upon to try; and that this will show that no such construction can be placed upon the verdict in this case as will support the judgment entered by the plaintiff. Conceding, for the sake of argument, that the proper construction of the verdict may be thus tested, I do not see how this test can advance the view contended for by the appellants. As I have stated before, there can be no doubt but that, by their pleading, and doubtless, in their argument, both parties claimed the right to all of the

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patterns on the premises—the plaintiff *contending that "patterns" were not embraced within the terms "working implements, machinery and tools," used in the mortgage, while the defendants contended that they were. This is obvious from the language used by Judge Pressley in the commencement of his charge: "It is my duty to construe this mortgage under the evidence offered before me, and I do not hesitate to say, from the evidence I have heard and the learned arguments of counsel, that my conclusion is very clear that a pattern used in connection with a foundry establishment is either a working instrument or a tool connected therewith." He therefore instructed the jury that the mortgage did cover the patterns used in connection with the foundry at the time the mortgage was given; but, inasmuch as the mortgage, by its express terms, only covered such articles as were on the premises at the time it was executed, only those patterns which were on the premises at the date of the mortgage passed under the sale for foreclosure to the defendants, while those which had been placed there since were the property of the plaintiff; and after telling the jury that it was for them to decide, from the evidence adduced, what portion of the patterns belonged to the plaintiff and what to the defendants, the judge gave them very clear and explicit directions as to the form of their verdict. It is quite manifest that the jury either disregarded or misunderstood the charge of the judge, for the uncontradicted evidence being that a portion of the patterns were on the premises at the date of the mortgage, while another portion had been placed there subsequently to that date, the jury were bound, under their instructions, to have found only a portion of the patterns as belonging to the plaintiff, designating what portion they so found; but their verdict is generally for the plaintiff, and contains no word indicating an intention to find only a portion of the patterns as belonging to the plaintiff. It is possible that they may have come to the conclusion that the question whether patterns were included within the terms used in the mortgage was a question of fact rather than of law, and, if so, that it was a question for them, not for the court; and they may have concluded from the evidence that the terms used in the mortgage did not embrace patterns. Be that as it may, however, it is quite certain that

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the jury either ignored or mis*understood the instructions of the judge, and, if so, the remedy was by a motion for a new trial, and not by the motion submitted in this case.

The appellants do not contend that the verdict was too uncertain and indefinite to authorize the entry of any judgment, because, if so, their remedy would have been by motion in arrest of judgment, but their contention is that the only judgment which can be entered on this verdict is a judgment for the amount found to be the value of the property in question. But in the case of Robbins v. Slatterly, MS. No. 712 decision, filed April 15th, 1879, this court has held that in a case of this kind the verdict and the judgment must be in the alternative, and that a judgment for the value of the property only must be set aside. This rule seems to be recognized in Bardin v. Drafts, 10 S. C. 493, and is understood to be in accordance with the decisions in New York. Dwight v. Enos, 9 N. Y. 472; Fitzhugh v. Wiman, 9 N. Y. 563. In the case of Boley v. Griswold, 20 Wall.

486 [22 L. Ed. 375], a somewhat different view is taken, but that case is not sufficient to overrule our own decisions, supported, as they are, by the cases in New York, as well as the true intent and meaning of the code; for a judgment which, in effect, deprives a party of the right to return the property in dispute, and forces him to pay such value as the jury may see fit to put upon it, is not in accordance with what is conceived to be either the spirit or letter of the code. If, therefore, a judgment for the value only could not be entered upon the verdict in this case, then it follows either that the verdict is too indefinite and uncertain to authorize the entry of any judgment, and, if so, a motion in arrest of judgment and not the motion submitted in this case would be the proper remedy, or that the verdict does authorize the entry of a judgment for the property claimed in the complaint, or in case a delivery of it cannot be had for the value as assessed by the jury, and either of these views would be fatal to this appeal.

It is quite true that the verdict in this case is informal and technically insufficient, but as is said in Bardin v. Drafts, supra: "Every reasonable presumption must be in favor of the verdict, and that would render it necessary to construe it as conformable to the requirements of the law where such

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construction is possi*ble;" and in Boley v. Griswold, Chief Justice Waite says: "In a court of error every presumption is in favor of the validity of the judgment brought under consideration." Looking at the verdict and judgment in this case in that spirit, I can come to no other conclusion than that the verdict must be regarded as finding the issue presented by the pleadings in favor of the plaintiff, and, as such, it authorized the entry of the judgment which is here sought to be set aside.

Again, it is argued that the description of the property in the complaint is insufficient. But it seems to me that the cases of Kimpton v. Nelson, referred to in 8 Bac. Ab., tit. "Replevin," H; Bourn v. Mattaire, 2 Strange 1015; Banks v. Angell, 34 E. C. L. 241, with the other authorities cited in respondent's brief, abundantly show that after avowry such description is sufficient. The defendants here admit that they took and retained possession of the property mentioned in the complaint, and it is now too late to raise the objection that the property is not definitely described. If the defendants regarded the averments of the complaint as too indefinite and imperfect, they should have made a motion before the trial to require the plaintiff to amend by making his averment more definite and complete. Childers v. Verner, 12 S. C. 5, 6. Not having done so, but, on the contrary, having answered admitting the taking and retention of the property sued for, they cannot now be permitted to say that the description of the property sued for is too indefinite to warrant the entry of a judgment for its recovery.

I think, therefore, that the order of the Circuit judge dismissing the motion to set aside the judgment and quash the execution should be affirmed.

Appeal sustained.

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15 S. C. *210

*(Case No. 1034.)

Ex parte DUCKETT.

(April Term, 1881.)

[1. *Criminal Law* ⇐1216.]

A prisoner was sentenced to imprisonment "in the state penitentiary at hard labor, for the term of two years from this date, February 27th, 1879;" but, by reason of his appeal, was not transferred from the county jail to the penitentiary until July 31st. *Held*, that the time for the commencement of the punishment was not of the essence of the sentence, and that the prisoner's term in the penitentiary was for two years from July 31st, 1879.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3310; Dec. Dig. ⇐1216.]

[2. *Convicts* ⇐10.]

By the terms of this sentence, interpreted in the light of the laws then in force, this convict might be hired out, by the directors of the penitentiary to work on a railroad.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. §§ 19, 20, 22–29, 32; Dec. Dig. ⇐10.]

Original application to this court, heard April 18th, 1881. The case is stated in the opinion.

Mr. R. C. Watts, for petitioners.

Mr. Youmans, Attorney-General, contra.

April 25th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was a petition for writ of habeas corpus, representing that the petitioners were illegally imprisoned and restrained of their liberty by Thomas J. Lipscomb, superintendent of the state penitentiary, heard by the Chief Justice and reserved for the determination of the full court on the facts, agreed substantially, as follows:

The petitioners, Henry Duckett and Griffin Duckett, were convicted of grand larceny in the Court of General Sessions for Laurens county, in February, 1879, and Judge Aldrich pronounced the following sentence: "The sentence of the court is that you, Henry Duckett, and you, Griffin Duckett, be each imprisoned in the state penitentiary, at hard labor, for the term of two years from this date, February 27th, 1879."

The petitioners appealed to the Supreme

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Court, which appeal *was pending until July 28th, 1879, when this court dismissed the

appeal and affirmed the judgment of the Circuit Court. The petitioners were in jail at Laurens at the time of their trial, and, pending the appeal, remained there. After the appeal was dismissed, July 31st, 1879, the sheriff of Laurens county delivered said petitioners to Thomas J. Lipscomb, Esq., superintendent of the state penitentiary, who afterwards, to wit, on October 1st, 1879, under an order of the board of directors of the penitentiary, hired them out to work on the Air-Line railroad. The petitioners now claim their discharge on the following grounds:

1. That their term of sentence expired on February 27th, 1881, two years from the date of their sentence, February 27th, 1879.

2. That they were sentenced to two years' hard labor "in the penitentiary," and in hiring them out, the directors transcended their powers.

As to the first ground for discharge. The petitioners were delivered to the superintendent of the penitentiary, July 31st, 1879, under the sentence that they should be "each imprisoned in the state penitentiary, at hard labor, for the term of two years." Two years from the time they reached the penitentiary will not have expired until July 31st, 1881, so that it is clear that the petitioners have not served out the time in the state penitentiary to which they were sentenced.

But in framing the sentence these words were added: "From this date, February 27th, 1879," and it is urged that this being a matter touching the liberty of the citizen, the sentence should be construed literally, and that the two year's imprisonment in the penitentiary must be considered to have commenced at the date of the sentence, February 27th, although the parties were not actually lodged in the penitentiary until July 31st, 1879.

The judgment, though pronounced by the judge, is not his determination, but that of the law, which depends not upon the arbitrary opinion of the judge, but the settled and irreversible principles of justice. The substance of the sentence was that the petitioners should be "imprisoned in the state penitentiary, at hard labor, for the term of

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two years," and the date of the sen*tence, as also the time when it was directed to be carried into effect, was not of the essence of the sentence, but merely directory. Mr. Bishop lays down the law as follows: "Though the sentence to imprisonment ought properly to specify at what time it is to be carried out, yet time is not of the essence of such a sentence. Therefore, a defendant who had been convicted of an assault, was sentenced to imprisonment for two calendar months, 'from and after the 1st day of November next,' but did not go into prison according to the sentence, and, at a subsequent term, it was decided that the sentence for two months' imprisonment be immediately executed; the proceeding was held to be correct." 1 Bishop on Cr. Proc., § 878; Kelly v. State, 3 Smedes & M. 518; State v. Cockerham, 2 Ired. L. 204. In the case last cited, Judge Gaston, with great clearness said: "The time at which a sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law as declared by the court, while the direction with respect to carrying it into effect is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned two calendar months, and the words which follow in the record, 'from and after the 1st of November next,' direct the time of executing the judgment. The entry, indeed, would have been more formal, had the judgment and the mandate for carrying it into effect been separate and distinct. But, however informal, it can be understood in conformity to the law as consisting of distinct parts, and, therefore, ought to be so understood."

So, in this case, the sentence was that the petitioners should be "imprisoned in the penitentiary, at hard labor, for the term of two years," while the direction with respect to carrying it into effect is in the nature of a mandate of execution.

This doctrine applies most appropriately to the case at bar. The absence of these parties from the penitentiary after sentence and before July 31st, 1879, was the result of their own act. They cannot say that they were undergoing part of their sentence during that time. They had the right to appeal, and the delay of five months was caused by their exercising their right of appeal to this court for the purpose of arresting the judgment, which had to be pronounced before

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their appeal could be heard. *State v. Rankin, 3 S. C. 438 [16 Am. Rep. 737]. During the time the appeal was being prosecuted the sentence was practically suspended, for it was proper not to enforce it pending appeal, the result of which might have been to reverse the judgment. The time spent in jail at Laurens, after sentence, cannot be considered as in part execution of the sentence to "imprisonment in the penitentiary." It would have been false imprisonment to have detained them there under that sentence. They were there when they were convicted, and simply remained there awaiting the final determination of their trial, which was not ended until their appeal was dismissed. They did not commence to carry out the sentence until that time, July 28th, 1879, when, for the first time, it was proper to enforce the sentence. The delay was as much their own act as if they had escaped confinement during the intermediate time. In Dolan's case, 101 Mass. 222, the prisoner asked his discharge, although the period of his actual confinement had been less than that for which he was sentenced, by reason of his escape for nearly a year during the term. The court say: "We are of opinion

that the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority. The punishment is imprisonment, the period of which is expressed only by the designated length of time. * * * Expiration of time, without imprisonment, is in no sense, an execution of sentence." We do not think the petitioners have served out "in the penitentiary," their full sentence of two years.

As to the second ground for discharge, that the petitioners were sentenced to two years' hard labor "in the penitentiary," and in hiring them out the board of directors transcended their powers. If it were true, as claimed, that the directors of the penitentiary have no right to farm out the convicts, we do not see that the result would be to entitle the prisoners to their discharge. On the contrary, they would be returned at once to the four walls of the penitentiary to serve out the remainder of their sentence. By an act of the general assembly, approved December 23d, 1878, (16 Stat. 727), it is declared "that from and after January 1st, 1879, the directors of the penitentiary, in their discretion, are hereby authorized and

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instructed to employ in the *institution or hire out all the convicts in that institution, under the regulations in such cases already made and provided for the employment of a portion of the convict labor," &c. We cannot say that this act is unconstitutional, and it was the law on February 27th, 1879, when Judge Aldrich sentenced the petitioners "to be imprisoned in the state penitentiary, at hard labor," &c.

This sentence must be construed with reference to the laws then of force, as to the power of the directors as to convicts. We do not see that the directors have transcended their powers, or placed the petitioners in any condition not allowed by their sentence, interpreted in the light of the laws in force at the time.

The motion for the discharge of the petitioners is refused, and they are remanded to the custody of the superintendent of the penitentiary.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 214

(Case No. 1036.†)

WALLACE v. FOSTER.

(November Term, 1880.)

[1. *Assignments for Benefit of Creditors* ⇐ 268.]

An assignee, who was also entitled to a beneficial interest under an assignment for the benefit of creditors, deposited with his attorney for safe keeping all papers connected with the assigned estate, and removed into another state; afterwards, upon ex parte proceedings by a creditor of the estate, in the Court of Common Pleas, the assignee was removed from his office and the plaintiff was appointed trustee of the creditors, and, as such trustee, plaintiff brought action upon a sealed note, an asset of the estate, payable to the assignee. *Held*, that plaintiff had no right to bring action upon the note.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 804–839; Dec. Dig. ⇐268.]

[2. *Assignments for Benefit of Creditors* ⇐ 212.]

The order removing the assignee and appointing the trustee was an absolute nullity, and may be so declared in any subsequent proceeding, as the court never acquired jurisdiction of the person of the assignee.

[Ed. Note.—Cited in Cone v. Cone, 61 S. C. 523, 39 S. E. 748.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 702; Dec. Dig. ⇐ 212.]

Before Hudson, J., Lancaster, September, 1880.

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*Action commenced November 23d, 1877, by Joseph F. Wallace, trustee for the creditors of J. Leroy Davis against J. H. Foster and J. C. Foster, upon a sealed note, given by defendants December 8th, 1857, for $618.59, payable to L. H. Massey, assignee of J. L. Davis, twelve months after date, with interest payable annually.

The case was referred to J. J. Hemphill, Esq., as special referee for final determination and report. Omitting his statement of facts—which are sufficiently stated in the opinion here—and his conclusions upon matters not considered by this court, his report was as follows:

The defendants contend that the court had no power in an ex parte proceeding to remove Massey and appoint this plaintiff trustee in his stead; the plaintiff contends, that however this may be, that the Court of Common Pleas, being a court of general original jurisdiction, and having appointed this plaintiff trustee, the question of the mode or manner of his appointment cannot be inquired into in this, a collateral action. While the mode or manner in which the judgment of a court is obtained, i. e., the regularity of the proceedings, cannot be attacked collaterally, it is nevertheless true that the power or jurisdiction of the court rendering the judgment may be inquired into in any subsequent cause in which the judgment of the first court is a necessary part of the plaintiff's case in the action pending.

The question then is, had the Court of Common Pleas of York county the power to appoint Wallace and remove Massey? The jurisdiction of the court over the subject matter—i. e., its power to remove an assignee and appoint a trustee, has not been questioned; but the defendants contend that the court had no jurisdiction over the

†Case No. 1035, Ex parte Dial, will be found in 14 S. C. 584.

person of Massey—he being a non-resident and the proceedings appearing on their face to be ex parte.

The question of the want of power of the court to appoint this plaintiff a trustee in the place of Massey in an ex parte proceeding has been strongly pressed by the defendants, but I think they have not sustained their position. There seems to be no case exactly similar to this in the books, or, at least, I have not been referred to it, nor have I discovered it myself, though a very near approach to it is found in McLaurin v.

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Thompson, *Dud. 335. Another case, probably more like the present one, is that of Ex parte Galluchat, 1 Hill's Eq. 148.

These cases seem to me to establish the doctrine that the courts will appoint a trustee for an estate upon the ex parte application of the beneficiaries of the estate in a case where the first trustee had abandoned his trust and left the state. If I have read these cases correctly, then the motion for a non-suit should be overruled; for from the defendants' own witness, Massey, it is established that he had removed from the state, had abandoned his trust and had placed the papers in the hands of an attorney to be held by him until the creditors should appoint an agent to take charge of and administer the estate.

But in addition to the above, the defendants, to sustain their motion, should not only show that the proceedings were in form ex parte, but should go further and show that Massey did not appear in the proceedings, or at least did not assent to the appointment of Wallace. The voluntary appearance of Massey in the proceedings would be as effectual to bind him as if he had been made a defendant and served with a summons; and while we might, in general, presume that in proceedings of this form, there were no defendants, still, this presumption is, in this case, overreached by another one, that I am bound to make, to wit, that all things were done that ought to have been done, and that the proceedings were regular until the contrary be shown by positive, not presumptive, proof.

Massey was examined by the defendants both by commission and personally, and he was not questioned upon nor does he deny that he assented to the proceedings by which plaintiff was made trustee.

I have examined the cases quoted by the defendants' counsel that were accessible, and though the language used in some of the opinions seems broad enough to cover their position, the circumstances of the cases are so different from this one that I do not consider them as direct authorities here.

I find and report as matters of law—

That the plaintiff, Wallace, was properly appointed trustee, and can maintain this action.

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*Upon exceptions by defendants to this report, the case came up before the Circuit Court. The presiding judge, upon the matter determined by this court, decreed as follows:

After hearing the pleadings, testimony, report of referee, and very full argument upon the questions raised and presented for consideration, I am constrained to differ with the referee in some of his conclusions.

I think the proceedings by which the assignee, Massey, was removed and a trustee appointed to take charge of the estate, was not only irregular but utterly void, in so far as it attempts to vest in the present plaintiff title in and to said estate.

There is no doubt but that a Court of Equity has full power, under proper proceedings, to remove trustees of all kinds, whether appointed by deed, will or order of court, upon good cause shown and when the exigency requires; and to substitute another instead of the one removed, and to invest him with title to and control over the trust estate. According to the practice in England, so solemn and so important a step was accomplished by bill filed, and a full hearing allowed to all parties in interest, so that the judgment of removal and substitution of the trustee and transfer of the estate became binding upon all parties interested, and who were invariably brought before the court. In South Carolina a less cautious and more objectionable course was at an early day countenanced; and trustees were occasionally removed upon proceedings by petition, and sometimes, though rarely, upon ex parte petitions. Ex parte Galluchat, 1 Hill's Eq. 148; Ex parte Knust, Bail. Eq. 489.

But an examination of the cases will show that our Court of Equity always preferred the proceedings to be, as in England, by bill; and while upholding the authority of this court to act on petition even ex parte, yet in each case it based its action upon the exigency of the estate and the peculiar circumstances of the case. But it is to be observed that our Court of Equity is abolished; and although full equitable jurisdiction is conferred upon the Common Pleas, and its powers are as large as were the powers of the extinct Court of Equity, yet these powers and this jurisdiction are exercised under and regulated by a greatly altered system of pleading and practice.

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*We take it that under the code the proceedings in the Common Pleas by which a party is to be divested of his property, and that property transferred to another, is entitled to an action, to be begun by summons, and that the party against whom the remedy is sought, whether resident or non-resident, must be made a party to the action. The note in suit is the property of L. H. Massey—being the proceeds of the sale of property

conveyed to him by J. Leroy Davis, upon trust, it is true, but the trusts are coupled with an interest of a very important character, to wit, the right to pay off and discharge debts of Davis for which Massey is personally liable as surety. To remove him from this trust, and to divest him of this property and invest another with all his rights and functions upon an ex parte petition of an alleged creditor of Davis, upon the allegation that Massey is insolvent and has left the state without making him a party thereto, or any one in interest, we think entirely beyond the power of the court, and at variance with the rules of pleading prescribed in the code. The proceeding should be by action, commenced by summons, and to which the assignee, though a non-resident, should be made a party as one absolutely necessary to a determination of the action. We do not think that the proceeding by petition in such cases is any longer recognized by the new pleadings.

In special proceedings and applications for extraordinary remedies—mandamus, quo warranto, habeas corpus, &c.—the proceeding by petition is not irregular, but in all cases other than special proceedings, the action is the only remedy. But even if proceeding by petition be admissible, we think the assignee a necessary party.

In our judgment the plaintiff has no title to this note and no authority to bring the action. The order of court appointing the plaintiff, we deem not merely irregular, but null and void, as is any judgment against one who is not a party to the action. The fact that Massey was examined as a witness in the cause and made no complaint at being removed, does not alter the case. He had no right to complain or to object, not being a party to the proceedings. The present plaintiff has been, in argument, styled a receiver, and it is contended the court can, on ex

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parte *application, appoint a receiver. But such an officer is only appointed pending action either before or after judgment, and even then rarely without notice to the defendant.

It is therefore ordered, adjudged and decreed that the complaint be dismissed, and that the defendants have their costs.

From this decree plaintiff appealed.

Messrs. Allison & Connors and J. F. Hart, for appellant.

Messrs. Ernest Moore and Wylie & Hough, contra.

April 30th, 1881. The opinion of the court was delivered by

McIVER, A. J. On February 28th, 1857, J. Leroy Davis made an assignment to L. H. Massey for the benefit of his creditors. The deed of assignment provided that the judgments against Davis should be first paid; next, sundry debts for which Massey was liable as surety for Davis; and lastly, creditors generally. Massey accepted the trust, sold all the property and proceeded with the discharge of his duties as assignee until some time in 1861. After the close of the war Massey became insolvent, and, in 1869, was adjudged a bankrupt, and in 1876 removed to the State of North Carolina, where he has ever since resided. Before leaving the state Massey deposited with his attorney in York county the papers belonging to the assigned estate, including the uncollected assets. In January, 1877, William I. Clawson, claiming to be a creditor of Davis, as assignee of one of the judgments against him, filed an ex parte petition in the Court of Common Pleas for York county, stating, among other things, that the petitioner had frequently applied to Massey to obtain his consent to the collection of the assets, but had been unable to do so, and praying "that the said L. H. Massey may be removed from his trust, and that a suitable person be appointed in his place to take charge of and settle up the said estate." Upon this petition the judge of the Sixth Circuit, within which the county of York is embraced, endorsed the following order: "Upon hearing the petition, and on motion of C. E. Spencer, attorney pro pet., it is ordered that L. H.

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Massey be, and he is *hereby removed from the office of assignee of J. Leroy Davis, and that J. F. Wallace, Esq., [the plaintiff herein] be and he is hereby appointed the trustee of the creditors to settle the estate of the said J. Leroy Davis." It not only does not appear that Massey was ever served with any notice of this proceeding, or made a party thereto, either by publication or otherwise, but it is manifest from the frame of the petition, that it was not contemplated that he should be a party, as there is no prayer to that effect, and no demand that he should answer. Under this order the plaintiff, having obtained possession of the uncollected assets of the assigned estate, brings this action on one of the notes under seal, taken at the sale and made payable to L. H. Massey, assignee of J. Leroy Davis or order.

One of the defences set up by the defendants is a denial that the plaintiff is the legal owner and holder of the note sued upon. The only evidence adduced to show plaintiff's title to the note was the ex parte order above referred to removing Massey, the payee of the note, from the office of assignee, and appointing the plaintiff "trustee of the creditors to settle the estate of the said J. Leroy Davis." The Circuit judge holding that this order "was not only irregular but utterly void, in so far as it attempts to vest in the present plaintiff title in and to said estate," sustained this defence, and exception was duly taken. So that the

fundamental question raised by this appeal is, whether an assignee can be removed from office and the legal title to the assets of the assigned estate transferred to another by a mere ex parte proceeding, of which the assignee has no notice.

Upon general principles, well recognized and founded in reason as well as supported by the highest authority, it would seem to be clear that an order or judgment which purports to deprive one man of the title to property and vest it in another, is an absolute nullity, unless such order is made or judgment rendered in some action or proceeding to which the person whose title is thus divested has been made a party and has had an opportunity to be heard. The fact that Massey was a trustee can make no difference. He had the legal title and could not be deprived of it by a proceeding to which he was not a party, and of which he does not

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appear to have had any notice what*ever. But in addition to this he was not a mere naked trustee, for, under the assignment, he was entitled to a beneficial interest, inasmuch as by one of the provisions of the assignment he was authorized to apply the assets to the payment of debts for which he was liable as surety in preference of the general creditors. It would require the strongest and most conclusive authority to induce us to sustain an ex parte order of this character. The cases relied upon for this purpose do not, in our judgment, furnish such authority. In McLaurin v. Thompson, Dud. 335, one McBryde had been appointed administrator of Colin McColl's estate, and upon his removal from the state the Ordinary granted letters of administration to one McIntyre. In a proceeding before the Ordinary for the purpose of obtaining an account of Colin McColl's administration of the estate of Duncan McColl, to which the defendant was a party as surety on the administration bond of Colin McColl, the question was raised whether the appointment of McIntyre was valid without a formal revocation of the letters of administration previously granted to McBryde, and all that the court decided was that the granting of administration to McIntyre was equivalent to a judgment of revocation of the previous grant to McBryde, and, as he was not contesting the new grant of administration, the court would regard it as a revocation. This case, therefore, does not decide the question now under consideration. The next case relied upon is Ex parte Galluchat, 1 Hill's Eq. 150. In that case an executor, having partially administered the trusts imposed upon him by the will, removed from the state, and having requested that he should be released from his office as trustee, the court, upon the ex parte application of the cestui que trust, appointed a receiver and discharged the trustee. It is very clear that this case furnishes no authority for the proposition contended for here. No question was raised as to the want of notice to the trustee, and in fact could not be, as the proceedings were instituted at his request. So, too, in the case Ex parte Knust, Bail Eq. 489, the point here made did not and could not arise, for there the trustee not only had notice but resisted the application.

It is argued, however, that even conceding that the order removing Massey from the office of assignee and appointing the plaintiff

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*trustee was erroneously granted, the defendants in this case cannot take advantage of it, and that such order must stand until it is vacated by a proper proceeding for that purpose. If the objection to the order was merely a want of regularity in granting it, then, possibly, there might be good ground for this position. But where the order is absolutely void the rule is different. Where an order has been passed or a judgment rendered by a court in a case in which the court has no jurisdiction either of the subject matter or of the parties, such order or judgment is an absolute nullity, and may be so declared in any subsequent proceeding. In this case there is no doubt but that the court had jurisdiction of the subject matter, but that is not sufficient, it must also have acquired jurisdiction over the person to be affected by the order in question. "Jurisdiction over the person is obtained by service of process, or in some other manner authorized by law, as by the voluntary appearance of a party during the progress of a cause." Freem. on Judg., § 119. In this case the record not only fails to show that the court had acquired jurisdiction over the person affected by the order by service of process or otherwise, but it does not even purport to make any one a party, being strictly an ex parte proceeding; and there is, therefore, no room for the presumption that the court had, in some way, either by voluntary appearance or otherwise, acquired jurisdiction over the person whose legal rights were sought to be divested. The order was manifestly granted under the theory that it was not necessary that Massey should be made a party, and we cannot presume that any steps whatever were taken to bring him under the jurisdiction of the court.

The order removing Massey and appointing the plaintiff cannot be sustained, as has been argued here, under Section 3 of Chapter XCVII., General Statutes, page 477. That section only provides for the appointment of an agent by the creditors in case the assignee neglects or refuses to assemble the creditors within ten days after the execution of the deed of assignment for that purpose, and that the agent so appointed may apply to the judge of the Court of Common Pleas for an order authorizing him to take into his possession the property assigned, and sell or dispose of the same according

to the terms of the deed of assignment. But

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*that does not apply to this case. There is no pretence that the plaintiff was ever appointed by the creditors as their agent, nor is there any evidence whatever that the assignee failed to call the creditors together within ten days after the execution of the deed of assignment. On the contrary, the evidence is that Massey did call a meeting of creditors before the sale, though it is not stated what was the purpose of such meeting. In addition to this we are not prepared to say that a judge would be justified in granting such an order without notice to the assignee and an opportunity afforded him to be heard.

The plaintiff's title to the note resting solely upon the ex parte order above referred to, which, we think, was an absolute nullity, his right to bring this action cannot be sustained.

Under this view of the case the other questions suggested by this appeal cannot arise and need not, therefore, be considered. Indeed it would, perhaps, be improper now to do so, for if, as we have seen, the plaintiff has no right to bring this action, any adjudication of those questions now would not bind the legal owner of the note, who is not a party to this case, and his rights ought not to be passed upon until he has the opportunity to be heard.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred

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15 S. C. *224

*(Case No. 1037.)

LOST BONDS CASE.† GIBBES v. GREENVILLE AND COLUMBIA RAILROAD COMPANY. STATE ex relatione ATTORNEY-GENERAL, v. SAME.

(November Term, 1880.)

[*Compromise and Settlement* ⟸17.]

Certain persons holding ten first mortgage bonds and thirty-seven non-mortgage bonds of a railroad corporation, all of which were alleged to have been destroyed, but there was difficulty in establishing the loss, made, through their attorney, with the corporation, an agreement by which, in settlement of their claims, they received interest-fund bonds to the amount of $8600 for their first mortgage bonds and state guaranteed bonds to the amount of $16,000, and interest-fund bonds for $6725 for their non-mortgage bonds; and upon such bonds they collected interest for four years. The corporation afterwards became insolvent, and, upon sale, realized enough to pay its first mortgage and state guaranteed bonds in full, but the non-mortgage and interest-fund bonds proved to be worthless. These parties, retaining their state guaranteed bonds, offered to return their interest-fund bonds of $8600, and to establish their ten lost first mortgage bonds, claiming the lien of the first mortgage, and that the substituted bonds were ultra vires. This court concurred with referee and Circuit judge, in holding that the intention of the settlement was payment and not substitution, and, for that reason, and because it was a compromise of a doubtful right, made with full knowledge of the facts, and an arrangement which was a unity, refused to permit the petitioners to establish the ten lost bonds, or to claim for the substituted bonds the lien of the first mortgage.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 66; Dec. Dig. ⟸17.]

[This case is also cited in Whaley v. Gaillard, 21 S. C. 562, and distinguished therefrom.]

Before Kershaw, J., Richland, June, 1880.

It will not be necessary to repeat the facts which are set forth in the opinion, but it will not be amiss to state some of the matters more fully.

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*Jacob Burriss, as administrator of Milford Burriss, brought suit against the Greenville and Columbia Railroad Company for a recovery upon thirty-two lost bonds, of which four were first mortgage, the others non-mortgage. Judge Orr, by decree of February, 1872, gave judgment upon three of the non-mortgage bonds, but dismissed the action as to the others, without prejudice to plaintiff's right to sue thereon thereafter, stating that the circumstances to prove their destruction were strong, but not sufficient fully to establish it. In April, 1873, J. P. Reed wrote to W. J. Magrath, president of the railroad, in relation to the claim of Burriss, and cited parts of Judge Orr's decree, and, as attorney for Burriss, and also for Dr. B. F. Brown and one Daniel Brown, who owned several bonds, suggested negotiations for an arrangement by which these lost bonds might be funded on the same terms as if the papers were produced, stating that, in his judgment, the ownership, identity and loss of these bonds could now be satisfactorily established. No further correspondence appears in the brief, until the agreement of April 29th, 1874, which is copied in the opinion. Soon afterwards the treasurer wrote as follows:

Columbia, S. C., May 6th, 1874.

J. P. Reed, Esq., Anderson, S. C.:

Dear Sir: We hand herewith bonds for account of the following named persons in settlement of claims of the respective parties, as per statements accompanying, which accord with the agreement of the 29th ultimo:

†There were so many appeals in the cases of Gibbes v. Greenville and Columbia Railroad Company and the State, ex relatione the Attorney-General, against the same defendant, four of which appear in this volume, that, for the sake of distinction, I have given to them the nick-names by which they were designated at the bar.—REPORTER.

For account of Jacob Burriss, administrator, interest fund bonds		$ 5,200
For account of Jacob Burris, administrator, guaranteed bonds	$11,000	
For account of Jacob Burris, administrator, I. F. bonds	4,625	15,625
For account of Benjamin F. Brown, I. F. bonds		3,400
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*For account of Benjamin F. Brown, guaranteed bonds	$ 5,000	
For account of Benjamin F. Brown, I. F. bonds	2,100	$ 7,100

Please send receipt for same.

Very respectfully, &c.,

C. H. Manson,

For G. & C. R. R. Co.

Received May 12th, 1874, from the G. & C. R. R. Co., the bonds named herein.

Reed & Brown,

Per J. P. Reed.

In the above statement, the $5200 were for six first mortgage bonds, $3000, and interest for ten years and six months at seven per cent., $2200; and the $3400 were for four first mortgage bonds, $2000, and interest $1400; the other figures represent amounts due on non-mortgage bonds. The interest fund bonds of the Greenville and Columbia Railroad Company were issued in July, 1873, and their payment guaranteed by the South Carolina Railroad Company, a connecting line, and the owner of a majority of the stock in the Greenville road. In June, 1872, the action by Gibbes and the State, ex rel. the attorney, had been commenced, and an order was then passed, declaring that the property of the Greenville and Columbia Railroad Company should continue in the possession of its president and directors, under the order of the court, and subject to its control; and creditors were called in. Burriss and Brown drew interest on their new bonds from January, 1873, to July, 1877.

The claim of Burriss and Brown was presented, and the first reference was held in March, 1880. In April, 1880, the road was sold.

Mr. J. S. Muller, for appellants.

Mr. James Conner, contra.

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*April 30th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. In the cases above stated the court passed an order calling in those claiming to be creditors of the defendant corporation to present and prove their demands.

Under this call it appeared that one Milford Burriss owned, among other bonds of a different class, six first mortgage bonds of the Greenville and Columbia Railroad Company, $500 each, viz., Nos. 904, 920, 921, 924, 925 and 985, and, also, that one Benjamin F. Brown owned four bonds of the same class, viz., Nos. 952, 1424, 1556 and 1557, all of which bonds were destroyed at Anderson Court House by the federal army, about the close of the late war (1865), and the claim was made that said lost bonds should be established as if they had been produced and proved.

The claim was resisted, and the following facts appeared: In 1873 J. P. Reed, Esq., as attorney of the parties, B. F. Brown and the administrator of Milford Burriss, deceased, wrote to W. J. Magrath, president of the Greenville and Columbia Railroad Company, upon the subject of these lost bonds, saying: "I beg that you will consider the matter and be prepared to negotiate with me for these arrangements without further controversy. I have full authority in the premises, and am prepared to do what is right."

To this letter the president replied, submitting propositions which became the basis of settlement, as follows:

"City of Columbia, S. C.

"In order to settle the claim of Jacob Burriss, as administrator of Milford Burriss, Benjamin F. Brown and Daniel Brown, for lost bonds of the Greenville and Columbia Railroad Company, and as a basis of settlement, it is agreed as follows, to wit:

"1. That for the first mortgage bonds, ten in number, the company will issue the new bonds which are being issued in funding the past-due interest according to the plan recommended by the bondholders' committee, for the entire sum of the principal and interest up to the 1st day of January last inclusive.

"2. For the non-mortgage bonds, there being thirty-seven in number, the company will deliver its bonds, guaranteed by the

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*state, issued during President Hammett's administration, for the principal sum, dollar for dollar, and for the interest, to be counted from the 1st day of January, 1868, to the 1st day of January, 1874; it will deliver the new bonds hereinbefore mentioned as being issued for funding the past-due interest."

This plan of settlement was accepted. The bonds described were delivered to Mr. Reed as attorney of the parties, who gave the following receipt:

"Received, May 12th, 1874, from G. & C. R. R. Company, the bonds named herein." [Giving the numbers and dates.]

"Reed & Brown."

The parties received the interest on the new bonds for several years, but, under the call aforesaid, produced the new bonds which had been issued in settlement of the ten first mortgage bonds before the master, and offered to surrender them, and claimed the right to prove their lost first mortgage bonds, in settlement of which these had been received.

The company resisted the claim, and in-

sisted that the settlement in April, 1874, included non-mortgage as well as first mortgage bonds lost or destroyed; that the thirty-seven non-mortgage bonds were utterly worthless, for which the claimants received bonds guaranteed by the state, now worth par, and that they cannot claim the benefit of part of the settlement and repudiate the remainder of it; that the settlement was an entirety, accepted by the parties and final. The issues were referred to the master, N. B. Barnwell, Esq., who took the testimony, and held that the claimants "are not now entitled to renounce their position of parties claiming to have lost their first mortgage bonds; and as there are no new facts developed of which they cannot be presumed to have had full knowledge at the time of their compromise, and they had the advice and assistance of learned counsel in the matter; and, further, as for several years they regularly received the interest on their new bonds, they have no equitable ground on which to claim relief from their bargain; and, moreover, as I am of the opinion, the bonds they hold are, though not secured by mortgage,

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valid obligations of the corporation, I *see no ground whatever for now making a new and different arrangement from the one they made for themselves."

The cause was heard by Judge Kershaw, who confirmed the master's report, and from his decree the appeal comes to this court upon the following exceptions:

"1. Because the master erred in finding that Jacob Burriss, the former administrator of Milford Burriss, received the said funded interest bonds Nos. 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, each for $500; Nos. 206 and 255, each for $100, in full satisfaction of the claim of his said intestate, Milford Burriss, deceased, against the said corporation under his lost first mortgage bonds, Nos. 904, 920, 921, 924, 925, 985.

"2. Because the master should have found that the said funded interest bonds were received merely as a substitute for the said lost first mortgage bonds; that the estate of the said Milford Burriss has never lost or relinquished its interest in the first mortgage of the said company's railroad as security for the debt due the said estate by the said company, and that John W. Daniels, the present administrator, is now entitled to have the said debt paid out of the proceeds of the said first mortgage.

"3. Because the master erred in not finding that the said funded interest bonds in the hands of the administrator of said estate were void and of no legal value as obligations of the said corporation.

"4. Because the master erred in not finding that the guaranty of the South Carolina Railroad Company, purporting to be endorsed upon the said funded interest bonds, was void and of no legal value.

"5. Because the master erred in finding that the said John W. Daniels, administrator of Milford Burriss, was not entitled to surrender the said funded interest bonds and be restored to his rights and the rights of his intestate under the said lost first mortgage bonds and the said first mortgage.

"6. Because the said master erred in not finding that the arrangement between the said corporation and Jacob Burriss, former administrator of Milford Burriss, ought to be rescinded and the parties restored to their former rights and conditions.

"7. Because the said master erred in not

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finding that Jacob *Burriss, administrator of Milford Burriss, had no right or power to make such a settlement of a debt due his intestate's estate, and that such settlement ought therefore to be rescinded and the parties remitted to their former rights and conditions."

It is insisted that the new bonds received in the settlement made by the claimants with the defendant corporation did not amount to payment or satisfaction of the lost first mortgage bonds, but were merely substituted for those bonds; and that the first mortgage covers and secures the evidence of the indebtedness substituted in the place of those—the lost bonds—for which they were substituted. If the question were substitution or payment, that was a matter of intention and made an issue of fact. The referee decided that question against the claimants, and the Circuit judge concurred with the referee. In case of such concurrence, this court, by a well-established practice, will not reverse the finding except "on clear or overbearing evidence." Reporter's note, 12 S. C. 612. We agree with the Circuit judge that "the testimony well warrants the finding of the fact of payment. The proposal was made to deliver the new bonds for the first mortgage bonds in order to 'settle' the claims. The new bonds were accepted 'in settlement' of claims of the respective parties. Settlement of a debt or claim is payment, according to Bouvier, as well as in common parlance."

But the facts of the case make something more than a simple question of substitution or satisfaction. The idea of substitution is excluded by the fact that the mortgage was executed to secure certain bonds, particularly described and numbered, and the bonds now in possession of the claimants and proposed as substitutes for those originally secured by the mortgage are not mortgage bonds at all, but funded interest bonds of a particular issue, and secured, not by mortgage, but by the guaranty of the South Carolina Railroad Company. The first mortgage cannot reasonably be made to cover and secure such bonds. The claim made is really not to substitute the new bonds for the lost mortgage bonds, but to vacate the agreement altogether on the ground of mistake, and to set up now,

as proved, not the new bonds as substitutes but the identical old lost mortgage bonds.

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The claimants *have no equity to cancel this part of their own executed contract for several reasons.

The bonds were lost or destroyed, and there was some difficulty in making the necessary proof to establish them. The parties owning the lost bonds made a proposition to settle the matter. Distinct terms of settlement were offered and accepted by them. We regard the arrangement then made as the compromise of a doubtful right, with full knowledge of all the facts, and as belonging to that class of agreements to which the doctrine as to mistakes does not ordinarily apply. The word "compromise" involves the idea of a surrender of rights. "If the parties intended the settlement as a composition or compromise of a doubtful or disputed right, the court will not, on the sole ground of mistake, set it aside. Durham v. Wadlington, 2 Strob. Eq. 258; Keitt v. Andrews, 4 Rich. Eq. 349. For it is obvious that in that case, inasmuch as the parties did not seek to conform their settlement to the exact facts of the case, the truth of no one fact could be regarded as vital to the consideration by which they were moved. For the same reason, if, for the want of information, the parties mutually assumed the existence of certain facts and understandingly dispensed with further inquiry as to their actual truth, the court will not interfere if this assumption turns out to be erroneous." McDow v. Brown, 2 S. C. 109; Pratt v. Weyman, 1 McC. Eq. 156.

There is another reason why these claimants have no equity to set up the ten lost mortgage bonds. That would be, in effect, to set aside the compromise agreement in part, and sustain it as to the other part. The arrangement not only embraced the ten lost mortgage bonds, but also thirty-seven non-mortgage bonds, which have turned out to be utterly worthless, but for which the parties received in the arrangement bonds of the company guaranteed by the state, which, after the priorities of the creditors of the company were ascertained, turned out to be worth par and interest. The parties have received the money on these, and, quoad hoc, do not propose to rescind the agreement. The settlement was a unity and cannot be maintained as to the part which was advantageous, and set aside as to the part which turned out to be disadvantageous. "Generally, no contract can be rescinded *by one of the parties unless both can be restored to the condition in which they were before the contract was made. If, therefore, one of the parties has derived an advantage from the partial performance, he cannot hold this and consider the contract as rescinded because of the non-performance of the residue." Pars. on Cont. 679; Hunt v. Silk, 5 East 449; Taylor v. Hare, 1 Bos. & Pull. 260; Fripp v. Fripp, Rice's Eq. 84.

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But it is urged that so much of the compromise agreement as relates to the ten mortgage bonds should be vacated for the reason that the funded interest bonds received in exchange for them in the arrangement were void and of no legal value, for the reasons that the Greenville and Columbia Railroad Company was in the hands of a receiver at the time they were issued, and the president and directors of that company had no authority or power to issue such bonds; and, also, because the guaranty of the South Carolina Railroad Company, endorsed on these bonds, was void and of no legal value. It has not been shown either that the president and directors of the Greenville and Columbia Railroad Company had no authority to issue such bonds as the funded interest bonds, or that the South Carolina Railroad Company had no right, legally, to guarantee said bonds. But we do not think these questions necessarily involved in this case. The proposition as to what terms the company would give to make the settlement was distinctly stated in writing, and as certainly accepted by the parties through their attorney. There is no allegation of misrepresentation, imposition or fraud. All the parties understood it or had the means of understanding it. The settlement was made and the bonds issued accordingly. The parties made their own contract with as full knowledge as they now possess in relation to the powers which could be legally exercised under the public acts incorporating the South Carolina Railroad Company and the Greenville and Columbia Railroad Company. They received the bonds thus issued and guaranteed; enjoyed the advantages for which they bargained; collected the interest on them; held them without complaint for years, and now, when the makers and the guarantors of the bonds have become insolvent, ask that they may be restored to their former condition as to so much of the

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compromise agreement as relates *to the ten mortgage bonds. This they ask on the ground that they thought, when they contracted, that the president and directors of the Greenville and Columbia Railroad Company had the right to issue said bonds, and that the guaranty by them would bind the South Carolina Railroad Company, whereas they now discover that this was a mistake of law. It was ingeniously and strongly argued at the bar that in South Carolina, according to the decided cases, relief will be granted for a mistake of law in a certain class of cases, and that this case falls under that class. The general rule certainly is, that a contract will not be vacated on the ground of ignorance or a simple mistake of law. But we do not think it necessary to enter upon the discussion of this vexed question here. We regard this as an effort to set aside a part of an agreement,

which was the compromise of a doubtful right, and we do not think that the parties have any equity to vacate part of their own executed agreement for mistake—if there was mistake—whether that mistake was one of law or of fact. "Where a compromise of a doubtful right is fairly made between the parties, whether the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent investigation and result." Durham v. Wadlington, 2 Strob. Eq. 258.

The judgment of the court is, that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 233

(Case No. 1038.)

STATE v. JAMES.

(April Term, 1881.)

[*Witnesses* ⇐48.]

One convicted of petit larceny is an incompetent witness. State v. Dodson, (3), 14 S. C. 628, affirmed.

[Ed. Note.—Cited in State v. Wyse, 33 S. C. 593, 12 S. E. 556.

For other cases, see Witnesses, Cent. Dig. § 111; Dec. Dig. ⇐48.]

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*Before Pressley, J., Marion, March, 1881.

Indictment against Richard James, Ben James and Louis James for murder. Louis was acquitted, and Richard and Ben were convicted.

During the progress of the trial Jack Johnson and Kelly McRimmon were offered as witnesses for the state against Richard James. The counsel for Richard objected to their being sworn or their statement taken as testimony against him, on the ground that they had been convicted of infamous crimes, and therefore disqualified from testifying. The records of their conviction were produced in court, showing that Jack Johnson had been convicted of petit larceny in Court of General Sessions, 1875, and sentenced to six months' imprisonment in the state penitentiary at hard labor: and that Kelly McRimmon had been convicted of the same offence in the Court of Trial Justice, 1877, and sentenced to thirty days' imprisonment in the county jail or pay a fine of $12 and costs. There was no evidence of a pardon having been granted in either case.

The presiding judge overruled the objection and allowed the witnesses to be sworn and testify. To this ruling the counsel for Richard James excepted, and in his behalf appealed to this court.

Messrs. C. A. Woods and W. J. Montgomery, for appellant.

Mr. Solicitor G. W. Dargan, contra.

May 23d, 1881. The opinion of the court was delivered by

McIVER, A. J. In this case the appellant, with his two brothers, was indicted for murder. Upon the trial, which resulted in the conviction of the appellant and one of his brothers, two witnesses, who had been convicted of petit larceny, were permitted, notwithstanding the objection of the appellant, to testify. Their testimony, it is stated, affected the appellant only, and he only has appealed.

The sole question presented by the appeal is, whether a person who has been convicted of petit larceny is a competent witness.

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*This question has been practically decided in the recent case of State v. Dodson et al., 14 S. C. 628. Further examination and reflection only serves to confirm us in the correctness of the conclusion reached in that case.

There can be no doubt that, at common law, a conviction of petit larceny rendered a witness incompetent to testify, (Pendock v. Mackinder, Willes 665; Commonwealth v. Keith, 8 Metc. 531; State v. Gardner, 1 Root [Conn.] 485; Lyford v. Farrar, 31 N. H. 314,) and we do not see how the fact that the legislature has declared the offence of petit larceny a misdemeanor and reduced the punishment, can affect the question under consideration. In a note to 1 Greenl. on Ev., § 372, it is said: "It was formerly thought that an infamous punishment, for whatever crime, rendered the person incompetent as a witness by reason of infamy. But this notion is exploded, and it is settled that it is the crime and not the punishment that renders the man infamous." To the same effect see 2 Russ. on Crimes 974; 1 Whart. Am. Cr. Law, § 760; 1 Archb. Cr. Pl. & Pr. 504. In 1 Greenl. on Ev. § 372, in speaking of the incompetency of witnesses upon the ground of infamy, it is said: "The basis of the rule seems to be that such a person is morally too corrupt to be trusted to testify," or, as is said in Starkie on Ev. (Sharswood's ed.) 118: "If a person had been convicted of an offence which is inconsistent with the common principles of honesty and humanity, the law considered his oath to be of no weight and excluded his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to affect the property or liberty of others." The fact that the legislature has seen fit to alter the amount and character of the punishment for this offence does not change the nature of the offence, the moral qualities of which remain the same as before. This, therefore, cannot restore the competency of a person convicted of this of-

fence, for, as we have seen, "it is the crime, and not the punishment, that renders the man infamous."

In some of the states of the Union statutes have been passed altering the law in this respect, and declaring that a person convicted of petit larceny shall not thereby be rendered incompetent to testify as a witness.

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But we have no such statute in this *state, and must, therefore, adhere to the rule of the common law.

We think, therefore, that the Circuit judge erred in permitting witnesses who had been convicted of petit larceny to testify in this case, and that the appellant, against whom alone these witnesses testified, is entitled to a new trial.

The judgment of this court is, that the judgment of the Circuit Court be reversed as to the appellant, Richard James, and that the case be remanded to that court for a new trial as to the said Richard James.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. 236

(Case No. 1039.)

CALDWELL v. LITTLE.

(November Term, 1880.)

[1. *Executors and Administrators* ⇐86.]

A, B and C were executors of an estate X, which was alleged to be indebted to an estate Y, of which A and B became administrators. Action was brought in the Court of Probate by a distributee of the estate Y against A and B, as administrators, calling upon them to account for their administration of that estate. There being no allegation or proof that A and B, as executors, had received any portion of the estate X, and they having denied any receipts of the estate Y—*Held*, that constructive payment by operation of law had not been established.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 359–383; Dec. Dig. ⇐86.]

[2. *Courts* ⇐198.]

The executor, C, could be no proper party to a proceeding instituted by a distributee of the estate Y, except upon allegations which would make a case not covered by the terms "matters testamentary and of administration," and, therefore, a case beyond the jurisdiction of the Court of Probate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 324; Dec. Dig. ⇐198.]

[3. *Executors and Administrators* ⇐76.]

[Cases of collusion with debtors of an estate, or misappropriation of the funds, are not cases involving "matters testamentary or of administration," and hence are not cognizable by the probate court.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 337; Dec. Dig. ⇐76.]

Before Kershaw, J., Laurens, September, 1880.

Hon. T. B. FRASER, judge of the Third Circuit, sat in this court on the hearing of this cause, in the place of Chief Justice SIMPSON, who had been of counsel in the court below.

Action by Nancy A. Caldwell against John

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W. Little and L. R. *Brooks, as administrators of David Williams, deceased. For a full understanding of the points decided by this court, the case is clearly stated in the opinion. The plaintiff appealed.

Mr. John W. Ferguson, for appellant.

Mr. B. W. Ball, contra.

May 23d, 1881. The opinion of the court was delivered by

T. B. FRASER, A. A. J. This action was commenced in the Court of Probate for Laurens county, January 15th, 1879, was carried by appeal to the Court of Common Pleas, and comes to this court by appeal from the judgment rendered in that court.

About the year 1825 John Williams died intestate, and administration on his estate was granted to two of his sons, Charles Williams and Lemuel G. Williams. David Williams, Letty Williams and Clarissa Williams were also children of John Williams, deceased.

In May, 1826, Charles and Lemuel G., the administrators, filed their first return in the office of the Ordinary, in which, among other things, they charged themselves with the sum of $802.05, with interest from April 13th, 1825, as the share of David Williams, and on April 13th, 1827, the return filed by them on that day showed that the sum due David Williams was $845.50, with interest from April 13th, 1825. These returns showed also the amounts due Letty and Clarissa, and the latter showed certain payments made for Letty and Clarissa, but none for David.

Similar returns were made annually until April 14th, 1839, when a memorandum was made on the return that "the different amounts charged to administrators is the whole of the capital, although it is charged on every return." After this the administrators returned only money paid out, and continued to make returns until April 14th, 1863, but no return shows any money paid out for David Williams. It appears that Charles Williams is dead, but the date of his death does not appear.

In 1876 David Williams died intestate, and Lemuel G. Williams administered on his

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estate, giving bond in the penal *sum of $1700, and, so far as is known, doing no other act as administrator of David Williams. He died in a few weeks after this, leaving a will, which was admitted to probate. The defendants, John W. Little and L. R. Brooks, were appointed executors of the will of Lemuel G. Williams, and qualified. George F. Moseley was also appointed executor, and qualified as such.

After the death of Lemuel G. Williams, the defendants, John W. Little and L. R. Brooks, were appointed administrators de bonis non of David Williams.

The plaintiff in this case is an heir and distributee of David Williams. L. R. Brooks, one of the defendants, speaks of David as his uncle, and, besides this, there is nothing in the case to show how many other distributees there are, Letty and Clarissa Williams, if alive, being the only other two who are mentioned in the testimony.

There is nothing in the case before the court to show that David Williams had any estate except what appears to have been due to him as shown by the returns above referred to, or what estate, if any, Lemuel G. Williams left at his death, and there is no admission of assets by the defendants of either estate.

This action is brought by the plaintiff, Nancy A. Caldwell, one of the heirs and distributees of David Williams, against the defendants as administrators of David Williams, and the defendants are called on to show cause why that estate should not be settled up.

The petition charged that there was a small personal estate of David Williams, besides a considerable estate in the hands of Lemuel G. Williams, deceased. L. R. Brooks, one of the defendants, denies that they received any estate of David Williams, and denies that David Williams had any estate in his lifetime in the hands of Lemuel G. Williams; and John W. Little only denies that he has received assets of David Williams, and says nothing of Lemuel G.

The testimony shows that David Williams lived during his whole lifetime with Lemuel G. Williams, his brother, who was unmarried; that David was of weak mind, but that he was able to do many things which were

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of service, and that, in fact, he *did do many kinds of service which were valuable. The testimony is conflicting as to the value of his services, and as to the proper compensation for the care and support of one in his condition. It seems that Letty and Clarissa, who are in a similar condition, are now supported at an annual expense of $125 each.

The judge of probate held "that this action is affected neither by the statute of limitations nor by the presumption of payment arising from lapse of time, and that the administrators have in their hands $845.50, with interest from April 13th, 1825, due the estate of David Williams, for which they must account."

On the hearing on the Circuit the presiding judge held that, "in order to reach this conclusion, it is necessary first to fix the liability for said sum upon the estate of Lemuel G. Williams; next, it must appear that in due course of administration it was the duty of the executors of Lemuel G. to pay the said sum to the administrators de bonis non of David Williams. These are questions which cannot be determined unless the executors of Lemuel G. Williams were parties, and were called upon to defend in that capacity. There were two administrators of John Williams. The admission on which the claim rests was the admission of both. Both are equally liable. Yet there is no representative of Charles Williams before the court. In the present state of the proceedings I do not see how it is possible to sustain the decree." "Shall the case be remanded in order that additional parties be made? I do not think so. It is a stale claim." The decree of the Probate Court was reversed and the action dismissed, each party to pay his own costs.

The grounds of appeal bring up all the questions on which the rights of the plaintiff depend.

The plaintiff's case is founded upon the constructive payment by the defendants as executors of Lemuel G. Williams to themselves as administrators of David Williams. If it had been established satisfactorily that Lemuel G. Williams at his death was indebted to David Williams or to his estate, and the defendants were the only representatives of both estates, we think that the claim would be well founded, and that it would be good law to hold that they had received in one capacity what they were bound to pay in another. This doctrine is founded

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on the *very necessity of the case. But the defendants deny as a matter of fact that they have received any estate of David Williams, and there is no proof that they have received any estate of Lemuel G. Williams, and, both in theory and in fact, the whole estate of Lemuel G. Williams may be in money and under the sole control of the co-executor, George F. Moseley, who is not a party to these proceedings. An administrator is chargeable with what came into the hands of his co-administrator only in consequence of his suretyship on the administration bond, and co-executors are chargeable only each with what comes into his own hands or what he contributes to put into the others' hands. See Wms. on Ex'rs 1293; O'Neall v. Herbert, McM. Eq. 497; Gayden v. Gayden, Id. 436. The fund in this case, if any, has not been traced to the hands of the defendants, and the basis for the constructive payment has not been laid. If there had been any charge of collusion or misappropriation of the funds of an estate, a creditor or distributee may bring suit against the person into whose hands the assets have improperly come, joining the administrator or executor as a party defendant. 1 Story's Eq., §§ 424, 581, note; Story's Eq. Pl., §§ 178, 514. This, however, is a distinct ground of equity jurisdiction, and we do not see how the general grant to the Probate Court of jurisdiction in "matters testamentary and of administration" can confer on that court a right to exercise jurisdic-

tion in such a case as this would be if George F. Moseley had been made a party in the original case in that court. There is no special ground stated in the case before us to make it proper to call in George F. Moseley as executor of Lemuel G. Williams. If he comes in at all, he must come in on the simple allegation that he is one of the executors, and, if on that ground, we do not see why in any case a creditor or distributee of an estate may not call in the debtors of another estate before the Probate Court and proceed to judgment, however complicated might be the proceedings. Cases of collusion with debtors of an estate, misappropriation of the assets, and, perhaps, others are proper subjects of equity jurisdiction, but are not properly cases of "matters testamentary or of administration," in which there is privity between the distributees, legatees or creditors and the personal representatives who are trustees for

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*them. If this view is correct, then an amendment in the Probate Court by calling in George F. Moseley as executor of Lemuel G. Williams would oust its jurisdiction. This court can hear and determine on appeal only such cases originating in the Probate Court as that court had jurisdiction of. Poole v. Brown, 12 S. C. 556.

In this view of the case it would not be proper to consider and determine the other questions involving the merits. The proper parties are not before the court, and cannot be brought here in this proceeding. Nothing is concluded by this judgment except that this action cannot be maintained in its present shape.

It is, therefore, ordered and adjudged that the exceptions be overruled, and that the judgment of the Circuit Court be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 241

(Case No. 1040.)

STATE, ex relatione VAN WYCK, v. NORRIS. SAME v. SAME. SAME v. SAME.

(November Term, 1880.)

[1. *Evidence* ⇐383.]

The genuine bank-book of a deceased commissioner in equity, regular in form, credited with deposits of more than sufficient to cover balance against him in his office, shows a due discharge of official duty, until the contrary appears.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660–1677; Dec. Dig. ⇐383.]

[2. *Officers* ⇐111.]

The official moneys of a commissioner in equity being on deposit in a solvent Branch-bank of the State within one month after the adjournment of court, the law was sufficiently complied with, although the deposit was actually made before court opened.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 180, 181; Dec. Dig. ⇐111.]

[3. *Limitation of Actions* ⇐183.]

In action upon the official bond of a deceased officer, the representatives and distributees of deceased sureties upon such bond suffi-

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ciently plead the *statute of limitations in this form: "If any cause of action existed, it did not accrue within four years before the commencement of this action."

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 683–695; Dec. Dig. ⇐183.]

[4. *Pleading* ⇐305.]

Where a mode of pleading is objectionable, the proper remedy is a motion to strike out as irrelevant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 910–917; Dec. Dig. ⇐305.]

[5. *Limitation of Actions* ⇐102.]

Where a commissioner turned over his office, bank-book, &c., to his successor, claiming to withhold nothing, the statute of limitations then commenced to run in his favor against persons having funds in his hands, the provisions of the law which imposed upon him the duty of making a complete transfer, being equivalent to a demand.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 505; Dec. Dig. ⇐102.]

[6. *Officers* ⇐111.]

A commissioner in equity in 1863 and 1864, deposited his official moneys in a Branch-bank of the State, where they remained until the failure of the bank at the close of the war. *Held*, that he was not liable for any of the money so lost.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 180, 181; Dec. Dig. ⇐111.]

[7. *Officers* ⇐119.]

A commissioner in equity, upon going out of office in 1866, reported balance due estates in hand to be a sum of money which was larger than the amount to his credit on his bank-book turned over, the excess being unaccounted for. After his death, and in 1874, action was brought against his administrator, and all his creditors were called in, who established claims less in the aggregate than the amount to his credit in the bank. *Held*, that it must be assumed that unpresented claims were satisfied, and that there was no unpaid balance against the commissioner, except what was covered by the deposit in the bank.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 197–206; Dec. Dig. ⇐119.]

[8. *Limitation of Actions* ⇐57.]

Demands against such officer for moneys received, but not charged against himself, for moneys credited, but no vouchers produced, and for bonds taken, but not turned over or accounted for, were barred by the statute of limitations, in four years from the termination of his office.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 155, 312–323; Dec. Dig. ⇐57.]

[9. *Limitation of Actions* ⇐72.]

The statute would bar the claims of infant distributees who had general guardians, and who attained their majority more than four years before action brought, even where the funds were derived from the partition of real property.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 390–398; Dec. Dig. ⇐72.]

[10. *Limitation of Actions* ⇐174.]
The heirs of a deceased distributee, whose estate was represented by an executor, would also be barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 659–661; Dec. Dig. ⇐ 174.]

[11. *Limitation of Actions* ⇐57.]
Infants who attained their majority more than four years before action brought, are barred of their claim against the commissioner for moneys improperly received on bond payable to himself for personalty purchased at commissioner's sale.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 155, 312–323; Dec. Dig. ⇐57.]

[12. *Officers* ⇐114.]
The commissioner held a bond payable in installments for personal property really purchased by himself, the purchaser under the order of sale having the right to anticipate payments as far as necessary for the payment of debts, upon which bond he credited payments in 1863 and 1864, before due, and charged himself with the amounts received, after the debts of the estate were all paid. *Held*, that he thereby made himself liable for the confederate money so received in anticipation, at its value at the time of the payment.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187–192; Dec. Dig. ⇐114.]

[13. *Officers* ⇐111.]
Where there was no order to pay out the funds of an estate, the commissioner rendered himself liable at its then value for confederate

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money *credited on a bond, although not paid in fact, but included in a receipt given by the obligor for her share of the estate.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 180, 181; Dec. Dig. ⇐111.]

[14. *Limitation of Actions* ⇐174.]
Where the statute of limitations is a bar to an action against an executor for a debt of his testator, it is equally a bar to an action against the heirs and distributees for the same demand.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 659–661; Dec. Dig. ⇐ 174.]

[15. *Limitation of Actions* ⇐102.]
[Cited in Holladay v. Holladay, 24 S. C. 525, to the point that the statute of limitations begins to run in favor of a trustee from the time he does some act purporting to be a termination of his trust.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 505; Dec. Dig. ⇐102.]

[This case is also cited in McCown v. McSween, 29 S. C. 133, 7 S. E. 45, without specific application, and in Charping v. Toxaway Mills, 70 S. C. 475, 50 S. E. 186, as to hypothetical denials in pleading.]

Before Pressley, J., Anderson, September, 1879.

In these cases, which were heard together, the Hon. THOMAS B. FRASER, judge of the Third Judicial Circuit, sat in the place of Associate Justice McGOWAN, who had been of counsel in the court below.

They were three actions commenced June 29th, 1874, in the name of the State of South Carolina, ex relatione Lydia A. M. Van Wyck, Mary Maverick and eight others, against Isabella H. Norris and thirty-four other defendants. They were actions upon three official bonds of A. O. Norris, as commissioner in equity for Anderson district, bearing date December, 1853, December, 1857, and December, 1861, respectively. The plaintiffs were heirs-at-law of the estate of Samuel Maverick, deceased, and the defendants were the administrator of A. O. Norris, his distributees, and the administrators, heirs, devisees, &c., of the sureties on the three several bonds. All other creditors of A. O. Norris were called in and made parties by publication.

The case is fully stated in the opinion. There is no fact omitted which affects the points decided, except, perhaps, the statement that under the order for the sale of the property of the estate of P. S. Johnston, purchasers were allowed to anticipate payments on their bonds for so much as would be necessary to pay debts.

Exceptions to the referee's report are so full that they clearly indicate the points made by the parties to the cause. No exceptions having been taken to the Circuit decree (only notices of appeal), these exceptions cover the grounds argued in this court. They are as follows:

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*The plaintiff, in behalf of herself and the said other heirs-at-law of Samuel Maverick, deceased, excepts to the following conclusions of law found by the said William H. Parker, referee:

1. Because the referee erred in holding that the late Andrew O. Norris, commissioner in equity, had deposited the moneys received by him on account of the Maverick estate, in bank, according to law.

2. Because he erred in sustaining the defence of deposit, when he reports as a fact that said deposit was not sufficient to cover the balances in the hands of the said commissioner on account of all the estates, by the amount of $14,362.02, and it is no defence to say that the said deposit was sufficient to pay all the demands presented, or that the failure to deposit according to law occasioned no injury to any one.

3. Because the referee erred in holding that the statute of limitations was well pleaded in the answers of the several defendants, or in any of them, the plea in all the answers being hypothetical and insufficient.

4. Because the referee erred in holding that the statute of limitations is a bar to the recovery sought by the complainants of the moneys received by the said Andrew O. Norris, commissioner.

5. Because the commissioner is the ministerial officer or financial agent of the court, and not a technical trustee, whose liabilities are governed by rules inapplicable to such ministerial officer, and the referee erred in treating him as such trustee, and holding that his report on estates for 1866 was such

act done in a public office by which he divested himself of his trust, with notice to the parties, as gave currency to the statute of limitations from that time.

6. Because such holding, in effect, makes the commissioner a technical trustee, and the referee has erred in applying to him the rules governing the liability of such trustees and contrary to the nature of the relation he sustains to moneys in his hands, as declared by law.

7. Because as to the $2512.50, claimed to have been paid to two of the Maverick heirs, and evidenced by receipts unsigned, the referee erred in holding that the said report on estates was such notice to the parties that

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the said commissioner held himself *not responsible for the same, as gave currency to the statute of limitations.

8. Because as to the sum of $1683.75, with which the said commissioner failed to charge himself, the referee erred in holding that the said report on estates was such notice to the parties that he claimed not to be charged therewith, as gave currency to the statute of limitations.

9. Because the referee erred in holding that the annual reports and accounts of the commissioner were conclusive of the rights of the parties whose estates or funds were accounted for.

10. Because the referee has erred in holding the commissioner to be a trustee in possession of money received for his cestuis que trust, and that the statute of limitations commenced to run from its receipt and the failure to pay over, and not from the time of the demand.

11. Because the referee erred in holding that a demand on the sheriff was necessary to constitute a breach of his bond and give currency to the statute, while the statute in the case of the commissioner runs from the time of the breaches, for if his holding that the commissioner is the agent of the court and parties be correct, then the statute cannot run in his favor as such agent, except from the time of the demand, notwithstanding there may have been previous breaches.

12. Because as to so much of plaintiffs' money as the late Andrew O. Norris failed to turn over to his successor, the referee erred in not holding that he held the same as the sheriff does, for the benefit of the parties entitled to it.

13. Because the statute of limitations can only run from the time of the demand of the parties in interest, and entitled to the money, and the referee therefore erred in holding that if a demand was necessary, it was made by act and operation of law, and by W. W. Humphreys, as successor of the said Andrew O. Norris, so as to give currency to the statute of limitations.

14. Because the referee erred in holding that the receipts of William Van Wyck, for himself and the other heirs, in March, 1861, were prima facie evidence of a demand of all moneys previously received and on hand at that time (which would, of course, include the balance of $10,212.49 reported at June

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Term, 1861, *as still on hand after such payments were made,) so as to give currency to the statute of limitations from that time.

15. Because the referee erred in holding, on the authority of Vaughan v. Evans, 1 Hill's Ch. 414, that the order to pay out was prima facie evidence of a demand, so as to give currency to the statute of limitations, that statute not being in question, and such holding being an application of the principle decided by it, never intended by the court, and for which it is not an authority.

16. Because the referee erred in not holding the minority of some of the Maverick heirs, a protection against the plea of the statute.

17. Because the referee erred in reference to the Strickland estate, in holding that the bond required of the administrator by the order of court to pay over to him the proceeds of the real estate, had been given when the proof was that no such bond was turned over by the said Andrew O. Norris to his successor, and no trace of it could be found in the offices of the Ordinary or commissioner, where it should have been recorded if it ever existed.

The defendants, Jesse W. Norris and others, except as to so much of the report of W. H. Parker, special referee herein, as finds in favor of the legatees of the estate of P. S. Johnston, deceased, (styled in said report heirs-at-law), viz., Mrs. Johnston, (now Cureton), Calhoun Johnston, W. C. Johnston, Mary Humphreys and Sallie L. Johnston, and G. W. Anderson, assignee of Calhoun Johnston, on the following grounds, to wit:

1. Because the several sums found in favor of the said legatees, and for the value of which, in United States currency, the defendants are required to account, were received by the late commissioner in equity in Confederate States treasury notes, in 1863 and 1864; were proceeds of sales made with reference to values in Confederate currency, in December, 1862, and March, 1863, respectively; by virtue of orders of sales, dated in November, 1862, and February, 1863; and were secured by bonds payable in installments, December 18th, 1863, 1864, 1865, as found by the referee; and from these facts

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he should have found *that these sums were lost to the estate of P. S. Johnston, by the subsequent loss of all value of the money in which they were paid, and not because they were paid before due, and it was error in him to find otherwise.

2. Because one of the said sums so found by the referee, to wit, $208.25, is part of a sum of $508.35, received by the commissioner on March 3d, 1863, on a purchase of $1320,

was among the earliest of his receipts, was received by him under order of sale authorizing anticipation of payments for the payment of debts, and was so applied by the commissioner to the benefit and advantage of the estate, as shown by the account of the commissioner with said estate in evidence and not contradicted: and the referee should have so found.

3. Because, if not so applied, the said sum of $538.25 was received on a purchase of $1320, one-third of which and interest ($470.80) would have been due December 18th, 1863, and one-third and interest ($501.60) on December 18th, 1864; and the same loss would have resulted to the estate (in the loss of the currency) if this sum had been received when due, making this a case of damnum absque injuria, and the referee should have so decided.

4. Because, if not applied to the payment of debts and expenses, the said sum of $208.25, so found by the referee, having been received by the commissioner prior to his deposit in bank, was a part of such deposit and should have been included by the referee in the sum reported by him as deposited for this estate, there being no evidence to the contrary.

5. Because the $628.40, another sum allowed by the referee, was paid to the commissioner (as evidenced by his account) by Mrs. Georgia Ann Johnston, one of the legatees of this estate, (now Mrs. Cureton), who also received from the commissioner, on the same day, May 30th, 1864, as legatee, the sum of $1230.08; she owed the commissioner for purchase at sale on December 18th, 1862, $569.75, which, with interest to May 30th, 1864, amounts to the sum with which she is credited, $628.46; the natural presumption is that she did not pay this sum, but received credit for it, and only received the difference in money, $691.54, and therefore that the $1230 covers the $628.46.

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*The disbursements of the commissioner were not questioned or gainsayed on the trial, and were not, therefore, involved. It was error in the referee not to find the facts as above stated, and to discharge the defendants from all liability to account for the same.

6. Because, as to the remaining sum of $544.26, received by the commissioner on August 6th, 1864, and adjudged to the said legatees by the referee, it was received in the exercise of a reasonable discretion reposed in the commissioner by the order of the court in a currency contemplated by the order, and there being no allegation or proof of waste, misappropriation or bad faith, the mere fact of receiving the sum before due subjects him and his sureties, at most, to liability to account only for the interest on the sum accruing up to the time of maturity of the bond, such being the measure of loss to the estate, and the referee should have so found.

7. Because it was error in the referee to decide that the legatees, Mrs. Cureton and her son, Calhoun Johnston, who came of age in 1870, more than four years before the commencement of this action, were not barred by the statute of limitations.

8. Because it was error in the referee to award interest on the sums allowed prior to the commencement of this action.

The Circuit decree was as follows:

This case involves so many parties in interest, and so many facts and points of law, that I have found it impossible to make any satisfactory condensation of the very full and able report herein, by William H. Parker, special referee.

After careful examination of said report and of the arguments and authorities by the attorneys in the case, I concur almost entirely in the result reached by the said referee. It is therefore ordered and adjudged that his said report be confirmed and made the judgment of this court, except so much thereof as concerns the estate of P. S. Johnston. As to that estate, it is my judgment that the statute of limitations bars the share of the widow by reason of her action not having been commenced within four years after settlement by A. Norris with his successor in office; further, that such of the minors are

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also barred as *came of age four years before the commencement of this suit, the burden of proof being upon them to show how long their disability continued. Such of said minors as are not so barred, have leave to apply in this case for such order as may be necessary to enforce the payment of their claims out of the estate of A. O. Norris, or any of the sureties to his last bond.

It is further ordered that the plaintiffs in this case do pay the costs of the referee and of the officers of the court: that all other parties pay their own costs, except such of the minor heirs of P. S. Johnston as may recover under this judgment; they are to have the amounts due them, with costs.

Plaintiffs and defendants appealed.

Messrs. Burt & Broyles, for estates of Maverick and Strickland.

Messrs. B. F. Whitner, J. N. Brown and E. B. Murray, for defendants.

May 26th, 1881. The opinion of the court was delivered by

FRASER, A. A. J. These cases were heard together on the Circuit and in this court. The facts will be found in the report of the referee, as modified by a statement of "facts additional" thereto, as agreed on by counsel and forming a part of the "case" before the court, and the testimony of W. W. Humphries, J. N. Brown, B. F. Crayton and Andrew O. Norris also in the "case."

It will not be necessary to re-state the

facts, except so far as they explain the judgment of this court.

Andrew O. Norris, now deceased, was commissioner in equity for Anderson District for three successive terms of four years each, and entered into bond, with sureties for each term, for the faithful discharge of his duties.

1. The first bond was dated December 3d, 1853, with sureties James W. Harrison, Elijah Webb, J. E. Norris, Jesse W. Norris and E. S. Norris.

2. The second bond was dated December 3d, 1857, with sureties J. W. Harrison, Jesse W. Norris, J. E. Norris, Benjamin F. Sloan and Charles L. Gaillard.

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*3. The third bond was dated December 2d, 1861, with sureties Jesse W. Norris, E. S. Norris, Charles L. Gaillard, B. F. Sloan and James C. Keys.

The third and last term ended about January 3d, 1866, when Andrew O. Norris was succeeded in office by W. W. Humphries.

Andrew O. Norris, the commissioner, and all the sureties on these bonds died before the commencement of these actions, except J. W. Harrison and James C. Keys, who are insolvent, and have not been served with process.

The personal representatives, as well as the devisees, legatees, heirs and distributees of Andrew O. Norris and his sureties, who have died, have all been made parties to these proceedings.

These actions have been brought on these bonds in the name of the State of South Carolina, ex relatione Lydia A. Van Wyck and others, heirs-at-law of Samuel Maverick, deceased, on behalf of themselves and others, creditors of Andrew O. Norris, deceased, individually, and as commissioner in equity. The actions, in effect, are proceedings to marshal the assets of the estates of Andrew O. Norris and his deceased sureties on his official bonds, and for general relief.

Ida L. Featherstone, who had commenced an action on her own account on these bonds, was enjoined, but was afterwards permitted to proceed with an independent action.

All the issues of law and fact were referred to W. H. Parker, as special referee, and he was directed to call in, by publication, all the creditors of Andrew O. Norris, and to take an account of the administration of his estate, and, also, of the administration of the estates of the deceased sureties. The referee was also directed to take an account of the money received by Andrew O. Norris, as commissioner in equity, from sales made by him of the real estates of Samuel Maverick, and also of all moneys received by him as commissioner for others, and not accounted for.

The referee published the notice calling in creditors. Various claims against Andrew O. Norris, as commissioner, were presented, and some claims against him individually. The referee submitted his report, which, with some slight modifications, was confirmed by the Circuit judge.

As to several claims presented there has

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been no appeal. Only *three have been brought before this court by the appeal from the judgment of the Circuit Court.

1. The claim of the representatives of Samuel Maverick, deceased.

2. The claim of the representatives of Noel E. Strickland, deceased.

3. The claim of the representatives of P. S. Johnston, deceased.

There are claims against Andrew O. Norris, as commissioner in equity, for moneys received by him and not paid out, and for other defaults, as will hereafter appear.

The aggregate of the commissioner's balances for all estates in the office, as appears from his report in 1866, was the sum of.....	$90,695 65	
Deducting investments.....	12,420 63	
		$78,275 02
Deposited in bank, as appears by bank-book		63,913 00
Leaving unaccounted for.....		$14,362 02

The report to June Term, 1866, states that the above sum of $12,420 was invested for several estates named in Confederate bonds, Confederate money and individual notes, and that the above sum of $63,913 was deposited in the branch of the Bank of the State of South Carolina, at Columbia, and was in full of all the balances on all other estates.

It does not appear from the report of the referee what items made up the $14,362.02, the amount unaccounted for.

The total amount of claims against the commissioner is stated in the report of the referee to be $34,980.35. It does not appear exactly how this sum is made up, but it is conceded that the total amount of the claims presented is far less than the amount deposited in bank. The deposit in bank does not profess to cover items of cash received and not charged against the commissioner in his account, or items claimed to have been paid out, and for which no proper receipt has been shown; or money collected after the date of the deposit in bank, or bonds not collected and not turned over to his successor by the commissioner.

These deposits in bank were made between

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October, 1863, and *February, 1864. No Court of Equity was held for Anderson District in 1862, 1863 or 1865. The court was held in June, 1864, and again in June 1866. The reports to June Term, 1864 and 1866, showed the same balances, and that the sums admitted to be on hand had been deposited in bank.

The deposit was made by Andrew O. Norris in his official capacity as "A. O. Norris, Commissioner in Equity, Anderson District," in a genuine "bank-book of the Branch Bank of the state," and in the handwriting of the

proper officer of the bank. This bank-book was turned over by Andrew O. Norris on or about January 3d, 1866, to W. W. Humphries, his successor in office, with an order for the payment of the money.

The fact that there is a large amount, $14,362.02, which has been received by the commissioner and not now accounted for, and the fact that there has been deposited in bank a much larger sum than is claimed by the parties now before the court, amounting to $28,932.02, cannot affect the rights of the parties now before the court. It will be time enough to consider these facts when other parties come forward who can show an interest in these amounts.

The claims now under consideration and above referred to, are:

I. The Maverick estate, consisting of—

1. Money collected and included in bank deposit, $25,760.30.

2. Money received on bonds and not charged in the account, $1683.75.

3. Amounts claimed by the commissioner in his account to have been paid out and the receipt not signed, $2512.50.

4. Balances due on bonds of J. C. Kennedy and Thomas M. Howard, not turned over to successor.

The bond of J. C. Kennedy has not been turned over, but the mortgage remains unsatisfied. The bond of Thomas M. Howard, in some way not explained, appears to have been assigned by the commissioner in equity for Greenville District, to Samuel M. Green and Laura R. H. Green, his wife, in part payment of the share of the latter in the estate of William Turpin, and to have been finally satisfied in April, 1867.

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*II. Estate of Noel F. Strickland, reported as on hand annually, from 1856 to 1866, $515.75.

At the June Term, 1853, there was an order to pay over this whole fund to Noel F. Strickland, and before payment he died. Administration on his estate was granted by the Ordinary to A. T. Broyles, but as the fund in court was the proceeds of the sale of real estate, an order was made June 26th, 1854, to pay over the whole fund to A. T. Broyles for the payment of debts on his entering into bond to the commissioner, with good security, in double the amount of the fund.

There is no record of such a bond in the commissioner's office, and if such bond has ever been given it cannot be found, and there is no evidence to show that, in fact, such a bond was given.

On February 16th, 1855, the commissioner paid to A. T. Broyles, out of this fund, which was originally $700, the sum of $184.25, leaving in his hands the above balance of $515.75, which has been reported as on hand annually from 1856 to 1866. This sum is reported in 1864 and 1866 as included in the deposit in bank.

This claim is presented by a petition filed by A. T. Broyles who had been appointed administrator of Noel F. Strickland, on behalf of the widow and children. There is no evidence that they or any of them are living, and, if living, they are non-residents. They were parties to the petition to pay over the fund to A. T. Broyles for the payment of debts of Noel F. Strickland. The children were all under twelve years of age March 25th, 1854, when that petition was filed.

III. Estate of P. S. Johnston.

The appeal in this case is on behalf of the representatives of Andrew O. Norris and his sureties.

This claim is as follows: Amount reported as on hand at the June Term, 1864, and at June Term, 1866, as deposited in bank, $7-103.47.

Among the property sold by the commissioner and belonging to this estate was a slave, who was bid off by J. W. Harrison for $1320 on March 3d, 1863, and for which amount he gave his bond in three install-

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ments, payable December 18th, 1863, *1864 and 1865. This slave was bought by J. W. Harrison for the commissioner, and went into his possession, and he himself made the payments on the bond.

On March 3d, 1863, he credited the bond and charged himself with $538.25.

On December 18th, 1863, he credited the bond and charged himself with $304.05.

On August 6th, 1864, he credited the bond and charged himself with $544.26.

The report of the referee charges the estates of the commissioner and his sureties with the sum of $208.25 as the excess of the credit over what was due December 18th, 1863, with interest, and also with the sum of $544.26, the amount of last installment, credited before it was due, with the interest, and not deposited in bank—the first amount to be scaled at $1.90 to $1, and the second at $8.05 to $1.

The referee also charges the estates of the commissioner and his sureties with the sum of $628.46, received May 30th, 1864, on the bond of Mrs. Johnston, the widow, and paid out to her on the same day with other money, and her receipt taken therefor. Interest is also charged on this sum, and it is scaled at the rate of $9.47 to $1. The order under which the sale to J. W. Harrison was made, was dated February 13th, 1863, and the sale was made on March 2d, 1863.

These claims come under one or more of the following classes:

1. Money collected by the commissioner at various times during his three terms of office, and from time to time deposited in bank, and finally included in the deposit in the branch of the Bank of the State of South Carolina, at Columbia, as shown by the bank-book above referred to.

2. Money collected by the commissioner at

various times during his three terms of office, and omitted in his account and unaccounted for.

3. Money collected on bonds charged in the commissioner's accounts as received and paid out, but the receipts for which have not been signed by the parties, and as to which payments there is no other evidence.

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*4. Certain bonds held by the commissioner and not turned over to the parties interested or to his successor.

5. Bonds collected in confederate money before due and deposited in bank.

6. Bonds collected in Confederate money before due and not deposited in bank.

The defences set up are—

I. The deposit in bank.

II. The statute of limitations.

To the plea of the statute it is replied that, if allowed at all, it cannot be applied to the claims of some of the parties who are under disability of minority. The facts in reference to the minority of some of the parties will be stated hereafter, in referring to the different estates involved.

I. As to the first defence—the deposit in bank—it is unnecessary to do more than to say that this court has held that a bank-book of the branch of the Bank of the State of South Carolina, regular in form, in the handwriting of the proper officer of the bank, containing an account with "A. O. Norris, Commissioner in Equity, Anderson District," showing a sum of money on deposit more than sufficient to cover the balance against the commissioner, must be assumed to show a due discharge of official duty until the contrary appears. Featherston v. Norris, 7 S. C. 484; Same case, 14 S. C. 624. The estates under consideration were specially named in the reports of 1864 and 1866, and the latter report claims that all the balances are covered by this deposit. The fact that there is a large balance unaccounted for cannot affect this case, because it must be assumed, for the purposes of this case, that those who have not brought forward their claims have been satisfied, and that there is, in fact, no such outstanding unpaid balance against the commissioner.

The amount deposited is $63,913, and the total of claims presented is $34,980.35, showing a balance "more than sufficient" to cover the claims of these estates, and all others brought into this case.

Neither does it impair the value of this deposit if it be admitted, as contended in the

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argument of these cases, that Confed*erate money was deposited in bank. It was received on deposit as gold or bank bills would have been, and the same common catastrophe would have caused the same loss to the parties interested in either case.

It is true that this money was not deposited within one month after the time for the adjournment of the Court of Equity for 1862 and 1863. Under some circumstances it might be important to inquire whether the commissioner was bound to deposit the money until the court had been actually held and had adjourned, so as to have the funds in his hands subject at once to the order of the court. The money was, however, deposited before the June Term, 1864, and was reported as being in bank. The commissioner might have made himself liable for a premature deposit if the bank had failed in the meantime. No good reason, however, appears why a deposit previously made and permitted to remain when the proper time arrived, is not, in all respects, just as good as if then made. All that would have been necessary would have been to make a new entry in the bank-book with a new date. So far as appears to the court the bank was then a safe depository of public and private funds, and only went down in the ruin which subsequently overtook public and private fortunes at the south.

II. As to the plea of the statute of limitations. A preliminary question has been made that the statute is pleaded "hypothetically," and cannot, therefore, avail. It is in this form: "If any cause of action existed, it did not accrue within," &c.

A hypothetical denial is allowable only when the facts are not presumptively within the knowledge of the defendant, (2 Wait's Pr. 422), as in this case, where all the original parties are dead. A defence, however, may be thus pleaded "when a plain and direct statement cannot be given, and when this form is used from necessity and in good faith." An answer may deny that "a ditch was dug," and then say that if dug, it was sufficiently guarded, &c. 2 Wait's Pr. 309.

But if the mode of pleading is objectionable, the proper remedy is "a motion to strike out as irrelevant," &c. Id. There is no

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*good reason why the plea of the statute should not be governed by the same rules.

We will then proceed to consider the plea of the statute of limitations as applicable to these claims. "A statute of limitations," says Mr. Justice Story, "instead of being viewed in an unfavorable light as an unjust or discreditable defence, should have received such support from courts of justice as would have made it what it was intended emphatically to be—a statute of repose." It supplies the defects of human memory, the loss of papers, and of witnesses who have removed beyond the jurisdiction of the court or who have died, and promotes promptness and punctuality in all business transactions.

The law is too well settled to make any reference to authority necessary, that when a trustee does an act which purports to be a termination of his trust, it gives currency to the statute from the time of such an act. This act may be simply an act done in a

public office, in which, by law, he must render an account of his trust. When the act purports to be a complete termination of the trust he henceforth holds adversely; and, at the end of the statutory period, all further account is barred.

Trustees are not the only persons who are entitled to the benefit of the statute, and, therefore, it is not important to determine whether the commissioner in equity was or was not a trustee. He was, however, a public officer, to whom was entrusted, by law, the collection and custody of the money of others, and the care and custody of their bonds and other property.

In Houseal v. Gibbes, Bail. Eq. 484 [23 Am. Dec. 186], the court uses this language: "The office of master of the Court of Equity is, in some respects, perfectly analogous to that of sheriff of the court of law. Both are receiving officers of their respective courts. The commissioner in equity was the receiving officer of the Court of Equity."

In Wright v. Hamilton, 2 Bail. 51 [21 Am. Dec. 513], the doctrine is recognized that the statute will commence to run in favor of a sheriff from the demand; and it is expressly held in Williams & Clinton v. Sims, 1 Rich. Eq. 53, that a claim against the sheriff will be barred after four years from demand.

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The sheriff was not *required to turn over money to his successor, and demand only could give currency to the statute.

The plea of the statute was not allowed to prevail in Houseal v. Gibbes, because the master held the fund under an order of the court requiring him to "improve on interest," or "invest in public securities." The court says: "Of course he cannot, in that point of view, plead the statute of limitations until he had previously divested himself of that trust by discharging it, or by denying all liability to discharge it further."

This is the same rule which is applied in the case of trustees. The general rule is that the statute begins to run from the accrual of the cause of action, and in cases of trustees and receiving officers the right of action commences from the demand and refusal, or from the act, which is a disavowal of the trust and the assumption of an adverse position.

If there should be a demand on the commissioner for the payment of money which he should pay out, and he refuses, the right of action accrues, and the sureties for the term are liable for the breach of the bond.

In Vaughn v. Evans, 1 Hill's Eq. 430, it is held that "an application for an order" to pay out or invest is such a demand. If it is such a demand as to make the sureties liable it is because it is a breach of the bond to neglect or refuse to do the duty, and the right of action accrues. From this time the statute ought to run if, as we hold, the commissioner in equity was such an officer as to be entitled to plead it.

The twenty-sixth section of the act of 1840 (11 Stat. 119), provides for a complete termination of the office of a commissioner in equity on the election and qualification of his successor, and the transfer to him of "moneys, bonds, notes, certificates of stock, and all other choses in action or property held by" him "by virtue of his office." He is authorized and required to demand from his successor a receipt for the property turned over, and he is declared to be liable for what he fails to turn over. The successor is required to give a receipt for the property turned over, if one is demanded of him, and if not required of him, it is his duty to make

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an "inventory" of such books, *bonds, &c., as have come into his possession, and file the same in the records of the court.

The outgoing and incoming commissioners are, by this section, both made liable for a neglect of the duty prescribed in it—to a rule for a contempt, to an action on the case, and to an action on the official bond. It is difficult to conceive any more sweeping or stringent provisions for the complete transfer to a successor of all property in charge of a commissioner at the termination of his term of office. After this he cannot answer to any one except his successor, and he cannot pass over his successor and pay or turn over to parties in interest. He must turn over to his successor. Under Section 16 "all moneys deposited in bank * * * or invested by him under any order or decree of the court in bonds, notes, stocks, or any property whatsoever, shall be transmissible to such successor in trust for parties interested."

This court concludes, from the testimony of W. W. Humphries, Norris' successor, that when Norris turned over his office on January 3d, with the bank-book above described, with an order for the payment of the money, he claimed to have turned over everything for which he was liable, as "Norris made no complaint that any of the papers were lost or that he was unable to turn them over."

If an order of the court can operate as a demand, certainly the provisions of Sections 16 and 26 must have that effect; and if the statute commences to run from the demand, it should commence to run from this statutory termination of the office and its duties. Parties under no disabilities had four years to investigate their rights, and there is no more reason for indulging them in long delay than others who have business relations with individuals or receiving officers of the courts.

Under the view taken by this court of these defences, we hold—

As to the Maverick estate:

The sum of $25,760.17 is sufficiently accounted for by the deposit in bank, and the sum of $2512.50, for which the receipt has

not been signed, and the $1683.75, omitted

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items, and the bonds of *J. C. Kennedy and Thomas M. Howard, not turned over, are barred by the statute of limitations.

Samuel Thompson and Josephine Bryan having had guardians-in-chief, their claims are also barred by the statute. Long v. Cason, 4 Rich. Eq. 60; Massey v. Massey, 2 Hill's Ch. 496. And they attained majority more than four years before the commencement of these actions. The rule is that when an act is done, during minority, which would give currency to the statute in case of an adult, the statute commences to run as soon as the minor comes of age.

S. A. Maverick and Joseph B. Weyman were two heirs-at-law of Samuel Maverick. The former died in 1866 or 1867, and the latter some time before. Each left a will. The former appointed his wife, Mary, executrix, and his son, S. A. Maverick, executor, of his will. Joseph B. Weyman bequeathed his estate to his wife, Emala.

The interests of S. A. Maverick and Joseph B. Weyman passed under their wills to their personal representatives. There is no express authority in this state, so far as we can ascertain, that holds that the proceeds of land sold for partition is converted into personalty. It is certainly no longer subject to all the rules which govern real estate. The right of dower does not attach to it. There was no necessity that a married woman should convey it by a renunciation of her inheritance, as in case of land, before an officer. In Hood v. Archer, 2 N. & McC. 149, the court uses these words in reference to such money: "By legal operation converted into money." Where a will directs executors to sell the real estate and distribute the proceeds the land will be treated as personal property. The same rule applies to agreements for a sale for the purpose of division, and to a legislative direction for a sale. Adams' Eq. *136, note, and the authorities there cited.

The court holds that as to the shares of S. A. Maverick and Joseph B. Weyman, in the estate of Samuel Maverick, those who claim through them or under their wills are barred, by the operation of the statute, against their personal representatives.

As to the estate of Noel T. Strickland:

The whole fund was deposited in bank,

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and is sufficiently *accounted for, it is not important, therefore, to consider whether A. T. Broyles could not have received the fund under the appointment as administrator by the Ordinary, or whether he ever executed the bond to the commissioner as required by the order of the court.

As to the estate of P. S. Johnston, in which the appeal to this court is on behalf of the commissioner and his sureties:

The sum of $208.25, which the referee finds to have been received in excess of the first installment of the bond of J. W. Harrison, [we take the referee's statement, though it seems too small, as it has not been appealed from by the representatives of the Johnston estate], was received before it was due, and seems not to have been necessary, as an amount equal to the debts reported to be due, had already been paid in. It was, therefore, received without authority of law. The same is true as to the $544.26, the third installment received before it was due, and not deposited in bank. The amount of $628.46, received on the bond of Mrs. Johnston, May 30th, 1864, was in a transaction in which a receipt was given by her for $1230. If the large sum in bank was, as we hold, properly there, no fault could have been found with this transaction if there had been an order to pay out the money. But there was no such order to pay out, and it was a breach of duty in the commissioner to pay the money to her, even by way of discount. As to all three of these sums we find no fault with the scale adopted by the referee and applied to them. The claims of Mrs. Johnston and of Calhoun Johnston, who came of age in 1870, are barred by the statute of limitations.

The only default which is established by the judgment in these cases is as to a small portion of the estate of P. S. Johnston.

This estate was sold by the commissioner under orders of November 11th, 1860, July 8th, 1861, November 26th, 1862. The first sale was made December, 1862, and one sale was made in 1863.

John E. Norris was not a surety on the bond of 1861, and his estate is in no way liable for any default as to this estate. Benjamin F. Sloan and J. W. Norris were sureties on bond of 1861. Benjamin F. Sloan died February, 1867, and administration on his estate was granted in 1867, in March.

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*J. W. Norris died April, 1869, and administration on his estate was granted in June, 1869. As to any action against these administrators the statute is a bar. This is sufficient to protect the distributees. Any other rule would give creditors of any estate two periods of limitation—one against the personal representatives and one against the heirs, devisees, distributees and legatees. When the statutory period runs out the remedy is extinguished, and this should be an end of all litigation in reference to it. The minors, however, who are not barred as against the personal representatives, cannot, for the same reason, be barred of their rights as against the heirs, devisees, distributees and legatees of Benjamin F. Sloan and J. W. Norris.

The judgment of the Circuit Court is, therefore, affirmed, and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

15 S. C. 262

(Case No. 1041.)

GEIGER v. KAIGLER.

(November Term, 1880.)

[1. *Pleading* ⇐34.]

In an action brought for the recovery of real property claimed by plaintiffs as devisees of G., the complaint did not charge that the defendant claimed under G. Defendant's answer denied title in plaintiffs, and claimed the property under a contract to purchase made by the executor of G. under a power in the will, and the payment of the purchase money. *Held*, that this admission was the narrative of a single transaction, and if used by plaintiffs to show that both parties claimed under G., a common source, it must be taken as a whole.

[Ed. Note.—Cited in Wilmington, Columbia & Augusta R. R. Co. v. Garner, 27 S. C. 51, 2 S. E. 634.

For other cases, see Pleading, Cent. Dig. §§ 51½, 66–74; Dec. Dig. ⇐34.]

[2. *Ejectment* ⇐12, 15.]

In an action for the recovery of land upon the ground of title, plaintiff can recover only upon a perfect chain of title, unless there be a common source, or defendant is estopped from denying plaintiff's title, as, e. g., in case of landlord and tenant.

[Ed. Note.—Cited in Rhett v. Jenkins, 25 S. C. 458; Johnson v. Cobb, 29 S. C. 377, 7 S. E. 601; Anderson v. Lynch, 37 S. C. 578, 16 S. E. 773; Harrelson v. Sarvis, 39 S. C. 18, 17 S. E. 368; Cave v. Anderson, 50 S. C. 297, 27 S. E. 693; Martin v. Burgess, 63 S. C. 424, 41 S. E. 450; Dupuy v. Williams, 91 S. C. 193, 74 S. E. 381.

For other cases, see Ejectment, Cent. Dig. §§ 47, 59; Dec. Dig. ⇐12, 15.]

[3. *Ejectment* ⇐95.]

In an action to try the title to real property, mere prior possession by plaintiffs, even if by descent cast, will not dispense with the necessity of proof of their title.

[Ed. Note.—Cited in Reeves v. Brayton, 36 S. C. 398, 15 S. E. 658; Heyward v. Farmers' Min. Co., 42 S. C. 147, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702.

For other cases, see Ejectment, Cent. Dig. § 280; Dec. Dig. ⇐95.]

[4. *Ejectment* ⇐1; *Trespass to Try Title* ⇐1.]

The several actions of ejectment, trespass to try title, &c., considered, and cases reviewed.

[Ed. Note.—Cited in Columbia Water Power Co. v. Columbia Land & Investment Co., 42 S. C. 497, 20 S. E. 378, 540.

For other cases, see Ejectment, Cent. Dig. §§ 1, 2, 6; Dec. Dig. ⇐1; Trespass to Try Title, Cent. Dig. §§ 1, 2; Dec. Dig. ⇐1.]

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[5. *Powers* ⇐9.]

*A will taken as a whole showed an intention that the executor should have the possession of the entire estate, and full power was given him to sell any part of it; under this power the executor made sale of a tract of testator's land. *Held*, that the plaintiffs claiming as devisees, could not maintain an action at law against the purchaser, for the recovery of this tract of land.

[Ed. Note.—Cited in Reeves v. Brayton, 36 S. C. 400, 15 S. E. 658.

For other cases, see Powers, Cent. Dig. § 20; Dec. Dig. ⇐9.]

[6. *Ejectment* ⇐26.]

Possession of this tract of land under a contract of sale, made with the executor under this power, and payment of the purchase money, is a good equitable defence to an action brought by these plaintiffs for possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 113; Dec. Dig. ⇐26.]

[7. *Ejectment* ⇐14.]

[Where defendant's possession was obtained in such manner that he is estopped to deny plaintiff's title, such estoppel will support ejectment.]

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 58; Dec. Dig. ⇐14.]

[This case is also cited in Heyward v. Farmers' Min. Co., 42 S. C. 144, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702, without specific application; in Tompkins v. Railroad Co., 30 S. C. 482, 9 S. E. 521, as to the changes wrought by the Code in actions for recovery of real property; and in Hillhouse v. Jennings, 60 S. C. 401, 38 S. E. 596, as to sufficiency of pleading in actions involving title to real property, where peaceable possession is alleged.]

Before Wallace, J., Richland, July, 1879.

Action by Caroline J. Geiger, Isabella C. Geiger, Juriah E. Geiger, John A. Geiger and Frederick Ann Geiger against George Kaigler.

It does not appear when the action was commenced; the brief says "it was begun by summons and complaint." The complaint states that Henry J. Geiger, the son of testator, died under age and unmarried, and that Alexander Geiger, the executor, died in 1868. The case is fully stated in the opinion.

Mr. J. D. Pope for appellants.

The fee rests in the appellants as heirs-at-law, or as devisees under their father's will, and not in the executor, who is given neither an estate nor any beneficial interest in the realty. The fee passed to the children, whether they be devisees or heirs-at-law, subject to the exercise of a power given to the executor. Couple the fourth clause of the will with the third, and we have the true relation of Alexander Geiger to the children—that of testamentary or statutory guardian of their persons and estate. 3 Stat. 707; 2 Kent 225; Bac. Ab., tit. "A," 3; McPher. on Inf. 91. Alexander took no fee in the lands. 4 Kent 320, notes; 2 Dev. & Bat. 439; 1 Tread. Const. R. 106; 1 Wms. on Ex'rs 579; 1 Sugd. on Pow., ch. III., 129, et seq. He took a naked power and could sell, strictly because of the appointment to sell. Plaintiffs proved the will and established their title, identified living parties and the locus in quo, proved the death of others, and rested. Defendant sets up a simple defence, equitable in its

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*nature, that the executor exercised the power in the will, received bond for titles, and paid the price. Of all this there was no proof, and yet a non-suit. The answer pleads the statute of limitations. We could prove the infancy of some of the co-tenants. From the complaint and answer, it appears that plaintiffs and defendant claim from the same source; defendant thereby admits the title

of Henry Geiger to be good. 4 Rich. 558; 1 Strob. 1. If defendant proves title from Henry Geiger, plaintiffs are estopped, or, he might, in the Court of Equity, set up equities, which, if proved, would cause the court to enjoin. These equities may now be set up by answer, as a defence to plaintiffs' action at law, but defendant must prove them. 5 Rich. Eq. 15; Adams' Eq. 363, notes; 11 How. 131; 3 Greenl. on Ev., § 281; Dyer 108; 12 Pet. 178. The case of McCaw. v. Blewit, 2 McC. Ch. 90, is to the contrary, but has long since been declared not to be law. The avoidance must be proved. 2 Johns. Ch. 88. Carrier v. Hague, 9 S. C. 455, is not in point. The answer was construed to be a general denial, and if taken in any other sense must be used as evidence. The non-suit was erroneous.

Mr. Louis Le Conte, contra.

June 10, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action for the possession of a tract of land (Chappell) in Richland county. The complaint states that Henry J. Geiger, the elder, died in October, 1858, seized and possessed of the land, and that he left a will, of which Alexander Geiger was appointed executor, and in which the plaintiffs, his only children, were named as the beneficiaries. That the defendant, George Kaigler, acquired possession of the land sued for some time in the year 1863, and held in some way under Alexander Geiger, who died in 1868.

The defendant answered, making three defences.

1. He denied the alleged seizin of the father, Henry J. Geiger, at the time of his death—admitted death of Henry J. Geiger—that he left a will, of which Alexander Geiger was appointed executor, but he denied that

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the plaintiffs are entitled to *any legal estate in the lands of said testator, and submits it to the decision of the court upon reading of said will; admits that he acquired the possession during the year 1863, but denies that he held "in any manner under the said Alexander Geiger or any one whomsoever."

2. That the premises were devised to the said Alexander Geiger, as executor, with full power to sell and convey the same; that the said Alexander, on October 22d, 1863, bargained and sold the said premises to the defendant, (receiving from defendant a full and ample price therefor), and executed to this defendant a bond for title, and delivered to him a plat of survey of said land; that the defendant entered upon said lands under color of the aforesaid bond and plat as a purchaser of the land, claiming the same in his own right exclusively in fee simple, and that he has ever since held possession of the same under such exclusive claim.

3. The statute of limitations.

The will of Henry J. Geiger was read in evidence, which is as follows:

State of South Carolina, Lexington District.

In the name of God, Amen! I, Henry J. Geiger, of the state and district aforesaid, being sick and weak of body, but of sound and disposing mind, memory and understanding—praise be to God for the same—do make and declare this my last will and testament, in manner and form following, that is to say: I do hereby nominate and appoint my only brother, Alexander Geiger, now living in the State of Alabama, the sole executor of this my last will and testament, hereby revoking and making void all former wills and testaments at any time heretofore by me made, and do declare this to be my last will and testament. I appoint that my aforesaid executor shall make the following disposal of my property:

First. That he shall pay all my just and lawful debts.

Secondly. That he shall take charge of all my effects and make such disposition of them as he, in his judgment, shall deem proper.

Thirdly. I do declare that my only concern

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being for the wel*fare of my children, I therefore request him to take my three eldest daughters, Caroline Juriah, Isabella Charlotte, and Juriah Elizabeth, to some retired mountainous part of the country where they may be educated and reared in industrious habits—that by no means they be educated in a city or town—my object being to keep them out of circles of fashionable society. And I request him to take my two sons, John A. Geiger and Henry J. Geiger, and my youngest daughter, Frederick Ann Geiger, to live with him wherever he may reside until they are ten years of age, and, after that age, to place them at school in some retired part of the country.

Fourthly. I appoint that he dispose of as much of my real estate as may be necessary to carry into effect the above-mentioned requests, and that the remainder be retained in his possession until any one of the above-named heirs may be disposed to settle, and that he then make an equal division of the said estate among them.

Fifthly. I request him that when the estate of my father-in-law, John Kaigler, deceased, is settled up, that he take charge of so much of the said estate as will fall to me in right of my wife, Charlotte, John Kaigley's daughter, and that he make such disposition of it as shall be, in his judgment, beneficial to the interest of my children.

Sixthly. Inasmuch as I was appointed by my mother executor of her estate, in behalf of my children, and she gave a portion of her effects to my children, I request him to take charge of the same and manage it for their benefit.

Seventhly. I request that whatever (besides the above-named property) there may be belonging to me, and not mentioned in this will,

that he take charge of the same and manage it in the same manner in which he is directed in regard to the other property.

Given under my hand and seal, signed and sealed this the 2d October, in the year of our Lord one thousand eight hundred and fifty-eight, and in the eighty-second year of the Independence of the United States of America. Henry J. Geiger. [L. S.]

In the presence of William J. Ligon, William Henry Baker, John Gates, John H. Arthur.

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*There was very little oral testimony. Nothing was proved concerning the land in question but the following:

John A. Arthur said: "Not acquainted with the land in question. * * * To the best of my recollection, at the time of Geiger's death, Davis was in * * * Knew that Mr. Davis' overseer, Loomis, came to pay Geiger, and renewed lease of land in question to Davis."

John A. Geiger said: "Reasonable rent of land in question, per annum, is about twenty bales of cotton, or $600 or $800."

Westley Horsey: "Knew land in question; land certainly worth two years' rent to clear it," &c.

The case turned mostly on the will and the pleadings. At the close of plaintiff's testimony the defendant moved for a nonsuit upon the following grounds:

"1. That there was not sufficient evidence of plaintiff's title to go to the jury unless defendant's answer be taken as part thereof, which showed purchase and payment by defendant from the executor in pursuance of the power conferred by the will of the testator.

"2. The plaintiffs derived no legal estate in the premises under the will of the testator, but that the same vested the legal estate in fee in the executor.

"3. That under the statute of limitations the action was barred."

Judge Wallace granted the nonsuit upon the ground "that the will of the testator, Henry J. Geiger, conferred upon his executor, Alexander Geiger, a power coupled with a trust, and the executor having made the sale of the premises thereunder and received the purchase money, whereby a complete equitable title appeared in defendant."

The plaintiffs excepted to the order, and appeal to this court to set aside the nonsuit and for a new trial.

In order to have a clear view of the questions it is necessary to determine at the outset what force and effect the answer of the defendant should have as evidence.

Defendant's attorney says that "by common consent that part of the answer which set up the affirmative defence of purchase

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*from Alexander Geiger was considered to be before the court, although not otherwise put in evidence."

Plaintiff's attorney says: "The complaint and the answer show that plaintiffs and defendant derive title from the same source." but denies that the answer is evidence of any other statement in it. The answer is simply a pleading. "The allegations of new matter in an answer (not relating to a counterclaim) is to be deemed controverted by the adverse party as upon direct denial or avoidance, as the case may be." Code, § 191.

The statement of the second defence in this answer was new matter, which was not proved aliunde, and the plaintiffs propose to use one part, stated as an admission, viz., that the defendant claimed from the executor of Henry J. Geiger, but deny to all its other statements the force of evidence.

The answer of defendant in the second defence did make such a statement, but, at the same time and in the same connection it further stated that he paid in full for the land and had the executor's bond for title under his power in the will to sell. This was but a narrative of one transaction, of which the plaintiffs propose to use only a part. The statement was a unity, and could not be divided. If the answer was used as evidence, it was subject to the ordinary rules of documentary evidence.

"The pleadings leave upon the plaintiff the onus probandi, and the allegations of the answer are but a proffer of the points upon which defendant relies. Prior to the opening of the defence the plaintiff resorts to the answer, and produces it as evidence in his behalf. He must take it as it stands, and cannot be permitted to carve out a part and reject the residue which qualifies, explains or pertains to the portions selected. The whole answer should have been admitted as evidence so far as it explains or qualifies, or is properly connected with the portions relied on by plaintiff." Carrier v. Hague, 9 S. C. 459; Cohen v. Robert, 2 Strob. 415.

How stands the matter, then, in the view that the answer was not in evidence? In that case the second defence must be considered as stricken out, as outside of the answer there was no proof of the facts on which it rests. The action being for the recovery of the land, upon the ground that the

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plaintiffs have the legal title, and the *defendant having denied plaintiffs' title, it was necessary that they should recover upon the strength of their own title—that is to say, it was incumbent upon them to prove title in their father, Henry J. Geiger, through whom they claimed. This doctrine was firmly established in South Carolina by an unbroken current of decisions running certainly down to the adoption of the code of procedure, from the case of Drayton v. Marshall, 1 Mill Const. R. 184 (1817), in which Judge Cheves said: "It was necessary for the plaintiff to

prove a perfect title, unless the defendant held under him or under those from whom the plaintiff derives his title." As we understand it, this is the generally received doctrine in actions for the recovery of the possession of lands when the plaintiff rests his right to recover upon his title. Mr. Tyler says: "The party claiming the right to lands must recover, if at all, on the strength of his own title, and not on the defects in that of his adversary. This is an elementary principle in the action of ejectment, and it has been reiterated over and over again by the courts. The claimant in the action will not be assisted by the weakness of the defendant's claim, because the possession of the latter gives him a right against every person who cannot establish a title. This is the general rule, in respect to which there is no exception, and it has been established by a world of authorities, both in this country and in England. The party who would change the possession must make out a title, upon the strength of which he must recover, if at all." Tyler on Eject. 72, and many authorities.

To this rule there are several well-established exceptions, in which, from the operation of familiar principles, it is considered unnecessary for the plaintiff to prove a perfect chain of title: as, for example, when the plaintiff can bring the defendant into privity with his title, by showing that the parties claim from a common source. Martin v. Ranlett, 5 Rich. 541 [57 Am. Dec. 770]; Hill v. Robertson, 1 Strob. 1. Or when it can be shown that the defendant's possession was acquired in such manner as to estop him from denying plaintiff's title, as in case of landlord and tenant. Beyond these exceptions we know of no others in actions for the recovery of land upon the ground of title.

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Of course we do not *speak of actions of trespass quare clausum fregit, which are brought simply for damages to the possession.

It is urged for the plaintiffs that they claim title under their father, Henry J. Geiger, and should not have been required to prove title, for the reason that the defendant also claims under Henry J. Geiger, and, consequently, are within the exception as to tracing title to a common source. The point was well taken if sustained by the proof. What is the evidence upon this subject?

The complaint does not charge that the defendant went into possession under Henry J. Geiger, but states that "the said George Kaigler acquired possession of the land some time in the year 1863, and held in some way under Alexander Geiger." It is true that Alexander Geiger was the executor of the will of Henry J. Geiger, but the above does not charge that the defendant went in under his as executor. The defendant made no admission in his answer. Omitting in this connection his statement in the second defence, (which, according to our present view, is not in evidence,) he denied "that he held under Alexander Geiger or any one whomsoever." Outside of the pleadings there was no proof whatever as to how the defendant went into possession, and therefore the claim that the parties trace title to the same source, as a matter of fact, was not made out.

But it is insisted that to the rule that the plaintiff can recover only upon the strength of his own title, there is another exception, viz., that without regard to title the party showing the prior possession should be held to have the better right and allowed to recover; that prior possession as against the defendant, should be held to stand in the place of title. The modification here contended for is thus stated by Mr. Tyler: "When the owner of the true title neither objects nor consents to the possession of either party, the court regards the better right as between the parties to be vested in the first possessor and grantees claiming through him." Tyler on Eject. 72; Smith v. Lorillard, 10 Johns. 339, and other authorities.

These authorities seem to indicate that there may be some such rule where the old action of ejectment, pure and simple, is still retained as the means of recovering lands.

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*The action of ejectment was a possessory proceeding—possession being the gist of the action—and did not necessarily decide the question of title. Originally there were several actions in relation to land. The object of the old writ of right was to try the title; that of ejectment, writ of entry and of assize, originally, was to recover the possession, and the action of the mesne profits was for rents and profits for its detention. The writ of right went to the root of the matter, and after issue once joined, the judgment was absolutely final, so that a recovery had could be pleaded in bar of any other claim or demand. Not so as to an action of ejectment. In that action, even after it became a mixed action, and was used to try title, the unsuccessful party might re-try the same question as often as he pleased without leave of the court, for, by making a fresh demise to another nominal character, it became the action of a new plaintiff upon another right, and the courts of law could not any further prevent this repetition of the action than by ordering the proceedings in ejectment to be stayed until the costs of a former ejectment were discharged. 3 Bla. Com. 305, note. By our act of 1744 the parties were limited to a second action, provided it was brought within two years. 3 Stat. 612. Our action of trespass to try title under the act of 1791, which was of force down to the time of the adoption of the code (1870), was not identical in all respects with an action of ejectment. The act of 1791 provided as follows: "Whereas, since the disuse

of real actions, the common method of trying the title to lands has been by action of ejectment, which, depending upon a variety of legal fictions, is rarely understood but by professors of the law; in order to render more plain the mode of trying the title to lands in this state: Be it enacted, &c., That the method of trying the title to lands or tenements within this state, shall, henceforth, be by action of trespass, wherein the real name of the plaintiff and defendant shall be used, and not fictitious names; and if the jury shall find for the plaintiff, they are also hereby empowered, in the same verdict, to accord damages for mesne profits, and the judgment shall be entered on such verdict, as well for the damages as for the recovery of the land; and the plaintiff on such verdict shall be entitled to a writ of possession for the

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land and *to an execution for his damages." 5 Stat. 170. It is also provided that in actions of trespass brought to try the title to land the plaintiff or his attorney shall always endorse on the original and copy writ that "the action is brought to try titles as well as for damages." 7 Stat. 276.

This statutory action combined in itself the action for mesne profits in the form of damages, with as much of the old writ of right as put the title in issue. This is apparent from the endorsement required to be placed on the writ, "that this action is brought to try the title as well as for damages," also from the force given to the judgment, which, like a judgment in the writ of right, could be pleaded in bar to another action. Thomas v. Geiger, 2 N. & McC. 528; Tyler on Eject. 807. And, also, because a defendant in possession could defend himself by showing title in a third person. Faysoux v. Prather, 1 N. & McC. 296 [9 Am. Dec. 691]. From this essential difference in the action of ejectment and our action of trespass to try title, it would seem to be a strained conclusion that, because in ejectment presumption from possession was allowed in certain cases to stand for title, the same should be allowed in an action of trespass to try titles, the very object of which was to try the title, and in which the judgment was conclusive. We think the cases in our reports, considered together, sustain the view that the two actions were not in all respects the same.

It is true that Judge Nott, in Kennedy v. Campbell, 3 Brev. 553 (1816), said: "Our act of assembly substituting the action of trespass for the old action of ejectment, merely adopts a new mode of proceeding, but does not alter any of the principles of law relating to the subject. It would be productive of the most mischievous consequences if a contrary construction should be given to the act." The only question in that case was, whether a landlord had the right to come in and defend an action of trespass to try titles brought against his tenant. Considered in reference to the subject matter, the statement of the judge was perfectly correct, but, as a general proposition, it was unnecessarily broad.

In the case of Young v. Watson, 1 McM. 449 (1839), relied upon by the plaintiffs,

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Judge Earle says: "The plaintiff, it is *admitted, made out no title; and the defendant is not proved to be a disseizor. The endorsement which the plaintiff is required to make on his writ gives character to this action, which is to try the titles. I have not heard it doubted that in such case the plaintiff, when there has been no tortious eviction, could only recover on proof of good title. A plaintiff can only make out a perfect title by producing a grant, or by proving such a possession as will give title in himself or in some one from whom he derives title." What Judge O'Neall says in the same case most probably had reference to an action of quare clausum fregit. "When the plaintiff's possession, actual or constructive, is entered upon, I think that such possession is evidence of title to put the defendant to prove his title."

In the case of Watson v. Hill, 1 Strob. 79 (1846), it was held that trespass to try titles would lie by one in possession against one who enters upon land and commits a trespass. Judge O'Neall says: "In such case I have always supposed that the plaintiff had his choice to bring trespass quare clausum fregit or trespass to try title. In the former he would have the advantage of standing on his possession and throwing upon the defendant the burden of showing a paramount title; in the other, he waives this advantage and takes upon himself the burden of showing title. * * * The action of trespass proceeds upon the notion that defendant had entered upon the possession of the plaintiff. When the plaintiff shows actual possession, it may be, perhaps, in trespass to try the title, prima facie enough to entitle him to recover."

The cases of McColman v. Wilkes, 3 Strob. 465 [51 Am. Dec. 637], and of Cleveland v. Jones, Id. 479, in note, were actions of trespass quare clausum fregit, which action is founded on the plaintiff's possession, and will always lie when there has been a disseizin.

We conclude that in the action of trespass to try title under our statute, mere prior possession would not dispense with the necessity that the plaintiff should prove title to enable him to recover.

The act of 1791, so far as it prescribed the form of proceeding, was superseded by the code, which abolished all the different forms of action and substituted one form for all

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causes *of action. And it may be that in the general form of action of the code the means are given to enable a person to recover the possession of land seized by a mere trespasser as well as to try the title itself. But it is unnecessary to consider that question in this case.

This action was brought, as stated, ex-

pressly to recover the land in dispute, upon the ground that the plaintiffs had title to the same; and even if the old rule as to the necessity of proving title should now be held to be modified so as to allow a person deprived of the possession of land, under proper allegations, to recover that possession without proof of title, it can have no application to this case. Here prior possession cannot stand for title, although it is an action in the form prescribed by the code and not technically trespass to try title under the statute. The plaintiffs staked themselves upon their title, and they must recover, if at all, upon the strength of this title.

It cannot alter the case that the plaintiffs claim to have possession under their father by descent cast, according to the old doctrine that the "law presumes the possession transmitted from the ancestor to the heir to be a rightful possession until the contrary is shown, and, therefore, the mere entry of him who has the right will not be allowed to evict the heir." This has been changed by Section 110 of the code of procedure, which declares that "the right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property."

The plaintiffs having failed to bring themselves within the exception as to a common source of title, it was incumbent on them to make proof of the title of their ancestor, which they failed to do. The proof even of the possession of Henry J. Geiger was meagre, and, therefore, as to the first legal defence, considered as separate and distinct from the second, they failed to make the proof necessary to recover the land.

Upon the view that the answer was in evidence, the admissions of the defendant did establish the fact that he entered under a purchase from Alexander Geiger, as executor of Henry J. Geiger, the ancestor of plaintiffs,

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and therefore traced title to a com*mon source with the plaintiffs. That relieved the difficulty which existed as to the first defence; but the allegation of new matter, which came in along with the admission, viz., that the defendant purchased the land from Alexander Geiger, as executor of Henry J. Geiger, under the power of sale in the will of the latter, paid full price for the same and received from him possession, bond for titles, and plat of the premises, raises new questions.

1. What interest in the land did the will give to Alexander Geiger? A power coupled with an interest or a mere naked power to sell?

2. Was the sale by Alexander Geiger, under the circumstances stated, an execution of the power so as to vest in the defendant a good, equitable title?

The question as to what interest the will gave Alexander Geiger is one of intention, to be ascertained from its construction. 2 Washb. on Real Prop. 605. "A reference to the terms of the will is the only course by which to determine whether a naked power only is intended to be given, for even if the terms made use of in creating the power, detached from other portions of the will, confer merely a naked power to sell, yet if the other provisions of the will evince a design that, at all events, the lands are to be sold in order to satisfy the whole intent of the will, it is not a naked power, but is coupled with a trust and interest." Franklin v. Osgood, 14 Johns. 527. "A power to sell for the payment of debts would be such a power." Sugd. on Powers 111, note. "One test that is given in some of the cases for distinguishing a naked power from one coupled with an interest, is whether the donee of the power is to have possession of that to which the power relates. If he is, he is considered to have an interest, otherwise a mere naked power." 2 Washb. on Real Prop. 606.

Although this testator did not use the technical terms usually employed in disposing of property in trust, yet, taking the whole will together, we think that he intended to give at least the possession of the whole of his estate, real and personal, to his brother, Alexander Geiger, in trust for the performance of the various duties imposed upon him in relation

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both to his property and *his children. He gave nothing directly to his children, but, on the contrary, placed them under the exclusive control of his brother Alexander, with very peculiar and confidential instructions to take the sons and youngest daughter to his own home, and educate the other daughters in some retired mountainous part of the country out of the circles of fashionable society. He did not intend to die intestate as to any of his property. The residuary clause of the will is not only evidence that such was not his intention, but provides against such a result. Every direction of the will proceeds on the assumption that the property was in the possession of his executor and at his disposal. "The executor shall make the following 'disposal of my property,' 'pay my debts,' 'take charge of my effects,' 'dispose of so much of my real estate as may be necessary, and the remainder to be retained in his possession until any of the above-named heirs may be disposed to settle, and that he then make an equal division of the said estate among them," &c., and then the residuary clause giving "the property not mentioned in the will." We cannot resist the conclusion that it was the intention of the testator to give at least the possession of the whole estate to the executor in trust for the uses and purposes therein declared. Whether the provision in regard to the division among his children of so much of his real estate as was not required to be sold in order to carry out the injunctions placed upon his executor,

was, in effect, a devise to them or not, there is no doubt that he intended to give at least the possession of all the land to his executor, Alexander Geiger. If the plaintiffs, as contended, have the legal title, it is clear that they never had either the actual possession or the right to possession of the land sued for, and that alone would be conclusive that they have not the right to maintain an action at law to recover the same. A plaintiff in an action for possession of real property cannot recover unless he has not only the title but the right to immediate possession. "In an action of ejectment the question to be tried is the plaintiff's right to possession of the premises sued for, and, upon the trial of the general issue, the defendant may avail himself of a defence that the plaintiff had not the present right of possession." Tyler on Eject. 738; Carter v. Scaggs, 38 Mo. 302.

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This leads to the conclusion that *the plaintiffs have not the legal right as the heirs or devisees of Henry J. Geiger to maintain now an action at law for the recovery of the land. Any rights which they have are equitable in their character and must be set up through the forms appropriate to equitable proceedings.

The second defence, if true, makes out a good, equitable defence. Mr. Tyler (p. 738) states that "law and equity being now blended, an equitable title arising out of a contract for the sale of land, is a defence to an action of ejectment instituted to recover possession of the land. Possession of land under a contract of sale and payment of the purchase money, is held to be a good defence to an action brought by the alienor for the possession."

But the court having taken the view that the plaintiffs have not the right to immediate possession so as to enable them to maintain an action at law for the land, it is unnecessary to consider the question whether the alleged sale of the land to the defendant, Alexander Geiger, was a valid contract, in execution of the powers of the will. There was no evidence upon the subject except the answer of defendant, and to make any ruling upon his ex parte statement might do injustice to the plaintiffs.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 277

(Case No. 1043.)

BRATTON v. MASSEY.

(November Term, 1880.)

[1. *Trusts* ⇐140.]

A deed of indenture, executed in 1866, by A, his wife, and B, by which A and his wife agreed to separate and live apart, in its preamble recited an agreement that A should convey certain described property to B, to be held and managed by B as trustee for the sole and separate use of the wife, and to be at all times fully and absolutely at her disposal, under directions of the trustee during her life, and by will at her death, as if she were sole. By this deed A conveyed to B, his heirs and assigns

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forever, *a certain lot of land, in trust for the wife of the grantor, to allow her to "occupy, use and enjoy all of said property and estate, in the same manner as if she were unmarried," or to collect the rents and profits, and apply the same to her support and maintenance; that the trustee should sell, at the written request of the wife, and re-invest the proceeds or dispose of them for her support and maintenance, and what remained at her death she might devise by her last will as if a feme sole—the wife accepting this provision in full satisfaction of support, maintenance and alimony. The husband died, and afterwards the wife, without a will, the property remaining unsold. *Held*, that the wife took an absolute estate in fee simple in the land, which, at her death, descended to her heir-at-law. Simpson, C. J., dissenting.

[Ed. Note.—Cited in Rembert v. Evans, 86 S. C. 450, 68 S. E. 661.

For other cases, see Trusts, Cent. Dig. § 183; Dec. Dig. ⇐140.]

[2. *Husband and Wife* ⇐278.]

The release by the wife of all claim against her husband for alimony made her a purchaser of the estate for valuable consideration, and made the conveyance to her trustee to be for her sole and exclusive benefit, with full power of disposition in her. Simpson, C. J., dissenting.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. ⇐1052; Dec. Dig. ⇐278.]

[3. *Deeds* ⇐124.]

[Cited in Fuller v. Missroon, 35 S. C. 328, 329, 330, 14 S. E. 714; Brown v. McCall, 44 S. C. 511, 22 S. E. 823; Middleton & Revenel v. Taber & Willard, 46 S. C. 351, 24 S. E. 282; Foster v. Glover, 46 S. C. 538, 24 S. E. 370; McMichael v. McMichael, 51 S. C. 558, 29 S. E. 403; McMillan v. Hughes, 88 S. C. 299, 70 S. E. 804, to the point that the word "heir" is not necessary to give an equitable estate the character of inheritability.]

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345–355, 416–428, 434, 435, 439, 452; Dec. Dig. ⇐124.]

[4. *Deeds* ⇐124.]

[Cited in Bradford v. Griffin, 40 S. C. 475, 19 S. E. 76; Jones v. Swearingen, 42 S. C. 66, 19 S. E. 947; McMichael v. McMichael, 51 S. C. 558, 29 S. E. 403; McMillan v. Hughes, 88 S. C. 299, 70 S. E. 804, to the point that, to create an estate in fee simple in a natural person, the common-law rule requires that the deed contain an express limitation to such person and his heirs.]

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345–355, 416–428, 434, 435, 439, 452; Dec. Dig. ⇐124.]

[This case is also cited and followed in Fuller v. Missroon, 35 S. C. 315, 14 S. E. 714.]

Before Kershaw, J., Chester, June, 1880.

This was an action commenced August 11th, 1879, by John S. Bratton against Benjamin H. Massey, the heirs-at-law of W. T. Gilmore and certain creditors, who, together with the plaintiff, had established demands against the estate of W. T. Gilmore, under

proceedings had in the Circuit Court for Chester county, in 1869. B. H. Massey was also sole heir-at-law of Mary E. Gilmore. The case is stated in the opinion. The Circuit decree, after stating the facts, continued as follows:

This was a deed made by the husband to provide for the separate maintenance and support of the wife, and for a separation. It was voluntary, there being no covenant on the part of the trustee to save the husband harmless in respect of the debts of the wife. Such a deed would be voidable by the creditors under the statute 13 Elizabeth. Smith's L. Cas. *12; Fitzer v. Fitzer, 2 Atk. 513.

But that ground is not taken here, and, if it had been, it might have been answered that the claim was barred by the statute of limitations, after four years from the execution of the deed, as in Lott v. De Graffenreid, 10 Rich. Eq. 346.

I proceed, therefore, to the question as presented. There is no doubt that the conveyance to Massey was in fee. The words employed were those usual and proper for that

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purpose. This, *however, settles nothing as to the resulting trust. The deed authorized the trustee to sell and convey and re-invest during the life of Mrs. Gilmore, and she was authorized to dispose of the property by will. It was, therefore, necessary for the purposes of the deed that the fee should be in Massey.

The real question is, what was the interest of Mrs. Gilmore? Was it a life estate, or a fee? If it was a life estate, then all the trusts declared in the deed terminated at her death, she having failed to dispose of it by will under the power conferred upon her by the deed. In that case the trust resulted to the heirs of the grantor. 2 Story's Eq. 1196a; Hill. on Trust. 114; 4 Kent 307; 2 Washb. on Real Prop. 472; Lloyd v. Spillet, 2 Atk. 150.

It is contended by defendant that, a consideration being expressed in the deed ($1), there can be no resulting trust according to the proposition laid down by Mr. Washburne, (Book 2, ch. II., § 2, ¶ 43,) as applicable to uses. But in regard to trusts, it is different, as may be seen from the same author, (Book 2, ch. I., § 2, ¶ 12,) where it is said that "if the consideration were not something substantial, equity would interpose and hold the bargainee, though the owner of the legal estate, as the trustee of the bargainor." Here the consideration was merely nominal which passed from the grantee, who is an express trustee, without any beneficial interest whatever, and, so far as the cestui que trust is concerned, there was no legal consideration whatever.

It appears to me plain that the estate of Mrs. M. E. Gilmore was limited to her life. A conveyance by deed of lands generally, without the word "heir," carries no more than the life estate. 4 Kent 5. Washb., Book 2, § 2, ¶ 28: "In interpreting the words in which a trust is declared, courts adopt the same rules as in granting the legal estate. Thus, a trust in favor of A, with no words of inheritance, would be for life only." Id., § 3, ¶ 4.

The deed plainly declares the object of the trust to be to provide for the maintenance and support of Mrs. Gilmore. It is true, the whole might have been expended for that purpose by the trustee, if necessary, yet the words import no more than a life estate. No further expenditure could be made by the

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*trustee for her support and maintenance after her death. What then remained the deed gave her the power of disposing of by will, "notwithstanding her coverture, as if she were sole and unmarried." These words convey a naked power. Sugd. on Pow. 125. This power having failed of execution, the trusts of the deed are exhausted, and result to the grantor.

If these trusts had been created by will, a greater latitude of construction might have been admissible, and, under our statute, the gift would have been considered a fee simple, unless such construction would have been inconsistent with the intention of the testator. Rev. Stat. 443.

The defendant contends that this was a gift generally, and not for life, and, being coupled with a general power to dispose of the estate, that it should be construed a fee simple. Had that been the character of this gift, and it had arisen under a will or devise, there could have been no doubt of the proposition. Pulliam v. Byrd, 2 Strob. Eq. 142. Very good authority is cited in the margin of that case for the proposition that in a devise the same effect would follow, where the estate was limited for life, with a general power of appointment, though the law is there declared to be otherwise. But I do not find any authority for extending the principle to the case of trusts created by deed, in violation of the rule of common law requiring words of inheritance to create a fee, though there may be found some countenance for this view in certain decisions respecting marriage articles and executory trusts. Fonb. Eq., Book 2, § 2, and note.

It will be observed that the deed under consideration does not convey an estate "to the sole and separate use" of Mrs. Gilmore, but in trust for her maintenance and support. She had, therefore, no estate at all in the property conveyed. It is like the case of Hyde v. Price, 3 Ves. 445, where Lord Alvanley says: "I am of opinion that this is not property she is entitled to, to her sole and separate use. There is a special trust upon it. She has no dominion over it." See the observations of Mr. Roper upon deeds of this character in his learned treatise on Husband and Wife vol. II., p. 304.

For these reasons I conclude that at the death of Mrs. M. E. Gilmore the trust in the

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property conveyed by the said deed *resulted to the heirs of W. T. Gilmore, and the same became liable for the payment of the debts established against his estate.

Defendant appealed.

[For subsequent opinion, see 18 S. C. 555.]

Messrs. R. E. Allison and W. B. Wilson, for appellant.

Mr. G. J. Patterson, contra.

June 28th, 1881. The opinion of the court was delivered by

McIVER, A. J. On December 22d, 1866, W. T. Gilmore and wife, M. E. Gilmore, with the defendant, B. H. Massey, executed a deed of indenture in substance and to the effect following: After reciting that some unhappy differences had arisen between the husband and wife which had induced them to agree "to live separate and apart from each other, and, previous to such separation he, the said W. Taylor Gilmore, has consented thereto, and has agreed to transfer, release, convey, surrender and deliver certain real and personal property, hereinafter mentioned, for the support and maintenance of said M. E. Gilmore, to be held and managed by the said Benjamin H. Massey as trustee, in trust from henceforth to the sole and separate use of said M. E. Gilmore, and to be at all times as fully and absolutely at her disposal, under directions to her said trustee in her lifetime, or by will at her death, as if she were sole and unmarried," the deed proceeds as follows: "Now this indenture witnesseth that the said W. Taylor Gilmore, in pursuance of said proposal, promises and agrees with the party of the second part that the said M. E. Gilmore shall and may live separate and apart from him and reside in places and families of relations or friends or other persons, and follow such business and pursuits as she, at her will and pleasure, may think fit and desirable; and further, that, as well for the consideration aforesaid as for and in consideration of the sum of $1 to the said W. Taylor Gilmore by the said Benjamin H. Massey paid, the said W. Taylor Gilmore has granted, bargained, sold, &c., * * * all that lot of land, &c. * * * To have and to

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hold all and singular the *premises * * * unto the said Benjamin H. Massey, his heirs and assigns forever, in trust, however, and upon the confidence that he, the said Benjamin H. Massey, shall allow the said M. E. Gilmore to occupy, use and enjoy all of said property and estate, or that he shall collect and receive the rents, issues and profits thereof and apply the same to the support and maintenance of said M. E. Gilmore in same manner as if she were sole and unmarried. And, further, the said W. Taylor Gilmore covenants and agrees that it shall and may be lawful for the said Benjamin H. Massey, by deed or other sufficient writing, by and with the written directions and approval of said M. E. Gilmore, to sell, transfer, deliver and convey the whole or any part of the property and estate herein and hereby conveyed and released, to such person or persons, and for such sum or sums of money or other valuable consideration as to him shall seem wise and prudent, and to sign and deliver good and sufficient title therefor to the purchaser, and by and with the written direction and approval of the said M. E. Gilmore, to re-invest the proceeds of said sale in other property better adapted to the wants, conveniences or wishes of said M. E. Gilmore, but subject to the same trust as the property so sold and delivered or otherwise disposed of as will best contribute to the decent and comfortable support and maintenance of said M. E. Gilmore. And the said W. Taylor Gilmore further covenants and agrees that it shall and may be lawful for the said M. E. Gilmore, by her last will and testament, to give, devise and bequeath the whole or any portion of the estate and property hereby conveyed and transferred, or other estate and property substituted in its place as hereinbefore authorized, that may remain unexpended at her death, to such person or persons, and in such proportions as she may direct and appoint; and said will, so executed, shall be as good and available at law, notwithstanding her coverture, as if she were sole and unmarried. In consideration of the estate and property herein and hereby conveyed, released, assigned and delivered by the said W. Taylor Gilmore in trust for said M. E. Gilmore, in manner as aforesaid, the said M. E. Gilmore, in the presence of and by and with the advice and consent of her friend, kinsman and trustee,

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said Benjamin H. Massey, does *hereby agree to accept and take the same in full satisfaction for her support and maintenance, and all alimony whatever during her coverture." The deed also contains a covenant on the part of Massey that he will accept the trusts conferred and carry out the same, but it contains no covenant that Massey will save W. T. Gilmore harmless against the debts of his wife.

W. T. Gilmore died intestate, in 1867, and his estate has proved to be insolvent. Mrs. Gilmore died in 1878 without having executed the powers conferred by the deed, and thereupon this action was commenced by the plaintiff, who had established a claim against the estate of W. T. Gilmore, under proceedings to marshal the assets of his estate, for the purpose of subjecting the real estate conveyed to Massey as trustee, by the above-mentioned deed, to the payment of the debts of W. T. Gilmore, upon the ground that the property conveyed by that deed was to be held by the trustee only for the life of Mrs. Gilmore, and that upon her death, without having disposed of the same

by will, it reverted to the estate of W. T. Gilmore, and became liable for his debts.

The appellant, B. H. Massey, contends that, under a proper construction of the terms of this deed, Mrs. Gilmore took an absolute estate, which, at her death, descended to him as her sole heir-at-law, while the respondent contends that the estate was conveyed to the trustee for the sole purpose of securing to Mrs. Gilmore a support and maintenance during her life, with power in her to dispose of the same by will, and that she having died without executing the power, the whole of the trusts created by the deed were exhausted, and the estate reverted to the heirs of the grantor, and became liable for his debts. The Circuit judge sustained the view insisted upon by the respondent, and the real question raised by this appeal is whether, under a proper construction of the terms of the deed, the estate reverted to the heirs of the grantor or descended to the heir of Mrs. Gilmore.

If there was any trust resulting to the grantor or his heirs under the terms of this deed, it must be by implication, as it is not, and cannot be pretended that there is any express provision to that effect in the deed. It is contended, however, that inasmuch as the trusts declared by the deed do

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not exhaust the *whole estate, what remains after satisfying those trusts must necessarily revert to the grantor. This, of course, rests upon the theory that the whole estate was not exhausted by the trusts declared, and to this theory we are unable to assent, for we think that, by a proper construction of the deed, the whole estate was intended to be, and was, in fact, conveyed, and there was nothing left to revert to the grantor.

It is quite true that the estate is not conveyed in trust for Mrs. Gilmore and her heirs, and it is equally true that in a conveyance of the legal estate the word "heirs" is necessary to create a fee simple. It is likewise true, as a general proposition, as is said by Washburne in his work on Real Property, Book 2, ch. III., § 2, ¶ 28, that "in construing limitations of trusts courts of equity adopt the rules of law applicable to the legal estate," or that "declarations of trust are construed in the same manner as common law conveyances, where the estate is finally limited by deed," yet as the same writer says, in ¶ 40 of the same section, there are some exceptions to this rule, one of which he states, in ¶ 43, in the following language: "Another exception is that the word 'heirs' is not always necessary in order to give an equitable estate the character of inheritability, if it requires that such an effect should be given in order to carry out the clear intention of the party creating it. Thus it is said, if land be given to a man without the word 'heirs' and a trust be declared of that estate, and it can be satisfied in no other way but by the cestui que trust taking an inheritance, it has been construed that a fee passes to him even without the word 'heirs.'" Among the cases cited to sustain this doctrine are Villiers v. Villiers, 2 Atk. 71, and Fisher v. Fields, 10 Johns. 505, in both of which the question arose upon the construction of deeds, not wills, and the last sentence just quoted from Washburne is a quotation from the opinion of Lord Hardwicke in Villiers v. Villiers. In Fisher v. Fields, one B. Griffin, a discharged soldier in the Revolutionary war, having received his discharge entitling him to bounty land, sold his right to one Birch and delivered to him his discharge, upon which was the following certificate under his hand and seal: "This is to certify that the bearer hereof, J. B., is entitled to all the land that I (B. G.) am enti-

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tled to, either *from the state or continent, for my services as a soldier, certified in my discharge." The assignees of Birch sued out a patent for the land to which Griffin was entitled, which, under the statute, was issued in the name of Griffin. Subsequently Fields, with notice of this transfer to Birch, bought the land from Griffin and took a regular conveyance from him. In a contest for the land between the assignees of Birch and Fields, it was contended by the latter that the endorsement on the discharge not containing the word "heirs" could not operate as a transfer of anything more than the life estate. But the court held otherwise, and that although the patent was made out in the name of Griffin, he must, in equity, be regarded as a trustee for Birch and his assignees, and although the transfer contained no words of inheritance, yet, as the intention was manifest to sell the whole interest, the court would so construe it. Kent, C. J., in delivering the opinion of the court, used these words: "There never was a greater mistake, as I apprehend, than the supposition that this transfer of the soldier's right to Birch is to be tested by the strict technical rules of a conveyance of land at common law, and that Birch did not take the whole interest of the soldier, because the word 'heirs' was not inserted in the assignment." Again, he says: "A trustee or cestui que trust will take a fee without the word 'heirs' where a less estate will not be sufficient to satisfy the purposes of the trust." And again: "But what puts this point beyond all doubt, is the doctrine of the common law on the subject of uses and trusts. Before the statute of uses, if a man bargained and sold his land for a valuable consideration, without inserting the word 'heirs,' the Court of Chancery would have decreed an execution of the use in fee, because the use was merely in trust and confidence, and because this was according to the conscience and intent of the parties.

But after the statute of 27 Henry VIII., as the uses were transferred and made the legal estate, a different rule took place. A trust is merely what a use was before the statute of uses, and the same rules apply to trusts in chancery now which were formerly applied to uses. And in exercising its jurisdiction over executory trusts the Court of Chancery is not bound by the technical rules of law, but takes a wider range in favor of the intent of the party."

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*It seems to us, therefore, that in seeking to ascertain the nature and extent of the trust estate of Mrs. Gilmore, as created by this deed, we are not bound by the strict technical rules which would govern in the construction of a conveyance creating a legal estate, but that we must look to the intent of the parties, as evinced by the terms of the deed. Looking at this deed in this light, it is clear that the grantor intended to create in his wife an absolute estate in fee simple. It is very certain that he does not, in terms, limit the duration of the estate to the life of his wife, but, on the contrary, he invests her with powers which pre-suppose a larger estate than a simple life estate. The rights and powers given to her by this deed are precisely those of an absolute owner, and it is difficult to conceive how he could have conferred such absolute rights and powers, in the broad terms which he has used, without the intention of conferring upon her the absolute dominion over the estate, as far as it was practicable, under the law, as it then stood, for a married woman to hold and enjoy such an estate. For, as the law then stood, it was necessary for her protection that she, being a married woman, should have a trustee, but otherwise the deed gives her every right and every power which an absolute owner could have. She had the sole and exclusive right to the use, occupation and enjoyment of the land, and the rents, issues and profits were at her absolute disposal. She had the right to sell or dispose of, or what amounted to the same thing, require her trustee to sell or dispose of the whole or any part of the property, and either expend the proceeds for her own use, or re-invest the same in other property for her sole and exclusive benefit. And, finally, she had the right to dispose by will of any of the property which she had not consumed during her lifetime. What greater rights could the owner of the fee have? It is an entire mistake to suppose that the powers conferred upon Mrs. Gilmore were limited as to the manner of exercise—by will—and as to the subject upon which such power could be exercised—such portion of the estate as may remain unexpended at her death—for the deed gives her unlimited power of disposition during her life, and, in addition thereto, gives her the right to dispose, by will, of whatever remain-

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ed *undisposed of during her lifetime, and this is all the power of disposition which the absolute owner of property has.

It is conceded that the deed conveys an estate in fee simple to the trustee, and one of the trusts is declared in the following words: "In trust, however, and upon the confidence that he, the said Benjamin H. Massey, shall allow the said M. E. Gilmore to occupy, use and enjoy all of said property and estate * * * in same manner as if she were sole and unmarried." Now, what estate is she thus to occupy, use and enjoy? The terms of the deed answer, "all of said * * * estate," that is, all of the estate conveyed to the trustee, which is admitted to be the fee. It seems to us, therefor, that it is a mistake to say, as has been said, that no estate is conveyed to the sole and separate use of Mrs. Gilmore, and that the property is conveyed to the trustee only for the purpose of securing to her a maintenance and support during her life, for the deed, in express terms, conveys the fee simple to the trustee in trust that he shall allow Mrs. Gilmore to occupy, use and enjoy not only the property conveyed, but also the estate, which was, undoubtedly, a fee simple.

We think, also, that there was a valuable consideration for this deed proceeding from Mrs. Gilmore in the release by her of all claim against her husband for alimony. The deed declares that "in consideration of the estate and property herein and hereby conveyed * * * the said M. E. Gilmore * * * does hereby agree to accept and take the same in full satisfaction for her support and maintenance and all alimony whatever during her coverture." This amounted to a release of any claim she might otherwise have upon her husband for alimony, and such release was certainly a valuable consideration proceeding from her, and she may be regarded as in fact a purchaser of the estate conveyed to her trustee to be held by him for her sole and exclusive benefit, with the same powers of disposition as would belong to the owner of the fee.

We are therefore unable to perceive any ground upon which a resulting trust can be implied in the grantor, and, on the contrary, are of opinion that the terms used manifest an intent to create an absolute estate in fee

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simple in Mrs. Gilmore, which, *upon her death, descended to the appellant as her heir-at-law, and that a Court of Equity is bound to carry into effect such intent.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the complaint be dismissed.

McGOWAN, A. J., concurred.

SIMPSON, C. J., dissenting. W. T. Gilmore, and his wife, M. E. Gilmore, having

determined to separate and live apart from each other, entered into an agreement by which the said W. T. Gilmore was to convey certain real estate, together with other property mentioned in the complaint, for the support and maintenance of his said wife, to B. H. Massey, the appellant, as trustee.

Accordingly, a deed of indenture was executed by W. T. Gilmore, B. H. Massey and the said M. E. Gilmore, by which said property, real and personal, was conveyed "to the said Massey, to him and his heirs forever, in trust, that he should allow M. E. Gilmore to occupy, use and enjoy the same, or that he should collect and receive the rents and profits thereof and apply the same to the support of the said M. E. Gilmore in the same manner as if she were sole and unmarried." And, further, "that it shall be lawful for the said B. H. Massey, by deed or other sufficient writing, by and with the written direction and approval of the said M. E. Gilmore, to sell, transfer, deliver and convey the whole or any part of the property and estate herein conveyed and released, to such person or persons, and for such sum or sums of money or other valuable consideration as to him shall seem wise and prudent; and to sign and deliver good and sufficient title thereof to the purchaser; and by and with the written direction and approval of the said M. E. Gilmore, to re-invest the proceeds of said sale in other property better adapted to the wants of the said M. E. Gilmore, but subject to the same trusts," &c. And, further, "that M. E. Gilmore may, by her last will and testament, give, devise and bequeath the whole property hereby conveyed, or that which may be substituted in its place, or may remain unexpended at her death, to such person or per-

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sons, and in such proportions as she may *direct and appoint." The said M. E. Gilmore consenting "to accept the same in full satisfaction for her support and maintenance and all alimony whatever during coverture."

The property mentioned in the deed went into the possession of the trustee and was enjoyed by Mrs. Gilmore during her life. Mrs. Gilmore died in 1878, without making any disposition of the property either by appointment or in writing, by will or otherwise. In the meantime W. T. Gilmore had also died, largely in debt, and his other property proving insufficient to pay his debts, his creditors instituted this proceeding to make the property, conveyed in this deed to the use of his wife, liable for his debts, claiming that a life estate only was given to her, and that, upon her death, the property reverted to the estate of the said W. T. Gilmore. Judge Kershaw, who heard the case, sustained the claim of the plaintiff, and decreed the property liable to W. T. Gilmore's creditors.

Numerous exceptions were taken to this decree, but, upon examination, these exceptions will be found each to raise the same question, which is: Did Mrs. Gilmore take a life, or a fee simple estate under the deed referred to?

If I felt at liberty to construe this deed without regard to the legal effect of the terms employed, and untrammeled by previous decisions in analogous cases, I might reach a different conclusion from that which a legal construction and the decided cases may demand.

The powers granted to the wife are almost unlimited. She was authorized to take possession and to occupy the property; to consume in its enjoyment all or any portion of it; to dispose of it during her life upon such consideration as she saw proper; and, finally, "if any remained unexpended at her death, to give, bequeath, and devise it to such person or persons as she might direct or appoint, as fully as if she were sole and unmarried."

These are the powers which usually belong to an absolute estate, and if we were to confine our attention to the consideration of these, as alone bearing upon the question under discussion, it would be difficult to shut out the conclusion that it was the intention of the parties here to create an absolute es-

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tate. *But many cases, very similar in their facts to this case, have been passed upon and decided in our own courts.

We must look at these cases, and, extracting the principle upon which they have turned, apply it to this case and decide it as this principle shall require.

It is a familiar principle, found in all the elementary books on the subject of estates, that the term "heirs" is the apt and legal term uniformly to be used in the creation of estates of inheritance. At one time no other term would answer the purpose, and no estate of inheritance could be created without its use. This rule, however, has been relaxed somewhat, and especially in the case of wills and devises. It has been relaxed in these, because it has been thought that such instruments were entitled to a more liberal construction than others, on account of the emergency which sometimes surrounds the parties executing them—different from that which usually attends the preparation of other papers. In accordance with this relaxed rule, it has been held in many cases that no words of limitation are necessary in a devise to convey a fee simple estate. McAllister v. Tate, 11 Rich. 509 [73 Am. Dec. 119]. And in the general statutes of this state it has been enacted "that a gift of land by devise shall be considered as a gift in fee simple, unless such a construction be inconsistent with the will of the testator, expressed or implied." Gen. Stat., ch. LXXXVI., § 9. If, then, the contest here was over the construction of a devise, with the enlarged powers given to the devisee, as are found in this deed, there would not be much difficulty under the principle referred to above in deter-

mining the question at issue. The amplitude of the powers conveyed, accompanied with the indefinite character of the estate created, would sufficiently indicate the intention of the parties, and would so clearly mark the estate as an estate in fee simple, that there could be but little doubt on the subject. Pulliam v. Byrd, 2 Strob. Eq. 142.

But the instrument in this case is not a devise—it is a deed. We have found no authority for extending the principle which, as we have seen, applies to devises, to estates created by deed. On the contrary, as far as we have been able to discover, the common law rule requiring the use of words of in-

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heritance to *create a fee remains unchanged as to deeds, and the term heirs must still be employed in such instruments when it is desired to create such an estate. Knotts v. Hydrick, 12 Rich. 318; 4 Kent 5.

No such term is found in this deed qualifying the estate conveyed to Mrs. Gilmore; and if the estate here was a legal estate, and conveyed directly to her without the intervention of a trustee, there would be no room for the position that a fee simple had been created and given to her. The principles referred to above would settle the question at once. In such case, in the absence of words of inheritance and all other words limiting or defining the duration of the estate, under the principle that the deed must be construed most strongly against the grantor, and, therefore, that the largest estate that the language employed would carry, must have been intended, the court, no doubt, would conclude that Mrs. Gilmore took a life estate, with full power of disposition and appointment, according to the terms and provisions of the deed; and the case would end at this point.

But the estate conveyed here is not a legal estate; it is a trust estate. Will that fact modify, change or enlarge this principle, is the question which now opens for consideration.

It has been decided in this state, first as far back as 1811, and frequently since, that the character of trust estates, both of real and personal property, must be determined in equity upon the same rules of construction as are applied to legal estates. Cudworth v. Thompson, 3 Desaus. 256. They have generally the same incidents and qualities, and in endeavoring to ascertain the quantity of a given trust estate, equity follows the same rules, and applies the same principles, which, in a like purpose, the law courts apply to estates. 2 Washb., Book 2, ch. III., §§ 2, 3; 4 Kent 6.

It would follow, then, that this being an estate in equity, or a trust estate, would make no difference as to the questions involved.

These general principles are not contested by the appellant, as we understand. But it is contended that, although an absolute estate is not given in terms to the cestui que trust, Mrs. Gilmore herself, yet that such an estate is given to her trustee—the convey-

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ance to *him being in terms "to him and his heirs forever." That by these words the fee passed out of the grantor upon the execution of the deed; and this fact, lifting the case from under the principles referred to above, operates to enlarge the estate in the cestui que trust into an absolute estate, and without possibility of return to the grantor. Now we have seen that the estate which was given to Mrs. Gilmore, when considered by itself and judged by the rules applicable to the construction of a deed like that under which she held, was a life estate, nothing more. Can the fact be, that because, in the same instrument a fee was given to her trustee, who was to hold for her use and benefit, that that will enlarge her life estate into a fee simple? As to the question of intention, it may be asked if such was not the purpose of passing the entire estate out of the grantor into the trustee, what was the purpose? It certainly could not have been for the benefit of the trustee, and it is contended, therefore, that it must have been for the benefit of the wife.

It will be remembered that Mrs. Gilmore was invested with the power to sell and convey during her life, or rather that the trustee was authorized to do so upon her written directions. She was also empowered to dispose of the entire estate by will. Was it not necessary, for the purpose of meeting the exercise of these powers on the part of Mrs. Gilmore that some one should be clothed with the fee so as to be able to convey to her vendee or appointee, as the case might be, that full estate which she could create or appoint under the provisions of the deed, and yet, having but a life estate herself, had no power to convey it to such vendee or appointee? This may have been the reason for investing the trustee with the fee.

"Where an estate is given to trustees in fee upon trusts that do not exhaust the whole estate, and a power is superadded which can only be exercised by the trustees conveying in fee simple, the trustees will take the fee, and the estate conveyed by them will be sustained by the fee in them, and not by the mere power." Perry on Trusts, § 316, p. 293. It is true that by this author, (Section 312), it is stated that the statute can only execute in the cestui que trust the estate which the trustee himself takes, that is, the statute executes or trans-

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fers the exact *estate given to the trustee. But we have nowhere found the doctrine suggested that the quantity of the estate conferred upon the cestui que trust is to be measured by that which may be conferred on the trustee instead of by the language

which is used as to the cestui que trust herself.

It is often important to know the exact legal interest of the trustee in the estate, not so much, however, to ascertain the quantity of interest conveyed to the cestui que trust, but to measure the powers of the trustee. On this principle "two rules of construction have been adopted by courts: First. Wherever a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitations in the instrument, whether to him and his heirs or not. And, second, although a legal estate may be limited to a trustee to the fullest extent as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily required." Perry on Trusts, § 312. See, also, §§ 318, 319, 320.

We do not think that in this case the life estate of Mrs. Gilmore was enlarged to a fee on account of the fact that the trustee, for the purposes of his trust, was invested with such an estate.

It may be that upon the death of the husband, there being then no longer any necessity for a trustee, that the use became executed in the wife. If this be so it could not help the appellant, because the statute could execute in her no greater legal estate than she previously had in equity, which, as we have seen, was a life estate.

Lastly, upon the termination of the life estate of Mrs. Gilmore did the fee result to the debtor or his heirs, or did it pass to the heirs of Mrs. Gilmore?

The general rule on this subject seems to be that where the use as to a part is only declared, the residue would result to the grantor or his heirs, if he be dead. As where a conveyance is made by a man to the use of his heirs, and no use is declared of the same during his life, an estate for life arises in his own favor by implication. So, besides the use to his heirs, if he had declared an immediate use to one for years, so much of

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the use as *would be left between the expiration of the term for years and the grantor's death, when the use to his heirs would be executed, would result to him.

So, too, and what is more in point: "If the limitation be by A for a valuable consideration to B in fee, to the use of B for life, without any other declaration, the use in fee, after the death of B, would result to the grantor." Washb., vol. II., 397.

"As a general rule, it is true that where the owner, for a pecuniary consideration, conveys lands to uses, especially declaring a part of the use, but making no disposition of the residue, so much of the use as the owner does not dispose of remains in him." Id. 397, quoting from a New York case.

Under these principles I think there was a resulting trust in this case to the grantor or his heirs, and I concur with Judge Kershaw in so holding. This is so, because a use in part only of the estate was declared in the deed, i. e., a life estate in Mrs. Gilmore, leaving the residue undisposed of. It is true, as is contended by appellant, that where the deed is based upon a valuable consideration, however small, even if it be a pepper-corn, as stated in some of the cases, this fact will sometimes be laid hold of by the courts as an evidence of the intention of the parties to carry the whole estate, and it will usually be held to prevent a resulting trust.

But this doctrine does not apply to a case of this sort. There is a qualification to that class of cases where a resulting trust is claimed between the original parties, upon the execution of a deed to one party, where the purchase money is paid by another, or where a voluntary deed is executed by one to another, without any declaration of trust, and the question arises to whom does the property belong, the grantor or the grantee? In such case the fact of consideration will determine the question. But, as we have said, this doctrine has no application here. And even if it had, we do not see that any valuable consideration was present in this case. There is no evidence that the nominal consideration mentioned in the deed was ever paid by the trustee, or ever expected to be paid, and the husband was certainly under both legal and moral obligation to support and maintain his wife.

Whether the property which he allowed

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her the use of during *life was more than sufficient for this purpose, we do not know nor is that material. Was it not his duty to furnish this, independent of any covenant that she might make? But I do not see that any such covenant was made by her, or any other legal consideration furnished by her, as a foundation of his deed, such as, in contemplation of the law, would prevent a resulting trust.

For the reasons given herein, I have been unable to concur in the opinion of the majority of the court. That opinion, while admitting the general rule as to the necessity of the use of the word "heirs" to convey a fee in a deed, holds that there are exceptions to this rule, and that this case falls under one of these exceptions, and Mr. Washburn, Book 2, ch. III., ¶¶ 40, 43, is referred to.

I do not understand Mr. Washburn as sustaining the views of the majority. In my judgment the paragraphs cited refer to the estate of the trustee and not to that of the cestui que trust. The idea suggested is that whatever may be the quantity of the estate, in terms, given to the trustee, yet, if the interest conveyed to the cestui que trust requires that the trustee shall have a fee, then the law will confer it upon him, although the word "heirs" is not used in the deed to him. In other words, whenever a fee is created for the use of the cestui que trust—a fee being

necessary in the trustee to protect the interest of the cestui que trust—he shall have a fee also. Mr. Washburn does not enlarge the rules by which it is to be determined whether or not a fee has been created for the cestui que trust. Nor do I think the cases referred to in the opinion of the majority fully sustain the position taken. In Villiers v. Villiers, 2 Atk. 71, Lord Hardwicke did say: "That if land be given to a man without the word 'heirs,' and a trust be declared of that estate, and it can be satisfied in no other way but by the cestui que trust taking an inheritance, it has been construed that a fee passes to him even without the word 'heirs.'" This is in exact accordance with the construction given above to the doctrine laid down by Mr. Washburn. The question being, what estate did the trustee take? "the man to whom the land was given"—but not the estate of the cestui que trust—Lord Hardwicke said that where the estate of the cestui que trust could be satisfied in no other way but by his taking an

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*inheritance—that is, where an estate of inheritance was given to the cestui que trust—"the man to whom the land was given," that is, the trustee should also have a fee, although the word "heirs" was not used in the conveyance to him. The case of Fisher v. Fields, in which Chancellor Kent delivered the opinion of the court, arose upon an assignment of a soldier's patent for land. The question was, whether the assignee was entitled to a fee when the word "heirs" was not used in the assignment. Chancellor Kent very properly said "that the transfer of a soldier's patent was not to be tested by the strict technical rules of the conveyances of land at common law." And so would we say here on such a paper; but the paper here is a conveyance of land, and not a mere soldier's patent.

Failing to agree with the majority, this is filed as my dissenting opinion.

Appeal sustained.

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15 S. C. 296

(Case No. 1044.)

UNION BANK OF SOUTH CAROLINA v. HEYWARD.

(April Term, 1881.)

[1. *Master and Servant* ⇐38.]

A bank-teller being dismissed from his office in March, retained of the funds in his hands $1500, claimed by him as his salary for the whole year. In April, the bank, claiming that his salary had been reduced to $1000 per annum, brought suit upon the teller's official bond, alleging refusal to turn over $1250 of the funds of the bank, and the only issue raised by the answer was, that defendant was entitled to retain the said sum of $1250 for his salary as teller. *Held*, that defendant had treated the contract as entire, and could not, therefore, assert his claim until the time when it became payable.

[Ed. Note.—Cited in Latimer v. York Cotton Mills, 66 S. C. 137, 44 S. E. 559.

For other cases, see Master and Servant, Cent. Dig. § 44; Dec. Dig. ⇐38.]

[2. *Banks and Banking* ⇐54.]

The teller having given bond to deliver up to the bank all moneys, &c., when required to do so, the bank might demand of him at any time, with or without dismissal, the assets in his hands; and a refusal to deliver was a breach of the bond.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92–98, 105–107; Dec. Dig. ⇐54.]

[3. *Trial* ⇐136.]

The construction of a written receipt is not for the jury, but is a matter of law for the court.

[Ed. Note.—Cited in Russell v. Arthur, 17 S. C. 480; Arnold v. Bailey, 24 S. C. 497

For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323–327; Dec. Dig. ⇐136.]

[4. *Set-Off and Counterclaim* ⇐40.]

Against the demand of the bank, the defendant could set off nothing more than was due him by the bank at the time of action brought.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 73; Dec. Dig. ⇐40.]

[This case is also cited in Murray v. Aiken Min. & Porcelain Mfg. Co., 37 S. C. 488, 16 S. E. 143, and distinguished therefrom, and in Murray v. Aiken Mining & Porcelain Mfg. Co., 39 S. C. 464, 18 S. E. 5, as to allowance of interest.]

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*Before Pressley, J., Charleston, February, 1880.

Associate Justice McIver declined to sit at the hearing of this appeal, because of his being a stockholder in the plaintiff corporation. By consent of counsel, the case was heard by the two remaining justices.

This action was commenced April 28th, 1877, by the Union Bank of South Carolina against W. H. Heyward, Jr., teller, and James B. Heyward, a surety on the official bond of the teller, for moneys alleged to be in the hands of W. H. Heyward and not turned over to the bank when demanded. Heyward ceased to be teller on or about March 10th, 1877, under the following resolution:

"Whereas, by resolution of the board of 15th March last, the salary of William H. Heyward, Esq., teller and book-keeper, was reduced from $1500 to $1000 per annum, to take effect from and after the 1st of June, 1876; and whereas, the date when such reduction should take effect was afterwards extended to January 1st, 1877, in consequence of Mr. Heyward's claim that he had been employed for one year from 1st January, 1876, at a salary of $1500 per annum, and that the salary could not legally be reduced before the expiration of the year, of which extension of time due notice was

given to Mr. Heyward; and whereas, Mr. Heyward refuses to accept the reduced salary, to wit, $1000 per annum, from 1st January, 1877—

"Resolved, That Mr. William H. Heyward, Jr., be and he is hereby removed and relieved from the office of teller and book-keeper, and that he be and is hereby required to surrender and account for the assets and property of the bank which now are or have been in or under his care, custody and control."

The following receipt was then given:

Charleston, S. C., March 10th, 1877.

Received of Mr. Wm. H. Heyward, Jr., teller and book-keeper of the Union Bank of South Carolina, the following notes, to wit, * * * all unpaid, and all the books left in his charge by said bank.

Also, received of Mr. Heyward the sum of

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six thousand one *hundred and four dollars and ninety-nine cents, which, according to the balance sheet upon Mr. Heyward's books, appears to be the amount due by him to the bank.

Mr. Heyward states, however, that he has retained and charged upon said books the sum of fifteen hundred dollars as salary, from 1st January, 1877, to 1st January, 1878, as appears from the entries in said books.

The bank denies Mr. Heyward's right to retain said sum, and alleges that Mr. Heyward is only entitled to charge and retain compensation for his services from 1st January, 1877, to 1st April, 1877, at the rate of one thousand dollars per annum. And this receipt is given and intended to be without prejudice to the rights of either party in respect to the rate of Mr. Heyward's compensation, or his right to retain the amount hereinbefore mentioned as claimed and retained by him.

(Signed) H. D. Alexander.

Cashier Union Bank of South Carolina.

Other facts are stated in the opinion. Under the charge of the presiding judge the jury found a verdict for plaintiff of $1250, with interest. Defendants appealed.

Messrs. J. L. Buist and A. G. Magrath, for appellants.

Mr. Isaac Hayne, contra.

June 28th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The defendant (appellant) was in the employment of the respondent plaintiff during the year 1876, as teller, at a salary of $1500 per annum. At the beginning of this engagement appellant gave bond with surety, conditioned generally "for the faithful discharge of the duties of the office, and, especially, that whenever required he would deliver up to the bank all goods, moneys and choses in action belonging to said bank, &c., which shall have come into his hands or care." Some controversy arose between the appellant and respondent during the year 1876, as to the reduction of appellant's salary for that year down to $1000. This, however, was arranged, and

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*appellant continued at the sum of $1500. After January 1st, 1877, appellant still continued in the bank discharging the duties of the office, until some time in February, when the controversy as to the salary again started, respondent contending that the board of directors had decided, by resolution the previous year, that the salary of the teller, as well as of the other officers, should be reduced for the year 1877, of which the appellant had notice, and the appellant denying that he had received such notice, and claiming that having entered on his duties in January, without notice, that he was entitled to the salary of the previous year, viz., $1500.

The parties failing to agree as to this matter, appellant was dismissed March 10th, 1877. Thereupon appellant delivered to the bank all the property in his hands belonging to the bank, except the sum of $1500, which he claimed that he had the right to hold in payment of his salary for the year, and he refused to turn this amount over.

This action was then brought upon the bond of appellant, alleging as a breach that appellant had refused and still refuses to account for and pay and deliver to the bank the money so received by him. The defendant (appellant) in his answer admits the execution of the bond; insists that he performed all the duties of his office, and claims that he is entitled to retain the amount in his hands, viz., $1250, for the salary due him as teller for the year 1877, which sum is the amount for the year, at the rate of $1500 per annum, less $250, conceded by plaintiff.

Upon these pleadings, after testimony, the parties went to the jury. The principal question of fact which the jury was called upon to decide was, what was the salary of the defendant for the year 1877? Was it $1500 or $1000? This depended upon the further fact, which the jury had to solve, did the appellant, before he entered upon his duties in January, 1877, have notice of the resolution of the board of directors reducing his salary for that year? This fact the jury seems to have found against the appellant, and, so finding, their verdict was for the plaintiff (respondent) $1250.

The appellant requested the judge to charge four legal propositions, one of which, the first, the judge charged, the other three

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*he declined, and the appeal assigns as error the refusal of the judge thus to charge, with two other exceptions to the charge as made, which will be noticed at the proper place.

The first error assigned is that the judge

refused to charge the jury as requested, "that if the jury believed that the defendant was discharged by the plaintiff without cause, and simply because he refused to accede to the reduction of salary at the caprice of the plaintiff, then at law, he would be entitled to be reimbursed for his damages for the plaintiff's breach of said contract, and it is the duty of the jury to assess the damages."

The rule on the subject of damages, in cases of entire contracts, is this: If a party be dismissed without cause he becomes entitled to the full amount of the wages agreed upon; but in such case he should treat the contract as subsisting to the end of the year and he could not recover upon it until the expiration of the term for which he was employed. He has the right, however, to regard the contract as rescinded and put an end to, but in such case he will be held to have waived his claim to damages for the whole period, and will be restricted to compensation on a quantum meruit up to the time of dismissal. Watts v. Todd, 1 McMull. 26.

Now apply this principle to this case. Here the appellant claims to have been dismissed without cause. If this was true, which was a question of fact for the jury, the appellant had the right to wait until the end of the year, or the end of each month, if his salary was payable monthly, and then sue for it, or he could have treated the contract as rescinded at once, and have sued for the amount then due. And, if sued himself by his employer, he would be entitled to set up, by way of counter-claim or by discount, under the old practice, provided his right of action had accrued, such amount as then might be due him.

In this case the action of the respondent was commenced before the end of the year, or the month, and the appellant, would have been precluded from setting up a counter-claim for the whole amount, or even the amount for the month, had he attempted to do so, for the reason that there was nothing then due him under the contract. He had no

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right of action, and he *cannot set up a demand by way of counter-claim, upon which no right of action has accrued to himself.

Has he treated the contract as rescinded and claimed damages up to the time of dismissal?

Upon looking into his answer it will be found that no such defence is set up. He claims in his answer "that he is entitled to retain the said sum of $1250 for the salary due him as teller for the year commencing in January, 1877." This is the only issue which he raises. Under these circumstances there was no error on the part of the judge in declining to charge as requested on this proposition.

2. Appellant requested the judge to charge "that if the jury believed from the evidence that the plaintiff called upon the defendant to deliver up the assets—which were properly in his control—not in pursuance of any regular duty imposed on him in the ordinary course of business, but simply for the purpose of compelling him to acquiesce in his discharge by the plaintiff, then there was no breach of his contract in his refusal to deliver said assets, if they find that he was then willing, and always had been willing to account for the same."

The judge refused thus to charge, and we can find no error in this. The appellant was an employee of the respondent. He had given bond to the respondent "to deliver up to respondent all goods, moneys and choses in action belonging to said respondent." We conceive that the respondent had the right at any time to demand possession of such of the assets of the bank as might be in the hands of the teller or any other employee, either with or without dismissal. The property entrusted to the employee was not his property, but the property of the bank, and the bank had the right to control, and a refusal on the part of the employee to turn it over upon demand at any time would be a breach of duty, and where bond had been given, as in this instance, would be a breach of the bond.

So that the Circuit judge could not have legally charged the proposition as requested. In addition to this the judge says, there was no evidence pertinent to this subject, and that the case put was a hypothetical case, having no application to the case in hand.

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*3. Appellant excepted, because the judge declined to charge "that if the jury believed from the evidence that there was a controversy between the plaintiff and the defendant as to the amount which was to be paid to the defendant by the plaintiff; and if they agreed that the defendant should retain the sum of $1250, subject to the adjudication of the said claim, the plaintiff cannot recover, unless the jury believe that the defendant was not justly entitled to retain that amount; and if they believe that the defendant's claim was correct and just, then the verdict should be in his favor."

The propriety of this charge depends upon the fact whether the respondent had agreed that appellant should retain the sum of $1250, acknowledged to be in his hands, subject to adjudication. This, again, depended upon the construction to be placed on the receipt which had been given by respondent when the other property was turned over. The construction of this receipt, being a matter of law, was for the court, and not for the jury. And the court holding that there was nothing in the receipt intimating that plaintiff assented to the defendant retaining that

money, he could not have charged as requested.

4. Appellant excepted to the charge, "because his Honor charged the jury that the defendant having been discharged by the plaintiff during the year for which he was employed, without cause for such discharge, could not retain of the moneys of the plaintiff which were in his hands, an amount equal to the salary for the year for which he had been employed, and during which he had been discharged without cause."

We have looked into the charge of the judge as furnished in the "case," and we do not find any language which admits of the construction as presented in this ground. The judge nowhere charged, as we understand from the printed copy of his charge in the brief, that the defendant had been dismissed without cause. The question of fact which he submitted to the jury was, whether the appellant had sufficient notice that his salary had been reduced; and he charged them as matter of law, that if he did have this notice then his discharge was lawful; but we do not see that he stated that appellant had been dismissed without cause.

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*5. The appellant excepts further "because his Honor charged that defendant could not set off against demand of plaintiff for money in his hands, the demand of the defendant against the plaintiff for money agreed by the plaintiff to be paid to the defendant for his services, and from the performance of which services the plaintiff had, without cause, prevented the defendant."

This embraces the same statement as the ground above, viz., that his Honor charged "that appellant had been prevented from discharging his duties without cause." The judge did charge that appellant could not set off against the respondent anything more than was due him at the time the action was brought. There was no error in this.

A counter-claim is a cross' action, and it must contain all the elements of a cause of action, and must be governed and judged by the same rules which apply to the complaint. And to entitle a defendant to set it up, one of the first necessities is that a right of action must have accrued; in other words, the claim must be due. Pom. on Rem., § 738.

There was no counter-claim technically and formally set up in this case, such as is required where the defendant intends to rely upon it as such. And even had this been attempted it would have been totally defective, because the claim for services was not due, and might never have become due. The death of the defendant during the year would certainly have defeated a portion of the claim.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McGOWAN, A. J., concurred.

15 S. C. *304

*(Case No. 1045.)

In re FIFTY-FOUR FIRST MORTGAGE BONDS. GIBBES v. GREENVILLE AND COLUMBIA RAILROAD COMPANY. STATE, ex relatione ATTORNEY-GENERAL, v. SAME.

(November Term, 1880.)

[1. *Railroads* ⇐206; *Receivers* ⇐49.]

Under action pending in the name of the state for the foreclosure of a mortgage upon the property of a railroad corporation, and the appointment of a receiver, and on the motion of the attorney-general for such appointment, an order was passed by the court in the words following: "As the state cannot be required to give security as other plaintiffs, it is ordered, that the president and directors of the Greenville and Columbia Railroad Company, under the order of and subject to this court, continue in the possession and management of the property of all kinds of the said company; and in like manner continue to conduct and carry on the business of the said company; that they make report to this court, at such times as this court may require, of the condition of the property of all kinds of the said company, of its earnings and profits and expenditures, to the end that such orders may, from time to time, be moved for, as may be necessary and proper for the protection of the property of the said company, and the interests of all parties concerned, pending litigation." *Held*, that this order constituted the president and directors of the corporation receivers, and that they continued in the management of the road and its business, as officers of the court and not of the company. Simpson, C. J., dissenting.

[Ed. Note.—Cited in Ex parte Brown, 15 S. C. 518, 532; Ex parte Benson & Co., 18 S. C. 38, 46, 44 Am. Rep. 564; Ex parte Brown, 18 S. C. 88; Ex parte Carolina Nat. Bank, Id. 295, 296; Roberts v. Johns, 24 S. C. 585.

For other cases, see Railroads, Cent. Dig. § 678; Dec. Dig. ⇐206; Receivers, Cent. Dig. § 82; Dec. Dig. ⇐49.]

[2. *Corporations* ⇐473.]

A referee in the cause reported $241,000 of this company's past-due bonds, secured by the lien of a first mortgage, as still outstanding, to which finding no exceptions were taken, and the report was approved by the Circuit Court. After the appointment of the receivers, fifty-four of these first mortgage bonds were purchased by these officers—some before the report of the referee, and some afterwards, but all before the approval of the report—and entered upon the books of the corporation as investments, and not as paid, and for several years reported to the company as still outstanding, and they were then reissued for value. *Held*, that these fifty-four bonds had not been paid, and in the hands of their purchasers, were secured by the lien of the first mortgage. Simpson, C. J., dissenting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1853; Dec. Dig. ⇐473.]

[3. *Exceptions, Bill of* ⇐39.]

Appeal from a decree rendered in term time dismissed—a copy of the exceptions not having been furnished to the trial-judge within ten days after the rising of the court. Ex parte Clyde, 14 S. C., 385, recognized and followed.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 51, 52, 54–56, 60; Dec. Dig. ⇐39.]

[This case is also cited and followed in Ex parte Carolina Nat. Bank, 18 S. C. 289.]

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*Before Hudson, J., Richland, July, 1880.

Hon. A. P. ALDRICH, judge of the Second Judicial Circuit, sat at the hearing of this appeal in the place of Associate Justice McGOWAN, who had been of counsel.

This case involves a contest between creditors of the Greenville and Columbia Railroad Company. It is therefore a branch of the parent-case reported 13 S. C. 228, but raises points not there considered.

On May 6th, 1872, James S. Gibbes and other creditors of the Greenville and Columbia Railroad Company, filed their complaint against this corporation and other defendants, praying that the rank and lien of the several mortgages on the property of the company be declared, and the order fixed in which they should be paid, and so forth. On June 11th, 1872, the attorney-general of South Carolina filed his complaint in the name of "The State of South Carolina by the attorney-general," against this same corporation, and others, its creditors, praying that the rights of the state under an act of the general assembly be declared and its interests protected, a mortgage held by the state be foreclosed, a receiver appointed, and suing and judgment creditors be enjoined, &c.

On June 18th, 1872, Judge Melton, on motion of the attorney-general for the appointment of a receiver, and by consent of other counsel, filed his order wherein he restrained creditors from suing, or enforcing their judgments, appointed John S. Green referee to call in creditors "to make proof before him of their several and respective claims," and to "take testimony as to the liens set up against the said company, their order of priority, and the amounts respectively secured by such liens," and to make report to the court. The order further provided: "As the state cannot be required to give security as other plaintiffs, it is ordered that the president and directors of the Greenville and Columbia Railroad Company, under the order of, and subject to this court, continue in the possession and management of the property of all kinds of the said company, and in like manner continue to conduct and carry on the business of the said company; that they make report to

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this court, at such times as this *court may require, of the condition of the property of all kinds, of the said company, of its earnings, and profits, and expenditures, to the end that such orders may, from time to time, be moved for, as may be necessary and proper for the protection of the property of the said company, and the interests of all parties concerned, pending litigation."

On November 15th, 1872, Mr. Green, the referee, reported, inter alia: "1st. First mortgage bonds—Furman, trustee. Outstanding, $241,000." To this part of the referee's report there was no exception taken by parties then before the court, or afterwards brought in by amended pleadings.

On May 13th, 1878, Judge Shaw passed an order directing that the substituted trustees of the first and second mortgages, be made parties, with leave to them "to file exceptions to the reports of the referees in the above-entitled cases." Amended complaints were filed in both cases in August, 1878, and they both alleged that there were still outstanding "$241,000 of first mortgage bonds." W. A. Clark, substituted trustee of the second mortgage, answered the amended complaint of Gibbes and others, but did not deny this allegation. He also excepted to the report of Referee Green, but not to the number of outstanding first mortgage bonds. This was in August, 1878.

The order of Judge Pressley, of November 23d, 1878, appointing a receiver, is substantially stated in the opinion. He considered that the order of Judge Melton made the president and directors of the company "officers of this court and responsible to it in the character of receivers." Judge Pressley's decree bears date September 6th, 1879. He says: "The report of the referee shows that holders of $241,000 of first mortgage bonds did not exchange them for those authorized by this act." He finds as a conclusion of fact: "4. After payment of said debts, the first mortgage bonds outstanding, and those held by the state, with all unpaid interest thereon, are the first lien on said property." He directs further inquiry as to the amount of several classes of bonds, but none as to the amount of outstanding first mortgage bonds. (The full decree may be read, if desired, in 13 S. C. at page 229.) This decree was affirmed on appeal, but the points involved here were not embraced in the exceptions there taken.

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*On November 29th, 1879, Judge Mackey passed an order directing the sale of the road on April 15th, 1880; and one other order referring it to N. B. Barnwell, the master of the court, to call upon the bondholders of this company, including those secured by the first mortgage, to produce their bonds and "make proof of the same, and of the amount of principal and interest due on the same," and that the master classify the bonds so proved in the following classes: 1. First mortgage bonds "not exchanged for bonds guaranteed by the state and now outstanding in the hands of persons holding the same."

In the matter of a claim for counsel fees, Judge Mackey passed a third order in this cause, in which, inter alia, "1. It is adjudged that the order passed by Judge Melton, in the case of State, ex rel. the Attorney-General, against the Greenville and Columbia Railroad Company, on the 18th day of June, 1872, did constitute the officers of the company the receivers of this court for the operation of the road and the protection of the defendant's property."

At a reference held before Mr. Barnwell, master, under Judge Mackey's order, the Na-

tional Bank of Greenville, William Knobeloch, T. J. Robertson and others, produced first mortgage bonds, fifty-four in number, which, it was conceded, were included in Referee Green's "$241,000 first mortgage bonds outstanding;" but they were objected to by other creditors, holding securities of an inferior lien, upon the ground that they were paid. The facts were, that these bonds all fell due July 1st, 1863, and March 1st, 1864, were purchased with funds of the company by its treasurer, under directions of the president, between March 7th, 1872, and January 6th, 1874, and re-issued in October, 1875, and in January, 1877, as collateral security for loans made to operate the road, or sold for the same purpose. "These bonds were purchased just as other securities were purchased, and were entered upon the books of the company as investments; we were not prepared to retire any bonds," is the testimony of the treasurer. From April, 1874, to May 1878, inclusive, these bonds were reported in the treasurer's annual report as outstanding.

The master, by his report of May 10th, 1880, (upon the matters involved, fully stated

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in the opinion,) found that these fifty-*four bonds were not entitled to the lien of the first mortgage. Upon exceptions by the holders of these bonds to this report, Judge Hudson filed his decree in open court July 27th, 1880, by which the master's report was confirmed, except in a particular not considered by this court.

The holders of these bonds served the following exceptions:

1. For that his Honor held that the status of the fifty-four bonds was not res judicata.

2. For that his Honor held that the action of the railroad company, in taking up and reissuing said bonds, extinguished their lien, notwithstanding the provisions of the act of January 28th, 1861.

3. For that his Honor held that the said bonds were not entitled equitably to rank with the guaranteed bonds.

4. For that his Honor held that neither the status of the president and directors of the railroad company, resulting from the order of June 18th, 1872, nor their intention in taking up said bonds pendente lite, prevented the usual effect of such bonds being taken up by an obligor and mortgagor.

5. For that his Honor overruled the exceptions made by these exceptants to the report of the master, submitted on May 10th, 1880, in relation to the fifty-four bonds, of which those proven by exceptants formed a part.

6. For that his Honor did not hold that, under all the circumstances of the case, the holders of the fifty-four bonds were, in the marshaling of securities for the purpose of distribution of the assets of the railroad company, equitably entitled to the position of bona fide holders for value, without notice of defects.

Notices of appeal and these exceptions were duly served and furnished. Mr. Fisher, receiver, also appealed upon a ground which it was unnecessary for this court to consider under the conclusions reached by them, but he failed to serve the presiding judge with copies of his notice and exceptions within ten days after the rising of the court.

[For subsequent opinion, see Ex parte Williams, 17 S. C. 396.]

Mr. J. P. K. Bryan, for National Bank of Greenville, appellant.

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*The question of the validity of these bonds is res adjudicata. 1 Rich. Eq. 1; 12 Rich. Eq. 138; 7 S. C. 134; 14 S. C. 225. The individual bondholders are bound, as their trustees were parties to the cause. 3 Otto 160; 10 Otto 611. A Court of Equity will keep an encumbrance alive or consider it extinguished, as will best serve the purposes of justice and the actual and just intention of the parties. 18 Ves. 384; 6 Johns. Ch. 423. But the company never paid these bonds—they were taken up by the receivers. The president and directors, by Judge Melton's order, were made receivers. High on Receivers, § 184; Kerr on Receivers 136, 169, 170; 20 Beav. 349; 54 Barb. 216. As receivers, these officers were not the legal representatives of the corporation. Kerr on Receivers 2, 168, 196, 206; 7 How. 331, and particularly Whitley v. Lowe, 25 Beav. 431.

Mr. J. H. Rion, for T. J. Robertson, appellant.

Mr. James Simons, for William Knobeloch, appellant.

Mr. D. T. Corbin, for J. H. Fisher, receiver, appellant.

Mr. S. W. Melton, for W. A. Clark, trustee, respondent.

Purchase by a debtor of his own obligation with his own funds, and payment of such obligation, are convertible terms. Byles on Bills, 54; 2 Pars. on Cont. 715; 4 Wels., H. & G. 13; 2 Bail. 203; Dan. on Neg. Inst., § 1285. The extinguishment of the debt extinguishes the mortgage; re-issuing the debt cannot revive the mortgage as against intervening encumbrances. 10 Rich. Eq. 487; 2 Jones on Mort., §§ 889-948; Herm. on Mort., § 173; 6 N. Y. 449; 5 Cow. 671; 20 N. Y. 395; 2 Allen 118; 3 Id. 339; 3 Metc. 55; 33 N. H. 532; 15 Vt. 374. The necessary conditions of res adjudicata do not exist. 7 T. R. 56; 3 Cl. & F. 510; 114 E. C. L. 255. This question was never considered. These officers were never appointed receivers—they were merely permitted to retain possession for the company. Why was not the word "receiver" used? If receivers, where is their authority to purchase and sell bonds? The

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holders are *clearly not bona fide holders

without notice, for the bonds were past due and dishonored. 50 N. Y. 158; 8 S. C. 305.

June 29th, 1881. The opinion of the court was delivered by

ALDRICH, A. A. J. Other branches of these causes have been before this court. I have not had the benefit of the argument therein, but proceed to present the questions submitted as they appear to me at the present hearing.

June 18th, 1872, Judge Melton made an order on a motion to appoint a receiver.

1. Restraining creditors of the Greenville and Columbia Railroad Company from instituting writs, and judgment creditors from enforcing their judgments.

2. That the president and directors of the company, "under the order and subject to this court," continue in possession and conduct and carry on the business of the company, and "make report to this court at such times as the court may require of the condition of the property of all kinds of the said company, of its earnings and profits and expenditures, to the end that such orders may, from time to time, be moved for as may be necessary and proper for the protection of the property of the said company and the interest of all parties concerned pending litigation."

3. That Mr. Green be appointed referee, to call in, by advertisements in the newspapers, the creditors of the company, "to take testimony as to the liens set up against the said company, and the amounts respectively secured by such liens."

Under this order Mr. Green held references and submitted his report, dated November 15th, 1872. In this report he classifies the priority of liens as follows:

1. First mortgage bonds outstanding, $241,000.

2. Guaranteed bonds outstanding, $1,419,071.55.

3. Second mortgage bonds outstanding, $1,200,000.

June 11th, 1872, Mr. Attorney-General Chamberlain filed a complaint on the part of the state, in which he prays "that a receiver be appointed of all the property, assets and effects of the defendants, to hold and keep the same subject to the further order of this court."

May 13th, 1878, Judge Shaw filed an order

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to amend the *complaint by making H. H. De Leon, trustee, a party, which was done August, 1878.

November 23d, 1878, Judge Pressley, after hearing argument in the cases, as amended, filed a judgment, in which he says: "I consider that the said order of Judge Melton," (June 18th, 1872,) "did make the officers of the Greenville and Columbia Railroad Company officers of this court and responsible to it in the character of receivers, but they have not executed the proper bond, nor have they filed their accounts or performed the other duties required by that order. It is therefore, incumbent upon me to put an end to that condition of the property, and to place it more substantially in the hands and under the custody and order of this court." He appoints Mr. Conner receiver.

September 6th, 1879, Judge Pressley filed his decree, holding "that the statutory liens, under the acts of 1861, 1866 and 1869, were securities for the payment of the bonds therein authorized, not mere indemnities to the state, and, therefore, it had no right to waive them in favor of the second mortgage." From this decree there was an appeal by De Leon, trustee, and Clark, trustee, but no exception was taken to that portion of the order of November 23d, 1878, which adjudged that the order of Judge Melton, June 18th, 1872, "did make the officers of the Greenville and Columbia Railroad Company officers of this court, and responsible to it in the character of receivers."

March 24th, 1880, this court, Mr. Justice McGowan delivering the opinion, dismissed the appeal and affirmed the Circuit decree.

November 29th, 1879, Judge Mackey made an order for the sale of the road; and, on the same day, filed another order directing holders of bonds to make proof of the same before the master, who is directed to "classify the bonds guaranteed by the state."

December 19th, 1879, Judge Mackey filed his decree, in which he decides: "It is adjudged that the order of Judge Melton, June 18th, 1872, did constitute the officers of the company the receivers of this court for the operation of the road and the protection of the defendant's property," &c.

Auditor Manson testifies: "It was not the

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intention of Mr. *Magrath to pay these bonds; we were not prepared to retire any bonds; these bonds were entered as an actual investment in company's books, and were purchased as any other securities were purchased by the company as an investment of company funds; these bonds were used for the purpose of raising money to operate the road by pledging them as collaterals for loans."

He also proves that from 1874 to 1878, the $241,000 of first mortgage bonds were reported to the company as "first mortgage bonds then outstanding."

The note to Knobeloch for $9000, and the two notes to the National Bank of Greenville for $5000 each, are secured by "first mortgage bonds past due."

Mr. Barnwell, master, reports upon the testimony: "These fifty-four bonds are not entitled to the security of the mortgage to C. M. Furman, and they are not, in the hands of the present holder, first mortgage bonds of the Greenville and Columbia Railroad Company." He also reports: "These bonds hav-

ing been proven before John S. Green in 1872, a referee in one of these cases, their validity cannot now be questioned. As to this view, it only applies as a matter of fact to a portion of them; as a matter of law, I feel called upon by the order of this court to treat all bonds as unproved until they are submitted to me and are proved before me, to my satisfaction, to be what they purport to be. I have, therefore, passed on these bonds as I have done on all others, without regard to whether or not they had been passed upon by Referee J. S. Green. It is also claimed for them that in fact a great many of these bonds were not re-issued by the company, but by a receiver of this court. As I am fully of the opinion that there was no receiver of this road until the appointment of James Conner as receiver," &c.

To this report exceptions were filed on the part of Knobeloch, Palmer, Robertson and National Bank of Greenville.

July 27th, 1880, Judge Hudson filed his decree, in which he overrules the exceptions, except those of the National Bank of Greenville. From this decree the cause now comes to this court on appeal.

The railroad interest, although in its infancy, has attained such vast proportions, commercial, financial and, I may add, polit-

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ical, *that it becomes us to proceed with great caution in prescribing the rules of law by which these corporations are to be governed. The questions constantly arising are of such novel aspect that it can hardly be said any fixed rules of construction have yet been established. By combinations and skillful management they have acquired an influence that seriously affects the interest of society in all its relations. This court cannot legislate, but in giving construction to the acts of the legislature granting charters and privileges, it will be careful to adopt such rules as will most effectually guard the public from imposition, while it preserves the chartered rights of the corporations. In the interest of society a vast power has been concentrated in these enterprises; the right of eminent domain has been invoked in their behalf, and it becomes us to see, that while all their just and chartered rights are preserved, the public shall not be damaged.

Two questions arise here:

First. The proper construction of the order of Judge Melton of June 18th, 1872.

Second. When these fifty-four bonds were taken up by President Magrath, was it with the intent to retire them, or was it for the purpose of an investment, to afford him negotiable securities by which he could hold in hand the current earnings of the road to meet its current expenses?

Judge Melton's order was passed on a motion for a receiver. It provides that the president and directors, "under the order and subject to this court," shall continue in possession of the road; conduct and carry on its business; make a report to the court of its condition, earnings, profits and expenditures. It appoints a referee to report the order and priority of the liens against the company, and restrains judgment and suing creditors. Now if this order did not make the president and directors receivers, for what purpose was it made?

It will be remembered that on June 11th, 1872, Mr. Chamberlain, then attorney-general, filed his complaint praying: "That a receiver be appointed of all the property, assets and effects of the defendants, to hold and keep the same subject to the further order of this court." Seven days after, Judge Melton filed his order of June 18th, 1872. Was

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not that in response to *the prayer of the complaint filed by the attorney-general on the part of the state? Did it not invest the president and directors with all the attributes of a receiver? We need be at no loss to determine who is a receiver since Gadsden v. Whaley, 14 S. C. 210. Mr. Justice McGowan, after reviewing all the authorities, happily defines him as "an executive officer of the court, to administer the assets of the estate under the direction of the court, which may, for the purpose of preserving the property, restrain the executor from intermeddling with the management of the estate and compel him to give up the control of it to the receiver; but such appointment and administration do not remove the executor or administrator or destroy his character as the legal representative of the estate. The authority of a receiver rests only in the orders of the court by which he is appointed. By virtue of any general authority as receiver he has no right to sue or be sued or defend." Now here were the president and directors of this road, on a prayer to appoint a receiver, directed to take charge of the property, manage it, report its earnings and expenditures, a referee appointed to call in creditors and report the priority of liens, and creditors, suing and judgment, restrained. From this order there was no appeal: it stood as the judgment of the court from 1872 to 1878. On November 23d, 1878, Judge Pressley filed a judgment, in which he said: "I consider that the order of Judge Melton made the officers of the Greenville and Columbia Railroad Company officers of the court and responsible thereto in the character of receivers." From this there was no appeal. Then Judge Mackey, December 19th, 1879, filed his decree, in which he said: "It is adjudged that the order of Judge Melton did constitute the officers of the company the receivers of this court for the operation of the road and the protection of the defendant's property." From this there was no appeal. Nor do we hear their character as receivers questioned until the coming in of the report, May 10th, 1880, in which Mr. Barnwell, the

master, reports there was no receiver until the appointment of Mr. Conner. Judge Hudson does not pass on this question, as he holds that whether receivers or officers of the company, the purchasers of past-due obligations can only rank as holders of unsecur-

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ed bonds. I have not drawn on the *wealth of authority contained in the arguments of the distinguished counsel who have presented these cases; that would extend this opinion unnecessarily, and the references will be found in the report. We conclude, therefore, and so adjudge, that the order of Judge Melton, June 18th, 1872, appointed the president and directors of the company receivers of the court.

Which brings us to the second inquiry. When these fifty-four bonds were "taken up," was it payment, and when re-issued were they deprived of the protection of the original security? This is a question of right and intent. It may well be questioned, if, under the order of the court appointing the president and directors receivers, they had authority to pay and retire the bonds secured by the first mortgage. They were required to carry on the business of the company—make report of its condition, earnings, profits and expenditures—for what purpose? That the court may make such orders as may be moved for, to protect the property and the interest of all parties concerned. The court was as anxious to preserve the liens and securities of the bondholders and other creditors as it was to preserve the property of the company which protected them. It was not to create dispute and litigation, for, to prevent this, creditors of all classes were enjoined. The receiver is the officer of the court, as Mr. Justice McGowan emphatically says, "its hand," to manage the property under the direction of the court for the best interest of all concerned. No preferences are to be shown, no practices tolerated that will give advantage to one class of creditors to the detriment of another class, but the whole business is to be managed on the basis of the broadest equity. Hence large discretion is allowed him in the financial manipulation of the assets; he may call in or put out the securities of the company as, in his judgment, will best enable him to secure the property to the stockholders and pay off its creditors, subject always to the check of the court. If, in doing this, he takes up bonds one month and re-issues them the next, to save interest and enable him to meet the current expenses on the most economical scale, I do not see that he thereby destroys the lien of the bond taken up, which made it a secure investment when originally issued and which is supposed to retain its lien as it passes

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from hand to hand around the financial *circle. To assume this would not only create distrust but destroy the credit of the road, for it cannot be supposed that capitalists will lend money on collaterals, the validity of which involved constant legal investigation. If he is "the hand of the court," where does he derive his authority to pay a bond, cancel and then re-issue it deprived of the protection of the original mortgage by which it was made valuable and negotiable? I see nothing in the order to confer such a power. It appears to me to be a most extraordinary proposition that where a receiver is appointed to protect creditors and property he will be permitted to destroy liens and make new debts on the faith of those very liens which he knows he has extinguished!

Now let us consider the condition of things when the receiver took charge of the property under the order of Judge Melton in 1872. The referee, Mr. Green, reports $241,000 (of which these fifty-four bonds were a part) as "first mortgage bonds outstanding." This report is not excepted to and becomes a part of the record. These bonds are annually described, for a series of years, in the reports of the company as bonds thus renewed. Mr. Manson, the auditor, says: "It was not the intention of Mr. Magrath to pay these bonds; we were not prepared to retire any bonds; these bonds were entered as an actual investment in company's books, and were purchased as any other securities were purchased by the company as an investment of company funds; these bonds were used for the purpose of raising money to operate the road by pledging them as collaterals for loans." How, then, can it be said this was payment, and debtor and creditor uniting in the same person, the lien of the mortgage was lost? That is not all. Mr. Magrath was not examined, but his acts speak with great emphasis. He not only published the bonds in his annual reports, which were distributed, "as first mortgage bonds then outstanding," but he actually incorporated in his notes to Knobeloch and the National Bank of Greenville a description of them as "first mortgage bonds past due." After this there was no use to examine Mr. Magrath to say with what intent he took up and re-issued the bonds. If he did not intend to give them the character of first mortgage bonds, he was practicing a hideous fraud on the men who advanced their money on the faith of

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that *security. And it is equally extravagant to suppose, that any man of ordinary business sagacity would advance his money to a corporation threatened with bankruptcy, in the hands of a receiver, unless he supposed he was protected by the first mortgage. Further yet: Judge Pressley, in September, 1879, held "that the statutory liens were securities, not mere indemnities to the state, and, therefore, it had no right to waive them in favor of the second mortgage." From this judgment there was an appeal, which was dismissed. Judge Mackey held that the

order of Judge Melton did appoint the president and directors receivers, from which there was no appeal. He ordered the master, Mr. Barnwell, to classify the bonds guaranteed by the state. What bonds? The bonds reported as "first mortgage bonds" by Referee Green—the bonds decided to be first mortgage by himself and Judge Pressley. Is not the question res judicata? And yet, when the master comes to classify the bonds, what does he do? He overrules Judges Mackey and Pressley, treats Referee Green's report with indifference, and actually holds, in face of the adjudications of Judges Pressley and Mackey, that there was no receiver of the road until the appointment of Mr. Conner. Instead, therefore, of classifying the bonds in accordance with the decisions of the court by whom he was instructed, he rules them out as not entitled to the protection of the first mortgage. The act of 1861 provides that "the bonds thus taken up shall stand as security to the state, and thereby give the state the lien under the first mortgage, until all the bonds thus secured by mortgage shall be retired." As I have said, Mr. Magrath never intended to retire these bonds and deprive them of the protection of the first lien. If, then, he took them up, not to retire them, not to pay them, but as an investment to save interest and meet the current expenses of the road, when he re-issued them, they went into the hands of the purchasers clothed with all the protection given them in their original and first issue.

After all the learning, instructive and interesting, that has been displayed, it does seem to me, from a careful consideration of the several reports, orders, declarations and judgments made herein, that this discussion is more of an intellectual gladiatorial contest on questions of law, arising since the

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commence*ment of the suit, than on the law applicable to the facts at the time of the transaction. But at last the real question is, did President Magrath, who issued these bonds, and the capitalists who advanced their money on the security, regard them as first mortgage bonds? On this question we have no doubt they were so issued, so regarded, and are entitled to the protection which gave them value when put in the market. And it is adjudged that they are secured by the first mortgage. Let the decree be reformed in conformity to the principles herein announced.

Here is a motion also to dismiss the appeal of Mr. Fisher, receiver, because a copy of the exceptions was not served on the presiding judge within ten days. The points involved in the appeal having been fully argued by counsel, and the case decided, it is a matter of little consequence to the appellant, Fisher, what becomes of this motion. We have no doubt that Mr. Corbin, attorney for Mr. Fisher, agreeing to pay, and actually paying his proportion of the expenses in preparing the brief, and the cause being fully settled for argument, supposed he had done all that was necessary. But the rule is finally established in Ex parte Clyde, and cannot be departed from.

The appeal of Fisher, receiver, is dismissed.

McIVER, A. J., concurred.

SIMPSON, C. J., dissenting. The majority of the court has reached the conclusion, in this case, that the bonds in question, upon their re-issue, retained the security of the mortgage by which they were secured in their first issue, and, this being the first mortgage, that therefore these bonds should rank as first mortgage bonds in the distribution of the assets of the company.

Being unable to concur in this opinion, I have dissented, and now propose to state briefly the reasons of my dissent.

The argument of the majority is, that the president and directors of the road became receivers under the order of Judge Melton, of June, 1872; that, as such receivers, they had the legal right to invest their receipts from the income of the road, in such securities as they saw proper; that these bonds were taken in by them as such investment; and

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being investments, *the receivers had the right to re-issue them afterward without disturbing the security of the first mortgage. This conclusion is based upon the position that these officers were receivers. Even if this was so, I do not see that it follows, necessarily, that they had the power to re-issue these bonds, with all their original incidents and surroundings, after once called in. But I am not satisfied that Judge Melton's order constituted these officers receivers in the strict sense of that term.

It is true that Judge Pressley thus construed this order upon the Circuit, and so has Judge Mackey; and now a majority of the court has so construed it. In the face of the concurring opinion of so many eminent jurists, of course I differ with great hesitation and doubt; but still I do differ, and I must follow my own judgment.

The question at issue is as to the intent of the order. Did Judge Melton intend to make these officers receivers?

The term "receiver" is a technical term, and has a well-defined legal meaning, and, when used in an order, carries with it a plain and well-understood signification. Besides this, the duties belonging to the office, which the term imports, are also well understood, so much so that the mere appointment of a party as receiver, when the term itself is used in the appointment, at once defines his duties without more. Such being the fact, it seems probable that had Judge Melton intended to divest the president and

directors of this company of their powers as officials of the road and invest them with the new power of a receiver, he would have so ordered, in plain and unambiguous terms; he would not have left the matter to construction, but would have used the precise and apt words to that end. This seems so reasonable that his failure to do so can hardly be accounted for on the ground that it was accidental, or that it occurred from inadvertence. It is more reasonable to suppose that it was intentional.

I venture the assertion that no order can be found in the history of judicial proceedings in which a receiver has been appointed where this term has been omitted. No such term is used in this order, nor has there been employed any term equivalent to this. And, although the prominent prayer of the complaint was for the appointment of a

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receiver, this term seems to have *been carefully avoided in the order. Besides, the order is defective in other particulars as an order constituting a receiver in a large and extensive insolvent corporation with millions of assets. No bond is demanded; no inventory of the property and assets required, and no assignment by the company of this property to these receivers is directed.

The order was a consent order, and my construction of it is that the parties agreed that the property, as a temporary arrangement, should be left under the control and management of the present officers of the company until the further hearing of the cause. In the meantime the creditors to be restrained from interfering with the running of the road—the appointing of a receiver to be left to some future stage of the proceedings. And this order was intended to carry out this assent and understanding of the parties.

This construction is sustained by the further fact that it is very unusual for the president and directors, as president and directors of an insolvent company, to be appointed receivers of the property and assets of the company pending the litigation. In fact, I doubt whether a case can be found where such officers, as individuals and by name, much less as company officials, have been appointed. Mr. High is emphatic in his condemnation of such a practice. The president and directors of a company are officers of the company, elected or appointed by the company, and under its control. The appointment of such officials, in their official character, would be the same as appointing the defendant company itself. And I do not suppose that there ever has been an instance, unless this be one, where the defendant has been appointed the receiver of the property in litigation. High on Receivers, § 72.

But, admitting that this order of Judge Melton did constitute these company officials in their official capacity receivers, does it follow that they have the power to buy up the bonds of the company with company funds, and subsequently put them out again subject to the protection and security of such mortgage, if any, by which they were secured in their first issue?

It will be admitted, I suppose, without

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question, that no *debtor could do this, whether he be an individual or a corporation, where the rights of other creditors are involved.

The application by a debtor of his own funds to his own debts, whether evidenced by notes or bonds, will inevitably extinguish the debt. There can be no such thing as a debtor being the assignee of his own indebtedness in such way as to keep his debt alive to himself against himself. In every contract there must be, at least, two parties.

True, either an individual or a corporation might re-issue his negotiable notes or his bonds, although once taken up and extinguished, but this would be done, not by virtue of any life still existing in such instruments, but by virtue of a new vitality imparted by the new contract of re-issue, and the paper would go forth the second time not as the old paper, but as an original instrument, discharged from all of its former incidents and accompanied with such only as the new contract might attach to it. No authority is needed to support this proposition; it springs from well-known elementary principles.

Now, apply this doctrine to the case at bar.

It is not claimed that the receivers used any other funds in the purchase of these bonds except company funds. Here, then, is the application of the debtor's money to the debtor's debts, not by the debtor's own act in person, it is true, but by the hands of another. This, however, can make no difference, as it is not the medium through which the application of the funds of the debtor is made which extinguishes the debt, but it is the fact that his money has been used.

Besides, could these receivers, had they kept possession of these bonds until final settlement, have presented them against this insolvent company as subsisting obligations and claimed the amount which their assignees are now doing, the full amount due thereon? Could they have instituted action against themselves to enforce payment? They might have held them and obtained, on final settlement of their accounts, credit for the sum paid out by them, but no more. The bonds, while in their hands, were certainly extinct as against the company.

If this was so, even for a moment, was

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not the mortgage dis*charged to that extent? and, if discharged, who had the power of re-opening this mortgage and of reinstating these bonds at their full value to the prejudice of other creditors?

My opinion is that when these bonds were

taken up by the funds of the debtor they were extinguished, and the mortgage was discharged to that extent.

And this, whether the order of 1872, constituted the president and directors receivers or not.

Decree reserved.

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15 S. C. 322

(Case No. 1046.)

Ex parte MACKEY.

(November Term, 1880.)

[1. *Mandamus* ⇐187.]

An order of the Circuit Court refusing to grant a writ of mandamus, is appealable.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 429; Dec. Dig. ⇐187.]

[2. *Mandamus* ⇐16.]

The Circuit judge refused to grant a writ of mandamus to compel a county board of election canvassers, then in session, to count the votes in a certain box; the board, which, by law, could not remain in existence for more than ten days, ceased to exist before petitioners brought their case by appeal to this court. *Held*, that no order made in the case by this court could accomplish the purpose desired, and, therefore, no writ of mandamus should be ordered to issue.

[Ed. Note.—Cited in State ex rel. Zimmerman v. Westmoreland, 29 S. C. 4, 6 S. E. 847.

For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. ⇐16.]

[3. *Mandamus* ⇐4.]

Under the election laws of this state the duties of the board of county canvassers are so far ministerial that they may be enforced by writ of mandamus when no other remedy exists, but where, as in case of county officers, appeal lies to the state board of canvassers, whose powers are revisory and judicial, such other remedy does exist, and mandamus cannot issue.

[Ed. Note.—Cited in State ex rel. Myers v. Appleby, 25 S. C. 102; State ex rel. v. Charleston Light & Water Co., 68 S. C. 552, 47 S. E. 979.

For other cases, see Mandamus, Cent. Dig. § 21; Dec. Dig. ⇐4.]

[4. *Mandamus* ⇐3.]

In cases of election for member of congress, the state board of canvassers acts ministerially and are excluded by the terms of the statute from revisory and judicial powers, and the power of congress to judge of the election returns of its members, does not constitute another remedy within the meaning of the rule. Therefore, in such case, mandamus to the county board is a proper remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 21; Dec. Dig. ⇐3.]

[5. *Appeal and Error* ⇐941.]

[Cited in Milster v. Spartanburg, 68 S. C. 35, 46 S. E. 539, to the point that the discretion of the court must be guided by law and cannot be exercised in the denial of a plain legal right.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3807; Dec. Dig. ⇐941.]

[6. *Mandamus* ⇐74.]

[Cited in State ex rel. Conant v. Fuller, 18 S. C. 251; State ex rel. Port Royal Min. Co. v. Hagood, 30 S. C. 523, 9 S. E. 686, 3 L. R. A. 841; Whipper v. Talbird, 32 S. C. 3, 10 S. E. 578; Ex parte Whipper, 32 S. C. 10, 10 S. E. 579; State ex rel. School Dist. v. Rice, 32 S. C. 100, 10 S. E. 833; State ex rel. Burnett v. Burnside, 33 S. C. 278, 11 S. E. 787; Ex parte Scarborough, 34 S. C. 15, 12 S. E. 666; Pettigrew v. Bell, 34 S. C. 107, 12 S. E. 1023; State ex rel. Davis v. State Board of Canvassers, 86 S. C. 454, 68 S. E. 678—to the point that the state board of canvassers has judicial powers and is beyond the reach of mandamus.]

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150–157; Dec. Dig. ⇐74.]

Before Wallace, J., Charleston, November, 1880.

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*These were petitions by E. W. M. Mackey, and the other parties mentioned in the opinion of this court, presented to Judge Wallace, then holding the Circuit Court in Charleston, for writs of mandamus to compel E. L. Roche, T. W. Carwile and H. J. McCormack to count the votes at "Brick Church" and "Ten Mile Mill" precincts. Judge Wallace granted an order in each case, on November 10th, 1880, requiring the defendants to show cause before him, at chambers, on the next day, why a writ of mandamus should not issue. Upon hearing the return the rule was discharged. The relators gave notice of appeal on November 16th. The opinion states the case.

Mr. D. T. Corbin, for appellant.

The petitioners were entitled to the writ of mandamus as a remedy for the wrongs complained of. Under the statute, the duty of the election commissioners was to count the votes and make a statement of the result of such count. Gen. Stat., ch. VIII., §§ 16, 18. There is no discretion given to them. McCrary on Elect., §§ 81–85; 1 S. C. 46. The parties complaining of such result have their remedy elsewhere. 4 S. C. 504. The board of canvassers are not to make a statement of the election, but a statement, or record, of the count. Here is a plain legal duty, and no discretion. Mandamus is, therefore, the proper remedy. Moses on Mand. 14, 90; Wood on Mand. 76, 77; McCrary on Elect., §§ 320, 331; Bright. Elect. Cas. 300, and note; 1 S. C. 40; 4 S. C. 232, 472, 506; 5 S. C. 264; 6 S. C. 128; 7 S. C. 258, 282, 376; 8 S. C. 377. The writ should not be refused because there is another remedy, unless it is as effectual, plain and speedy. 1 Cranch 169; Wood on Mand. 84, 89, 109. The true test seems to be, would the party, by the use of the other remedy, be in as good a position? Id. 68, 77, 114. If petitioners go to the state board of canvassers they go as defeated candidates and as actors. The state board can change the report only when there is a protest, and not then, if the power to decide resides in some other body. The petitioner, Mackey, has no remedy by appeal to the state board. 8 S. C. 377.

The state board, in its ten days of ex-

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istence, cannot properly *hear and determine,

therefore the necessity of this writ to compel the county board to do their duty.

Mr. C. R. Miles, contra.

The appeal should be dismissed, because the writ now would be nugatory, vain and useless, as the county board have, since the decision of Judge Wallace, adjourned sine die, so far, at least, as the general election of 1880 is concerned. Tapping on Mand. 15, 402; Moses on Mand. 88; Wood on Mand. 18, 89; 72 E. C. L. 199, 874; 6 E. L. & E. 228; 7 Rich. 234; 4 S. C. 185; Cooley on Const. Lim. 785. The state board have also decided, and adjourned sine die. The only object of appeal, then, must be to get an opinion here for use elsewhere, which should not be. Tapping on Mand. 16.

But the order was right. If the duties of the county board are not purely ministerial, but are, to any extent, judicial or quasi judicial, then it is clear that the writ of mandamus should not have been issued to compel them to do what, "upon consideration" and in the exercise of that discretion, they had "determined" they could not lawfully do. Tapping on Mand. 12; Moses on Mand. 36; McCrary on Elect., § 86. Cases cited by appellant are based upon the construction given to statutes, which, unlike the law here, limit the powers of election boards to mere ministerial duties. The powers of county boards, under our statute, have been considered by our Supreme Court. 4 S. C. 485; 5 S. C. 263; 7 S. C. 241. These cases decide that the county boards have the right and power to scrutinize, examine, determine and declare. These functions imply the exercise of discretion, are judicial, and cannot be controlled by mandamus.

Mr. J. P. K. Bryan, same side.

The remedy by mandamus is inapplicable, because petitioners had another plain and adequate remedy. High on Ex. Leg. Rem. 15, 18; 29 Wis. 79. These petitioners had another adequate remedy by appeal to the state board of canvassers, and this remedy they invoked and succeeded to the extent of gaining twenty-five hundred votes. This is plain as to the county officers. As to member of congress, he has the same plain and

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ade*quate remedy by protest and contest to the United States house of representatives. This matter being regulated by statute law of the United States, the state could not give relief. Besides the official returns of supervisors, United States officials, are sent to the congress. Rev. Stat. U. S., §§ 2018-2020.

July 1st, 1881. The opinion of the court was delivered by

McGOWAN, A. J. At the general state election, November 2d, 1880, the petitioners were candidates for office, viz., E. W. M. Mackey for congress in the second congressional district in the state, of which Charleston county is a part, and the others for the county offices of Charleston county, that is to say, John H. Ostendorff for the office of clerk of the Court of Common Pleas and General Sessions, Lewis Dunneman for that of sheriff, Warren R. Marshall for that of judge of probate, William H. Thompson for coroner, and Garrett Byrns, Renty K. Washington and A. E. Philippy for the offices of county commissioners of Charleston county. These parties on November 10th, 1880, jointly filed in the Court of Common Pleas the two petitions stated in the caption for writs of mandamus against the defendants as commissioners of election for the county of Charleston; the first to require the commissioners to canvass and count the votes cast at what was known as the "Ten Mile Hill" precinct of St. James, Goose Creek, and the other to canvass and count the votes cast at the "Brick Church" precinct, St. Andrews.

The allegations of the petitioners and the defence of the commissioners are the same in both cases, and we will therefore consider them together. The petitioners, among other things, state that "your petitioners, on information and belief, say that said commissioners of election, Edward L. Roche, Thomas W. Carwile and H. J. McCormack, disregarding their plain legal duty therein, have refused, though requested so to do, to canvass and count the votes cast and canvassed at said precinct, and duly returned to them, and have excluded and intend unlawfully to exclude from the aggregate vote of said county the said votes cast, canvassed and returned at said precinct. That irreparable injury is done your petitioners by said election commissioners by their said refusal to canvass and make proper statement of the

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*votes cast at said precinct, and your petitioners are remediless in the premises unless granted to them through the writ of mandamus. And your petitioners therefore pray that a writ of mandamus do issue, directed to said Edward L. Roche, Thomas W. Carwile and H. J. McCormack, commissioners of election for Charleston county, ordering and directing them, said commissioners of election, to proceed to count the votes cast at said precinct, and to include them in the count of votes for said county, cast at said general election, and to make such statement thereof in connection with the other votes cast in the said county as the nature of the election requires."

The defendants made return that "in pursuance of law they have duly organized themselves into a board of county canvassers, and as such board are now engaged in the performance of their legal functions, and as such board they have made a statement of the election held at the said precinct, such as the nature of the election requires. That

upon consideration of the returns from the said precinct, and upon consideration of the sworn statements of the managers of the said precinct and others, that the said election at the said precinct was held by the said managers under duress and intimidation, and that violence and threats of violence and intimidation and overawing and terrorizing of voters at said polls and precinct, prevailed to such an extent as to prevent a full, free and fair exercise of the right to vote thereat, and these respondents sitting as a board of county canvassers, upon due consideration of the same, have determined that the said election at the said precinct was illegal and unlawful and void, and that they cannot lawfully include said votes cast at said precinct in the legally cast votes of the said county, and they have not so included them. But these respondents, in pursuance of law, have made a full and complete statement of the said circumstances as required by law, and intend to send and are about to send the statement, together with the statements of the managers at said precinct as aforesaid, and all papers relating to the said election at said precinct, and all protests thereof, to the governor and secretary of state and others, as required by law. And they further submit that the writ of mandamus, as prayed, is not issuable to them in the premises," &c.

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*The petitioners replied, denying that violence and threats of violence and intimidation existed at said precincts "to such extent as to prevent a full, free and fair exercise of the right to vote thereat," &c.

The application for the writ was made to Judge Wallace, sitting for Charleston, who refused it. The board of county canvassers, as indicated in their return, transmitted to the board of state canvassers the ballot boxes and papers connected with the election at the several precincts where the votes had not been counted by them, accompanied by the protests of the petitioners, and a special statement of the facts in relation to the several precincts, and the affidavits and papers filed, together with their reasons for not counting the same. It seems that the petitioners appeared before the state canvassers and urged their protests, which board took action on the matter as shown by the following result:

"Resolved, That this board overrules the action of the county board of canvassers as to the 'Haut Gap' box, and accepts and acts upon the secondary evidence as to its contents as adduced before this board; and that it accepts and will act upon the messenger's statements as to the 'Black Oak' box; and that there has been nothing adduced before this board to cause it to change the action of the board of county canvassers as to the following boxes, to wit: Calamus Pond, Ten Mile Hill, Strawberry precinct, Biggin Church, Brick Church, St. Andrews, and Enterprize, Wadmalaw."

After this action of the state board of canvassers as to counting the votes the petitioners prosecuted this appeal as to so much of Judge Wallace's order as refused the motion for mandamus in relation to the boxes at "the Ten Mile Hill" and "Brick Church," upon the following exceptions:

"First. That it was error to refuse said writ of mandamus; that the same should have been granted as prayed.

"Second. That the sixteenth section of Chapter VIII. of the General Statutes defines the duty of the commissioners of election of said county when acting as a board of county canvassers.

"Third. It was error to hold that if said commissioners, acting as a board of county canvassers, decided not to count said box, the court could not compel them to proceed and count it.

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*"Fourth. It was error not to have compelled said commissioners of election in this return to the rule to show cause to specifically state the facts constituting the 'duress and intimidation' of the managers at said election, and its real effect upon them, by compelling a departure from their duty as managers and the effect thereof upon the election, and also the facts constituting 'violence and threats of violence and intimidation and overawing and terrorizing of voters at said poll and precinct,' and who and how many voters were prevented from voting thereby, to the end that the court might pass upon the propriety and legality of the decision of said commissioners of election in rejecting the votes cast at said precinct."

The last exception has not been pressed here. Whether the board of county canvassers were correct in their decision as to the alleged intimidation, violence and duress at the precincts in question, was a question of fact, as to which the evidence may have been and we suppose was considered by the board of state canvassers, but it was not considered by Judge Wallace, and is not before this court.

The other three exceptions make the point that it was error in Judge Wallace to refuse the mandamus. It is sometimes said that mandamus is not a writ of right, but lies in the discretion of the court, and in granting or refusing it the court should be governed by what seems to be necessary and proper to be done in the premises for the purposes of justice. If this means that it is in the absolute discretion of the judge to grant or refuse it there could be no appealable error in the order of a judge refusing it; for to say that a matter is within the discretion of a judge is but another mode of saying that it is beyond control. But we understand the discretion here spoken of to be that defined by Lord Mansfield in Rex v. Wilkes:

"Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular."

The object of the writ prayed for in this case was to compel the board of county canvassers for Charleston county to canvass and count the votes cast at the "Ten Mile Hill"

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and "Brick *Church" precincts of Charleston county in the election of 1880. That board, under the law, could not remain in existence longer than ten days, and long before the appeal from the order of the Circuit judge reached this court it had ceased to exist as an organized body, certainly so far as the election of 1880 was concerned. When that board became "functus officio" it was no longer possible to accomplish the purposes of petitioners by mandamus, whether issued by the Circuit judge sua sponte or in compliance with the judgment of this court upon appeal.

One of the fundamental rules in reference to issuing writs of mandamus is that the writ will not be issued when it would be unavailing. "Thus it is held that a mandamus should not be granted when it would be unavailing from a want of power in the defendants, for the court would refuse the writ if it was manifest that it would be void and fruitless. Thus, a mandamus to compel a board of canvassers to do certain acts after they have ceased to exist as a board, would be futile. The Supreme Court may interfere to control the actions of a board of canvassers while they exist as a board, but it can be done only while such board has a legal existence. And, when a mandamus is asked, it should appear that the defendants have it yet in their power to perform the duty required of them. Thus, a mandamus should not be issued to direct commissioners of excise to entertain the application of the petitioner after the board had met and completed the ten days prescribed in the act." Wood on Mand. 18; Tapping on Mand. 16; State v. Lehre, 7 Rich. 234; State, ex rel. Shiver, v. Comptroller-General, 4 S. C. 185. "The court will see that the object of the mandamus is for some proper and definite purpose, and not for the gratification of mere curiosity; nor will the court grant it when sought merely to obtain the opinion of the court upon a point of law." Tapping on Mand. 16.

As there is now in existence no board of county canvassers for Charleston county to canvass and count the votes cast in the election of 1880, no decision that this court can make will have the effect of accomplishing the purpose of petitioners. If this were an application in the original jurisdiction of this court it would undoubtedly be proper to

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refuse it. But as the application was *made in the court below, whilst the board of county canvassers were in organized existence, it may not be improper for us to consider whether the Circuit judge erred, as alleged, in refusing to issue the writ. The question is important in its relation to the electoral franchise and the purity of the ballot-box, so necessary in a republican government, which must take its character from that of the electors as certainly as the stream is affected by its source.

The question, then, is whether the Circuit judge erred in refusing to issue the mandamus to compel the county board of canvassers for Charleston to count the votes in the two boxes, notwithstanding the board had declined to do so for the reasons stated. A writ of mandamus is the highest judicial writ known to the constitution and laws, and, according to the long-approved and well-established authorities, only issues in cases where there is a specific legal right to be enforced, or where there is a positive duty to be performed, which can be performed, and where there is no other specific remedy; "where the legal right is doubtful, or where the performance of the duty rests in discretion, or where there is other adequate remedy, a writ of mandamus cannot rightfully issue. High on Ex. Leg. Rem., § 9; Wood on Mand. 68, and many authorities.

Without stopping to inquire whether the first prerequisite exists, and the petitioners have a clear and undoubted right, we will consider—

1. Whether the duties of canvassing boards in this state are discretionary, so as to place them beyond the reach of mandamus, or merely ministerial.

This question must be determined by the statute law upon the subject. It is said in McCrary on Elections 106, 107: "That the doctrine that canvassing boards and return judges are ministerial officers, possessing no discretionary or judicial powers, is settled in nearly or quite all the states. * * * There are statutes in some of the states which expressly confer upon a board of canvassing officers the power to revise the returns of an election, to take proof, and in their discretion to reject such votes as they deem illegal. Such a statute exists in Texas, (Gidding v. Clark, 42d Congress), and in Alabama, (Norris v. Handly, Id.), and in Louisiana and Florida. Although this is an

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extraordinary and *a dangerous power when placed in the hands of a board of this character with such inadequate facilities for obtaining legal evidence and deciding upon questions of fraud, yet it seems such statutes are not unconstitutional," &c.

The learned author does not undertake to construe the statute of South Carolina.

The laws of force in this state down to 1868 undoubtedly gave the board of managers of elections quasi-judicial powers in the words "to hear and determine the validity of the election." But in 1868 a new system was adopted, of which the following are im-

portant provisions relating to "the manner of conducting elections and returning votes." Gen. Stat. 31:

"Section 14. The commissioners of election shall meet at the county seat, as prescribed in the last preceding section, and shall proceed to organize, and shall form the county board of canvassers.

"Section 16. They shall then proceed to count the votes of the county, and shall make such statements thereof as the nature of the election shall require, within ten days of the time of their first meeting as a board of county canvassers, and shall transmit to the board of state canvassers any protest and all papers relating to the election, &c.

"Section 18. They shall make separate statements of the whole number of votes given in such county for representatives in congress, and separate statements of all other votes given for other officers, &c.

"Section 20. After the final adjournment of the board of county canvassers, and within the time prescribed by Section 15 of this chapter, the chairman of the board shall deposit in the nearest post-office, directed to the governor, secretary of state, [and formerly the comptroller-general], each, one of the certified copies of the statement and certificate of votes prepared as provided in the last preceding section.

"Section 26. Upon such statements they [the board of state canvassers] shall then proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices or either of them. They shall have power, and it is made their duty, to decide all cases under protest

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or contest that may *arise, when the power to do so does not, by the constitution, reside in some other body," &c.

It thus appears that the existing law establishes a system for ascertaining and declaring the result of elections, in which there are two boards, each with its proper functions—the county board to count the votes returned by the managers at the different precincts; make such statements thereof as the nature of the election shall require, and transmit to the state board any protest and all papers relating to the election; and then the state board of canvassers, who are required to meet, under the call of the secretary of state, for the purpose of canvassing the votes for all officers voted for at such election, make a statement of the whole number of votes given at such election, &c., and upon such statements shall then "proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices," &c. It seems that in this system the state board of canvassers is the tribunal of last resort, and that as to all matters pertaining to elections its decision is final, from which there is no appeal. The use of the word "canvassers" as to both boards seems to indicate something more than ministerial powers. In the case of State v. Nerland, 7 S. C. 246, Chief Justice Moses said: "The term [canvassers] employed to designate the duty to be performed by the commissioners would seem to impose an obligation beyond that of merely counting the ballots and comparing the statement of managers. 'Canvassing' implies 'search,' 'scrutiny,' 'investigation,' 'examination,'" &c.

It seems to us, however, that the duties of the county board to count the votes, make statements and transmit the papers, protests, &c., are so far ministerial in their character as to be liable, if they stood alone and had no reference to the state board, to be enforced by the writ of mandamus. But that board is only a part of the machinery provided to declare the result of elections, and is required to transmit all papers and protests concerning the elections to the state board of canvassers. State v. Chairman County Canvassers, 4 S. C. 485. On the contrary, the duties of the board of state canvassers, in all cases of contest and protest, are clearly re-

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visory and judicial, and beyond the reach *of mandamus. The words are, "shall then proceed to determine and declare what persons have been duly elected, &c. They shall have power, and it is made their duty, to decide all cases under protest or contest that may arise," &c.

"Where boards of canvassers are empowered with the exercise of judicial functions, and the whole question of the election, being authorized not only to perform the ordinary duties of canvassers, but also to hear and determine all contested elections, and no appeal lies from their decision, the courts will refuse to interfere by mandamus with the exercise of their discretion or judgment, and will regard their decision as final and conclusive." High on Ex. Leg. Rem. §§ 18, 57; Grier v. Shackelford, 2 Tread. 650; State v. Bruce, 1 Tread. 165; Mayor of Vicksburg v. Rainwater, 47 Miss. 547; Cooley on Const. Lim. 623.

The restriction in our law upon the powers of the board of state canvassers, expressed in the words "when the power to do so does not, by the constitution, reside in some other body," makes the election for congress an exception. State, ex rel. Wallace, v. Mackey and Hayne, 8 S. C. 377. As to that election, the duty of the state board of canvassers is merely ministerial. They have no right to decide a protest or contest as to the election of a member of congress; that power resides in "another body," viz., the house of representatives of congress, under Section 5, Article I., of the Constitution of the United States, which declares that "each house [congress] shall be the judge of the election returns and qualification of its own members."

2. If we assume that the duties of the

county board of canvassers, considered apart from their relation to the state board, are merely ministerial in character, the next question is, whether the petitioners, at the time they made their application for mandamus, directed to that board, had other legal remedy for the grievance complained of. The purpose of a writ of mandamus is to prevent a failure of justice, and if there is other adequate remedy for the wrong complained of, it will not be granted. "From the origin, nature and purposes of the writ, it has been shown to be an extraordinary remedy, applicable only to cases where the usual and accustomed modes of procedure and forms of remedy are powerless to afford relief. It fol-

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lows, therefore, *from the principles already established, as well as from the very nature and essence of the remedy itself, that the writ never lies where the party aggrieved has another adequate remedy at law by action or otherwise. And the rule will be found to be firmly established as one of the fundamental principles underlying the entire jurisdiction, that the existence of another specific legal remedy fully adequate to afford redress to the party aggrieved, presents a complete bar to relief by the extraordinary aid of a mandamus. * * * That while the above is of very ancient origin, it is not confined in its application to cases where the existing remedy relied on in bar of the jurisdiction by mandamus, is a common law remedy, but applies with equal force to cases where a particular or special remedy is provided by statute. Whenever, therefore, an express remedy is afforded by statute, plain and specific in its nature, and fully adequate to redress the grievance complained of, mandamus will not lie." High on Ex. Leg. Rem. 16, 18.

Had the petitioners such a remedy?

So far as the candidates for county officers are concerned, we think they had, and should have exhausted that remedy before applying for mandamus. The county board had no right to declare the election, and that distinguishes this case from that of State v. Acting Board of Aldermen, 1 S. C. 30, which was a special municipal election, in which the acting board of aldermen had the right to declare the election—their decision to be binding upon all parties. Here the county board had certain duties to perform, one of which was to transmit all the papers and protests to the state board, which alone had authority to decide and declare the election. This right to be heard before the state board upon all questions was not only a remedy, but the ordinary and appropriate remedy, more "plain and specific" than would have been a right to appeal from one jurisdiction to another, which has been held to be within the principle. State v. Supervisors of Sheboygan, 29 Wis. 79. In this case no formal appeal was necessary, but the papers went up, as matter of course, to the state board—the business was incomplete until that board had acted, which was to be the finishing act under the system provided for declaring the re-

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sult of elections, and to obtain *which was "the usual and accustomed procedure." The legislature has expressly provided a tribunal by which the rights of petitioners could be decided. The remedy was "speedy," for it was required to be done within ten days; it was "specific," as it related to the same identical subject matter; and that it might be effectual was shown by the results in this case.

The court, in the case of State v. Walker, 5 S. C. 265, say: "Under our laws there are two bodies entrusted with power to ascertain and fix the fact of an election for state and county purposes—the one acting as a primary tribunal and the other as a revisory body. The board of county commissioners is the primary body, and the board of state canvassers is the revisory body. To say that the election fails unless a proper declaration is made by the board of state canvassers, is to destroy entirely the functions of the county board. On the other hand, to allow the board of county canvassers power to make a determination and declaration valid and conclusive, unless reviewed or modified by the revisory body, is to give to each body a distinct, important and entirely consistent function, in harmony with the methods by which we are accustomed to fix the existence of facts, on which legal rights depend."

This appellate court—the state board of canvassers—being open to redress grievances suffered in all state and county elections, the petitioners availed themselves of the remedy—appeared, contested and protested in that tribunal the matter now complained of in court. That tribunal heard the protests, and in the exercise of its discretionary powers changed the result of the election in the precincts of "Haut Gap" and "Black Oak," and, as stated at the bar, altered the returns of the county canvassers in favor of the petitioners to the amount of twenty-five hundred votes. That board has now adjourned sine die, but, during its organized existence, it was not subject to mandamus. There was no appeal and the matter is ended. It is our duty simply to declare the law, and not to consider whether it is satisfactory or wise—that belongs exclusively to the legislature.

In this connection, also, an exception must be made in regard to the election for congress. As to that election the state, as we have seen, has not given the state board of

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canvassers revisory *discretionary powers, but has left the matter as provided for by the constitution of the United States. Does the provision of that instrument, before cited, that "each house shall be the judge of the election returns and qualifications of its own members," constitute another remedy within the meaning of the rule? That is to say, an

adequate, specific remedy, as speedy and as effectual as the writ of mandamus. We have not been referred to any case precisely in point, but, considering that the state law has not provided the alleged remedy, which is given by the constitution and laws of the United States, regarding its remoteness and the delays incident to that proceeding, and, judging from analogy, we are inclined to think that it does not afford another remedy in the sense necessary to exclude the right to mandamus. "In order to entitle a person to the writ two things must concur. First. A clear legal right to have the thing done, to compel the doing of which the writ is sought; and, second, that there is no other adequate legal remedy by which the specific performance of the duty can be enforced." Wood on Mand. 68, 84, 89, 110; Marbury v. Madison, 1 Cranch 169 [2 L. Ed. 60].

Some confusion in the case has arisen from the fact that the petitioners—one, a candidate for congress, and all the others for county offices—filed a joint petition. As appears from what has been already said, we conceive that neither the tribunal to judge nor the manner of finally declaring the election, is the same in the two cases. If E. W. M. Mackey, candidate for congress, had filed his petition separately, praying that the mandamus might issue requiring the board of county canvassers to count the votes found in the boxes for him as a candidate for congress, we do not see in the case any conclusive reason why the writ should not have been issued as to him. He did not file a separate petition, but made common cause with the candidates for county offices, and the difference between the offices as to the manner of counting the votes and finally declaring the election, was not called to the attention of the Circuit judge. The petition was presented jointly, and, as presented, was refused. Possibly the application might, even now, be divided, but that seems unnecessary, as the result must be theoretical merely, and can now have no practical effect upon the election.

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*Subject to the expression of opinion and modification herein made as to the election for congress, the judgment of this court is, that the judgment of the Circuit Court be affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 337

(Case No. 1047.)

SCAIFE v. THOMSON.

(November Term, 1880.)

[1. *Wills* ⇐194.]

The doctrine of implied revocation arising from an alteration of the estate of the testator considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 481–489; Dec. Dig. ⇐194.]

[2. *Wills* ⇐194.]

Revocations by reason of actual alteration of estate resulted from the principle that a will of realty was in the nature of a conveyance and could pass only the lands owned at the time of its execution; but this principle does not require such revocation where the testator died after the act of 1858 (12 Stat. 700,) which directed that after-acquired lands might pass as personal estate does.

[Ed. Note.—Cited in Bell v. Towell, 18 S. C. 100; Welborn v. Townsend, 31 S. C. 412, 10 S. E. 96.

For other cases, see Wills, Cent. Dig. §§ 481–489; Dec. Dig. ⇐194.]

[3. *Wills* ⇐194.]

A testator, seized under his father's will of a one-eighth undivided interest in certain lands and also in a mill-tract, made his will in 1845, whereby, in the ninth clause, he devised to his sister M. "my interest or legatee's part" in the certain lands, "or my part" of the mill-tract, and "$100 in property or money just as may suit my executor best;" and he declared that this property was to be M.'s "during her natural life and no longer, and at her death to be and belong to my executor and sons, this being all I desire she shall ever have of my estate." The tenth clause read: "I give, will and devise to H. and his children all the balance of my lands and all of my negroes and all the rest and residue of my estate of all kinds whatsoever, both personal and real, which I now have, or which I may hereafter own, or which I may own at the time of my death." And H. was nominated sole executor. In 1852, under proceedings in partition to which testator was a party, these lands and the mill-tract were sold at judicial sale and purchased by testator, who took deed from the officer of court. He died in 1868. *Held*, that the sale in 1852 did not imply an intention to revoke the devise contained in ninth clause, and that there had been no revocation of that devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 484; Dec. Dig. ⇐194.]

[4. *Wills* ⇐578.]

Both M. and H. died before testator, and after his death the sons of H. elected that the mill-tract should pass to them under the ninth clause. *Held* further, that the sons of H. took

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between them only a one-eighth in*terest in the mill-tract, and that the remaining seven-eighths passed under the tenth clause to both sons and daughters of H.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1259; Dec. Dig. ⇐578.]

[5. *Wills* ⇐441, 470, 487.]

The intent of a testator must be ascertained from the words of his will, and the circumstances by which he was surrounded at the time of its execution, and these circumstances may be proved by parol evidence. And the will must be construed as a whole.

[Ed. Note.—Cited in Cuningham v. Cuningham, 20 S. C. 330; Reynolds v. Reynolds, 65 S. C. 394, 43 S. E. 878.

For other cases, see Wills, Cent. Dig. §§ 958, 988, 1023, 1026–1032; Dec. Dig. ⇐441, 470, 487.]

[6. *Estoppel* ⇐95.]

Soon after testator's death, the four sons of H. took possession of the mill-tract, claiming it exclusively under the ninth clause of the will; proceedings were instituted the same year for the partition between the children of H. of all the lands of their father and of testator, except this mill-tract, which was in terms excluded from the prayer for partition; the eldest son sold his interest as one-fourth, to the second son, R., in 1868; the husband of one of the daughters rent-

ed this property from the sons for two or three years; the third son sold his interest as one-fourth to F., a stranger, in 1874; afterwards the fourth son died intestate, and his sisters and surviving brothers by their deed conveyed his interest, alleged to be one-fourth, to S., a stranger: R. then conveyed a one-twelfth interest each, to F. and S.; R., F. and S. erected valuable improvements. *Held*, that there being nothing in this case in the nature of a family arrangement, none of these acts, done while the daughters were silent but ignorant of their rights, estopped them from asserting their claim to a share in the mill-tract, except to the one-fourth which they had sold to S.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 285; Dec. Dig. ⟸95.]

[7. *Limitation of Actions* ⟸102.]

R. being guardian of one of his sisters could assert no adverse claim to this mill-tract as against her, until this relationship terminated; and there could be no adverse claim against any of the co-tenants unless the claim was adverse to all.

[Ed. Note.—Cited in Coleman v. Coleman, 71 S. C. 522, 51 S. E. 250.

For other cases, see Limitation of Actions, Cent. Dig. § 499; Dec. Dig. ⟸102.]

[8. *Partition* ⟸86.]

The Court of Equity has the right to decree rents and profits in partition, independently of the statute of 4 and 5 Anne, c. 16, § 27, (2 Stat. 438,) nor does the repeal of this statute, which authorized a particular form of action, prevent an action under the forms of the code of procedure, for enforcing a claim for rent. But all parties here having acted under a common mistake, the accounting was restricted to the commencement of the action.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 247–249, 252; Dec. Dig. ⟸86.]

[9. *Improvements* ⟸1.]

Improvements having been put upon this property by R., F. and S. under the honest conviction of exclusive ownership, they are not liable for such rents and profits as are due to the improvements; and in making the partition, the portion improved should be assigned to R., F. and S. without any estimate of the value of the improvements, or, if sold, they should be allowed out of the proceeds of sale, in addition to their shares, the enhancement in price caused by the improvements.

[Ed. Note.—Cited in Annely v. De Saussure, 17 S. C. 390, 394, 396; Jacobs v. Bush, Id., 595; In re Covin's Estate, 20 S. C. 475; Lumb v. Pinckney, 21 S. C. 475; Buck, Hefflebower & Neer v. Martin, 21 S. C. 593, 53 Am. Rep. 702; Johnson v. Pelot, 24 S. C. 263, 265, 58 Am. Rep. 253; Sutton v. Sutton, 26 S. C. 40, 1 S. E. 19; Annely v. De Saussure, 26 S. C. 499, 2 S. E. 490, 4 Am. St. Rep. 725; Charleston, C. & C. R. Co. v. Leech, 39 S. C. 450, 17 S. E. 994; Hall v. Boatwright, 58 S. C. 548, 36 S. E. 1001, 79 Am. St. Rep. 864.

For other cases, see Improvements, Cent. Dig. § 1; Dec. Dig. ⟸1.]

[10. *Tenancy in Common* ⟸28.]

[Cited in Pearson v. Carlton, 18 S. C. 54, to the point that when one tenant in common occupies and uses more than his share of the common property he is liable to account for rents and profits of such excess.]

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 76–88; Dec. Dig. ⟸28.]

Before Wallace, J., Union, April, 1880.

Action by M. F. Scaife, M. E. Nowell and E. E. Mills against J. S. R. Thomson, Wade

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Fowler, J. C. Spears, and H. H. *Thomson, administrator with the will annexed of J. Waddy Thomson, deceased, begun September 1st, 1879. To the full statement contained in the opinion it will be proper to add only the Circuit decree, which was as follows:

I regret that for want of time I will not be able to give the reasons fully that have governed my conclusions in this case. I desire to say at the outset that I am entirely satisfied from the evidence that throughout the entire transactions involved in this proceeding, there has been no intentional wrong-doing. That the parties have acted throughout upon an honest, though perhaps an erroneous conviction of their legal right. That there has been no intentional misrepresentation, concealment, imposition, or abuse of confidence.

The leading questions in the case arise upon the construction of the ninth and tenth clauses of the will of J. Waddy Thomson. The will was executed in 1845. At that time the testator was entitled under his father's will to one-eighth of the mill-tract.

In disposing of a large estate by his will, and in the ninth clause thereof, he devises to his sister, M. Caroline Thomson, for life, with remainder to his brother, H. H. Thomson, and his sons, in fee, his part of the mill-tract, and $100, with the right to take another piece of property in lieu of the mill-tract, if his sister should so elect, and then proceeds to say that this was all of his estate he desired his sister to have. The tenth clause of the will gives and devises all of his property that he might afterwards acquire and hold at his death, and that had not been disposed of in the preceding clauses of his will, to his brother, H. H. Thomson, and his children. After the execution of his will, testator acquired the whole of the mill-tract upon a sale for partition among the legatees of his father's will. I am of the opinion that the sale in partition and purchase by the testator of the entire property known as the Mill-Tract, did not operate to revoke the ninth clause of the will. I have not time to state the reasons and authority for this opinion. M. Caroline Thomson died before the testator, as did his brother, H. H. Thomson. Whatever interest, therefore, they took under the ninth clause of the will, devolved upon the sons of H. H. Thomson. The testator died in 1868. What

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do the sons take *under the ninth clause? They exercised the right of election given by the will to M. Caroline Thomson, and elected to take the interest conveyed by the will in the mill-tract. Now what interest in that tract did the will convey? Since the A. A. in 1858, the will speaks as if executed at the death of testator, and property acquired after the time at which the will

was actually executed, passes under the will, if there are words in the will that cover it, and a contrary intention does not appear. In the first place the testator uses the words, "my part," which, of course, mean less than the whole, and at that time he had a vested interest in one-eighth of the whole. But if the words, "my part," could be construed to mean the whole at death of testator, do not the words added to the bequest of testator to his sister—"this being all I desire she shall have of my estate"—prevent such construction and limit the device to one-eighth of the whole? I am of the opinion, therefore, that the sons took under the ninth clause one-eighth of the mill-tract, and that the remaining seven-eighths passed under the tenth clause to the children of H. H. Thomson. Upon the death of the testator, H. H. Thomson (the younger) administered upon testator's estate, with the will annexed, and took legal advice as to the rights of the legatees under the will. He was advised that the sons took under the will the whole of the mill-tract. There being other lands devised by the will to the children of H. H. Thomson, and some of these being minors, proceedings were filed in the Probate Court for the partition. In the petition for partition, it is set out that the mill-tract is devised to the sons, and no partition of that tract is asked for. This was in December, 1868. The partition was ordered and made of the other lands of testator, and no order made as to the mill-tract. There were four brothers and three sisters. Each brother supposed, and such was the legal advice, that he was entitled to one-fourth of the mill-tract. In December, 1868, H. H. Thomson sold and conveyed to J. S. R. Thomson, one-fourth, his supposed interest in the mill-tract. J. S. R. Thomson in his own right, and as guardian of his infant brothers, Lewis and Waddy Thomson, leased the mill-tract to H. F. Scaife, husband of Mrs. Mary Scaife, who is one of the children of H. H. Thomson, deceased, with the knowledge of all the children of H. H.

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*Thomson, deceased. At this time, Mrs. Nowell and Mrs. Mills, plaintiffs herein, were minors. J. S. R. Thomson was guardian of Mrs. Nowell, and Henry H. Thomson was guardian of Mrs. Mills. Mrs. Scaife was of full age. Mrs. Nowell attained her majority in February, 1870; Mrs. Mills attained her majority in April, 1872. Mrs. Scaife took possession of the mill-tract under the lease, and resided there several years. In the meantime W. Waddy Thomson sold and conveyed one-fourth of the mill-tract to Dr. Wade Fowler. Lewis, before arriving at full age, died, and his estate was partitioned among his brothers and sisters. His interest in the mill-tract, supposed to be one-fourth, was sold and conveyed by all the children to J. C. Spears. J. S. R. Thomson, supposing he held one-fourth under the will and one-fourth under the deed of his brother, H. H. Thomson, conveyed one-twelfth to Dr. Wade Fowler, and one-twelfth to J. C. Spears; the object being that J. S. R. Thomson, J. C. Spears and Dr. Wade Fowler should each own one-third of the property. Upon this state of facts, J. S. R. Thomson pleads the statute of limitations as a bar to the recovery from him of that part conveyed to him by his brother, H. H. Thomson. I am of the opinion that the facts make out a case of adverse possession by J. S. R. Thomson, and that the same facts make out a case of ouster against his cotenants, the plaintiffs in the case. But he could not acquire a title to the interest of his ward, Mrs. Nowell, in the fourth he bought from H. H. Thomson under the statute of limitations. The statute did not run against her on account of the fiduciary relation between her and J. S. R. Thomson. This, however, will not, as in cases of minorities, protect the other sisters, to whom he sustained no such relation. Mrs. Scaife was of full age, with the power to sue, when the possession began, and the statute is a bar to her claim as against the one-fourth under consideration unless prevented by the minority of Mrs. Mills. The adverse possession began in January, 1868. Mrs. Mills attained her majority in April, 1872. The full ten years had run out before the commencement of this action—for more than five years of which Mrs. Mills was not under disability that prevented her from suing. I am of the opinion, therefore, as to the one-fourth conveyed to J. S. R. Thomson by H. H.

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Thom*son, the claims of Mrs. Scaife and Mrs. Mills are barred, and that Mrs. Nowell is not, and that J. S. R. Thomson must account to Mrs. Nowell for her interest in that fourth. As to the fourth held by J. S. R. Thomson under a supposed devise, he waives all benefit from the statute of limitations, and must therefore account to the other parties in interest in proportion to their interest as ascertained by the principles of this decree. All the children of H. H. Thomson, deceased, having conveyed one-fourth to J. C. Spears, he of course has a good title to that extent. He also purchased one-twelfth from J. S. R. Thomson. At the time of this conveyance J. S. R. Thomson held a devise of one-fourth of one-eighth and one-seventh of seven-eighths. He held at the same time his brother Henry's deed for what his brother had the right to convey, which was precisely the same interest that J. S. R. Thomson held under the will of J. W. Thomson. To this extent Spears is protected in the purchase of the one-twelfth from J. S. R. Thomson. Dr. Wade Fowler holds a conveyance of one-fourth from W. Waddy Thomson, and a conveyance of one-twelfth from J. S. R. Thomson. The statute

of limitations at the time of the conveyance had not matured W. Waddy Thomson's right to convey, nor have the ten years run out since Fowler bought. He nor Spears pleads the statute. He, also, as Spears, bought one-twelfth from J. S. R. Thomson. His deed from Waddy Thomson only conveyed to him Waddy's share as one of the brothers, and for the balance he must account to the legatees under the will according to the principles of this decree. As to the one-twelfth conveyed to him by J. S. R. Thomson, he is protected as Spears is and according to the dates of his deed from J. S. R. Thomson, whether prior or subsequent to Spears, deed from J. S. R. Thomson.

I am of the opinion that the plaintiffs are entitled to an account of the rents and profits in proportion to their interests in the property, for a period beginning four years before the commencement of this action. It is true that under the common law a co-tenant had no right of action against his co-tenants for rents and profits. The English statute 4 and 5 Anne, c. 15, 16, gave this right of action. That statute, once of force in this state, was repealed in the revised statutes. But our Court of Equity, in

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*Corbett v. Laurens, 5 Rich. Eq. 326, says: "It seems to be just that while we afford relief to tenants in common beyond the operation of the statute of Anne," &c. The amount of the rents and profits, however, must be ascertained with reference to the state of the property at the time defendants went into possession. The defendants have expended large sums in improvements. The plaintiffs are not required to account for any part of this expense, and, of course, are not entitled to share in the increased profits therefrom before the partition of the property. Thompson v. Bostick, McM. Eq. 75; Corbett v. Laurens, 5 Rich. Eq. 314. I have not been able to see anything in the testimony that would operate to estop the plaintiffs.

It is ordered and decreed that a writ of partition be issued to divide the mill-tract among the parties according to the principles of this decree.

It is also ordered that it be referred to D. A. Townsend, Esq., to take an account of the rents and profits, according to the opinions herein expressed.

Thereupon the defendants, H. H. Thomson and J. S. R. Thomson, duly served and filed the following notice and grounds of appeal, to wit:

1. For that his Honor has held that under the tenth clause of the will of the testator, the interest of the testator in the mill-tract, acquired subsequently to the date of the will, passed to the children of H. H. Thomson, deceased. Whereas his Honor should have held that said mill-tract went, under the ninth clause of the will, to the sons of said H. H. Thomson.

2. For that his Honor has erred in not holding that the statute of limitations was a bar, so far as the same was pleaded, as well to the claim of the plaintiff, Mrs. Nowell, as of the other plaintiffs.

3. For that his Honor should have held that the defendant, J. S. R. Thomson, was protected by the bar of the statute of limitations as to one-fourth part of the mill-tract.

4. For that his Honor has decided that the defendants are not entitled in the partition and accounting to the value of improve-

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*ments put upon the property by them. Whereas his Honor should have held the reverse.

5. For that his Honor has erred in holding that the plaintiffs are entitled to any account for rents and profits of the mill-tract, whereas he should have held the contrary.

6. For that his Honor erred in holding that Mrs. Scaife and Mrs. Mills are entitled each to an undivided two-thirty-seconds part, and Mrs. Nowell to an undivided three-thirty-seconds part in said mill-tract.

7. For that his Honor should have dismissed the complaint as to each and all of the defendants.

8. Because his Honor did not hold that the defendants now in possession of the land, should be allowed credit in the partition for the improvements made upon the property by them, or those under whom they claim, to the extent of the enhanced value of the property by reason of the improvements.

9. Because his Honor, by the decree, debarred said defendants and each of them in this or any other proceeding from obtaining any compensation whatever, for the improvements upon said lands put there by them, or those under whom they claim.

The defendants, Wade Fowler and J. C. Spears, duly served and filed the following notice and grounds of appeal, to wit:

1. For that his Honor, Judge Wallace, held that under the ninth clause of the will of Waddy Thomson, the sons of H. H. Thomson took only the one-eighth interest in the mill-tract of land which testator owned at the time he executed his will.

2. For that his Honor did not hold that the plaintiffs were estopped, as far as their claims against these defendants are concerned—

First. By the proceedings in partition in 1868; or, second, by their long acquiescence in the right claimed by their brothers to the whole of the mill-tract; or, third, by the implication of the deed to Joshua C. Spears, that the brothers owned the entire interest in the whole of the mill-tract; or, fourth, by all the transactions and circumstances

taken together amounting to a family settlement or agreement.

3. For that his Honor did not hold that

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the defendants having *paid a full price for the land, expended much money in improvements thereon, relying upon the acquiescence, acts, and assumptions and acknowledgments of rights of the plaintiffs, that their brothers took the entire interest in the mill-tract under the will, whatever might be the plaintiffs' rights as to their brothers, these defendants could not be made to suffer from the mistake of the plaintiffs, or their over-confidence in their brothers.

4. For that his Honor held that the plaintiffs were entitled to an accounting for rents and profits in the land.

5. For that his Honor did not decree that the defendants should be allowed a rebate or set-off to the extent of the value of the improvements or betterments made by them upon the land.

The plaintiffs also duly served and filed their notice of appeal and exceptions, alleging that his Honor erred:

1. In holding that the sale of the land in dispute in 1852 for partition between the heirs of Richard Thomson, deceased, did not operate as a revocation of the ninth clause of the will of Joseph W. Thomson, deceased.

2. In holding that the facts of the case make out a case of adverse possession by J. S. R. Thomson, and that the same facts make out a case of ouster against his cotenants, the plaintiffs in this case.

3. In holding that the interests of the plaintiffs, Mary F. Scaife and Eugenia E. Mills, in the one-fourth of the said land purchased by J. S. R. Thomson from H. H. Thomson, was barred by the statute of limitations.

4. In holding that the plaintiffs were not entitled to an account of the rents and profits for a longer period than four years before the commencement of this action.

5. In holding that the rights of any of the plaintiffs are in any manner barred by the statute of limitations.

Mr. E. H. Bobo, for plaintiffs.

It is conceded that under the act of 1858, the after-acquired lands of testator pass under the will. Does the land in dispute pass under the ninth or tenth clause? The in-

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tention, as inter*preted by the state of affairs at the date of the will, must govern. 14 How. 399; 2 Strob. Eq. 272; Rich. Eq. Cas. 294. And the will must be construed as a whole. 2 S. C. 517; 5 Rich. Eq. 322; 8 Cranch 66; 1 Jarm. on Wills (5th Am. ed.) 604, note 4, 605, 606. The ninth clause here is restrictive, and the tenth clause requires the after-acquired part to pass to the children. 10 S. C. 414; 2 Strob. Eq. 272; Rich. Eq. Cas. 294; 33 N. Y. 558; 1 Redf. on Wills 390.

The sale under the partition proceedings in 1852 operated as a revocation of the ninth clause. 4 Kent 528–531; 7 Johns. Ch. 258; 14 How. 396; 14 Ves. 584; 9 Dana 25; 5 Ves. 654; 1 Roll. Abr. 615; 3 Lev. 108.

H. H. Thomson was administrator cum testamento annexo, and also guardian of Mrs. Mills until 1872, and being thus trustee his conveyance of more than his real share operated as a fraud, and the statute of limitations does not bar this action. 1 S. C. 337; 6 Wheat. 498; 2 Sch. & Lef. 607; 2 Desaus. 53, 233; Kerr on Fraud & M. 150, 178, 183. J. S. R. Thomson cannot have the benefit of the statute, because he was guardian of Mrs. Nowell until within a period less than ten years before action brought. Tyler on Eject. 150; 3 Murph. 583; 2 Hayw. 129; 4 Desaus. 77; 2 Desaus. 55. An adverse possession by a tenant of an undivided part of the whole premises, cannot confer a title to any part thereof, so long as the co-tenant has a clear title and right of possession to an undivided part of the same. In this case the plaintiffs had a clear right to their share of the part now owned by Fowler, and also to the part sold by J. S. R. T. 14 S. C. 180; 2 B. C. 181; 1 Washb. on Real Prop. 417; 1 Hill on Real Prop. 804, 807. There can be no adverse possession of an undivided part. 6 Rich. 67; Tyler on Eject. & Ad. Enj. 907; 38 Vt. 344; 4 Wheat. 213; 6 Johns. 218; Tyler on Eject. & Ad. Enj. 900; 2 Smith's Lead. Cas. (5th ed.) 560. Particularly so here, on account of the relationship of the parties. Ignorance of rights will prevent the running of the statute until those rights are discovered. 7 Yerg. 222; 1 Edw. Ch. 343; 8 Dana 495; 6 Dana 180; Kerr on Fraud & M. 41–95; 1 Story's Eq. 217, 218. Mistake of law or fact, under the circumstances, will prevent the bar of the statute. 2 Story's Eq. 737, 739; 1 Story's

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*Eq. 117–148; 2 Kent 129–147. There is no estoppel. 18 Wall. 271; 1 Story's Eq. 391; 1 Lead. Cas. Eq. 117; 3 Otto 326; 3 Watts 240; 4 Harris 361. The plaintiffs did not know their rights, and so the elements of estoppel are wanting. Big. on Estop. 437, 467.

The plaintiffs are entitled to rents and profits. 5 Rich. Eq. 325. Nor can the defendants be allowed for their improvements. McM. Eq. 69, 75, 298; 5 Rich. Eq. 314.

Mr. R. W. Shand, on same side.

Messrs. Duncan & Cleveland, for defendants Thomson.

The partition sale in 1852 did not operate as a revocation of the ninth clause. 4 Rich. Eq. 304; Freem. on Judg., § 304; 1 Wms. on Ex'rs. 204, note; 1 Jarm. on Wills (5th Am. ed.) *151 and note; 4 Kent *530. And

the act of 1858 confines these revocations to cases where the property is alienated at the time of the death. J. S. R. Thomson holds, by adverse possession, the part purchased by him in 1868. The saving of the statute in favor of Mrs. Nowell should not protect the others. Tyler on Eject. & Ad. Enj. 933; 1 Bail. 192. But it does not apply as to personalty. 1 Hill's Ch. 375; 2 Hill 334. Nor as to rents and profits. 4 Strob. Eq. 170. In the cases cited there was actual minority at time of action brought. But the statute cannot avail Mrs. Nowell. 4 Rich. 619. She could have brought her action before her majority. 11 S. C. 581; Ang. on Lim., §§ 42, 174, 178; Rice 41; 2 Strob. Eq. 337; 2 Rich. Eq. 259. The renunciation of a trust gives currency to the statute. 4 Rich. Eq. 60; 11 S. C. 294; 13 S. C. 20. Mrs. Nowell had only five years within which to bring her action. 4 Rich. 619; Ang. on Lim., §§ 194, 197; 2 Rich. Eq. 120.

Defendants should not have been required to account for rents and profits. There was no proof that more than their share had been cultivated. Freem. on Co-ten., § 271; 5 Rich. Eq. 318; McM. Eq. 77; 1 Hill's Ch. 49; 2 Id. 370. It is discretionary whether rents should be allowed before action brought. 2 McC. Ch. 320; 5 Rich. Eq. 268; 4 Strob. Eq. 169; 1 Hill's Ch. 381; Lewin on Trusts *751; Perry on Trusts, § 872. But

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*there was no remedy at common law for rents—the only remedy was given by statute 4 and 5 Anne, ch. XVI., § 27, which being now repealed, (Gen. Stat. 778), there is no remedy left for rents. 25 Minn. 222; Bac. Ab., tit. "Joint Tenants," L. 304; Freem. on Co-ten., §§ 259, 270; 1 Washb. on Real Prop. *420; McM. Eq. 75, 481; 19 Gratt. 38; 18 Am. R. 169; 15 Sim. 303. Defendants should have been allowed compensation for improvements. 3 Desaus. 245; Chev. Eq. 213; 1 Strob. Eq. 350; 3 Rich. Eq. 173; 1 Rich. Eq. 324; 4 Rich. Eq. 476; 1 Bouv. Inst., § 185; 1 Pars. on Cont. 221; 2 Story's Eq. §§ 799 a, 1237, 1239; 1 Story 478; 8 Wheat. 77; 4 Rich. Eq. 476.

The sons of H. H. Thomson were exclusively entitled to the land in dispute, under the ninth clause of the will. Look at that clause alone. A will of real estate was in the nature of a conveyance, (2 Bl. Com. 378; 16 How. 275; 9 Rich. Eq. 133), but ambulatory, (1 Jarm. on Wills 26; 4 Kent 520); and the legal phrases will be construed as in a deed, (O'Hara on Wills 24; 1 Greenl. on Ev., § 287); and words are taken strongly against testator. The ninth clause, written in 1868, would have carried the whole interest, for his part was then the whole. The act of 1858 put real property on the same footing as personal, and this ninth clause would have carried personalty. 5 Rich. 468; 1 Ves., Sr., 141; 7 Ves., 398; 2 Strob. Eq. 283. It follows that since 1858 this clause would carry the real estate there mentioned as owned at the death. Whether less or more, it was still his part. The testator knowing the act of 1858, did not republish his will. The whole will shows such intention, and it must be effectuated. 2 Redf. on Wills 486; 1 Wms. on Ex'rs 219; 1 Roper on Leg. *249. Nor is parol evidence permissible to show the interest owned at the date, for the purpose of affecting the intention. Wigram on Wills 29, 31, 53, 99; 8 Mass. 3; 5 Pick. 510; 47 Barb. 263; 1 Rich. Eq. 396. It was only the act of 1858 which permitted the after-acquired interest to pass. 9 Rich. Eq. 133. Like the codicil in 4 Rich. Eq. 260, the act of 1858 was as a republication of the will, which carried the part—the whole—then owned by testator. The following authorities sustain this view: Note to 14 Rich. Eq. 257; 1 Jarm. on Wills *327–335, and cases

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cited. Other tracts may have been *acquired, which would pass under the tenth clause. The quantity of interest intended cannot be affected by extrinsic evidence. Wigram on Wills 127, 170, 171; 2 Black 418; 1 Jarm. on Wills (ed. 1880) *199. Even if admissible, the general must give way to the specific devise; and now, a residuary devise of land is not specific. O'Hara on Wills 355; 1 Cush. 107; 14 Rich. Eq. 256; 2 Wms. on Ex'rs 1696; Dud. Eq. 161. Special attention is asked to Garrison v. Garrison, 29 N. J. 153, which is strikingly similar to our case.

Mr. R. Munro, on same side.

Mr. J. H. Rion, for defendants Fowler and Spears, in addition to other points discussed by other counsel, contended that the partition of 1868, the payment of rent by the husband of one of the daughters, the recitals in the assignment to Fowler and the deed to Spears, the erection of improvements, and the insolvency of Fowler's vendor, make it a case which equity will not permit to be disturbed; and that all the circumstances of the case make virtually a family agreement that the sons should take the mill-tract exclusively. Such an agreement, equity will not permit to be disturbed. 1 Ves. & B. 30; 1 Keen 683; 1 Story's Eq., §§ 113, 137, 138.

July 2d, 1881. The opinion of the court was delivered by

McIVER, A. J. J. Waddy Thomson departed this life July 5th, 1868, leaving a will bearing date September 30th, 1845. The questions raised by this appeal depend for their solution upon the proper construction of the ninth and tenth clauses of the will, which are in the following words:

"Ninthly. I give, will and devise to M. Caroline Thomson my interest or legatee's part of the Walker and Tuck bottoms, joining her lands, or my part of the mill-tract of land and mills in Union district on Thickety

creek, and one hundred dollars worth in property or money, just as may suit my executor best. Now I give this property, land, &c., to my sister during her natural life and no longer, and at her death to be and belong

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to my ex*ecutor and sons. This being all I desire she shall ever have of my estate.

"Tenthly, I give, will and devise to Henry Hopson Thomson and his children all the balance of my lands, and all of my negroes, and all the rest and residue of my estate of all kinds whatsoever, both personal and real, which I now have, or which I may hereafter own, or which I may own at the time of my death. It is my wish and desire that he shall keep all I have here willed him, and not sell it off, but he can give or divide it as he may think best. I also request him to take special care of my old, faithful, favorite negroes, and not separate them, hereafter named."

By the last clause Henry H. Thomson was appointed executor. The life tenant, M. C. Thomson, and the executor Henry H. Thomson, both predeceased the testator. At the date of his will the testator owned an undivided one-eighth of the mill-tract—the land which is the subject matter of the present controversy—as one of the devisees under the will of his father; but subsequently, to wit, in 1852, under proceedings for partition, the mill-tract was sold and J. Waddy Thomson became the purchaser, thus acquiring a right to the remaining seven-eighths of that tract. Henry H. Thomson, the executor, at the time of his death left four sons—H. H. Thomson, J. S. R. Thomson, W. W. Thomson and R. L. Thomson—and three daughters, the plaintiffs in this action. After the death of J. Waddy Thomson the four sons went into possession of the mill-tract under a claim that it passed to them, to the exclusion of their sisters, under the ninth clause of the will, and shortly afterwards J. S. R. Thomson bought the interest of H. H. Thomson in the mill-tract and took a deed from him, dated December 5th, 1868, for an undivided one-fourth of the same. About the same time proceedings were instituted for the partition of the real estate of J. Waddy Thomson, consisting of many tracts, amongst the plaintiffs and their brothers, but the mill-tract was not only not mentioned among the tracts subject to such partition, but it was declared in the bill for partition to be the property of the brothers, and was expressly excepted in the prayer for partition. To these proceedings the plaintiffs were made parties—Mrs. Nowell and Mrs. Mills being minors at that time, by guardian ad

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litem, and Mrs. *Scaife and her husband consenting in writing to the partition. On May 12th, 1874, R. L. Thomson, being a minor, died intestate, leaving as his heirs-at-law his brothers above named, and his sisters, the plaintiffs.

On September 22d, 1874, W. W. Thomson conveyed to the defendant Fowler an undivided one-fourth interest in the mill-tract, who soon afterwards entered into negotiations with the heirs of R. L. Thomson for the purchase of his interest, which resulted in his taking an assignment from the plaintiffs and H. H. Thomson of the amount "arising from the sale of the one-fourth interest in the mill-tract belonging to the estate of R. Lewis Thomson." In this assignment it was stipulated that it was to be void in case Fowler failed to bid off the property. For some reason this assignment never took effect, and when the interest of R. L. Thomson was subsequently offered for sale at public outcry it was bid off by the defendant Spears, and on December 7th, 1874, the heirs of R. L. Thomson conveyed to him the interest of their intestate in the mill-tract, describing it as a one-fourth undivided interest. Subsequently, but at what particular time is not stated, J. S. R. Thomson, under the belief that he owned a one-half interest in the mill-tract, (one-fourth as devisee under the ninth clause of the will, and one-fourth as purchaser of the share, of his brother, H. H. Thomson,) conveyed to Fowler and Spears each a one-twelfth interest, so that J. S. R. Thomson, Fowler and Spears now claim to be the exclusive owners of the mill-tract, the share of each being one-third. These parties claim to have expended large sums of money in repairs and improvements, made, as they allege, under the belief that they were the sole owners. As has been stated the plaintiffs, Mrs. Nowell and Mrs. Mills, were minors at the time of the partition in 1868, the former not having attained the age of twenty-one years until February 14th, 1870, and the latter on April 6th, 1872. J. S. R. Thomson was the guardian of Mrs. Nowell and had a full and satisfactory settlement of his guardianship accounts with her a few days after she attained her majority.

The plaintiffs contend that by reason of the alteration of the estate, by the sale for partition in 1852 and the purchase under it by the testator, the devise in the ninth clause of

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the will was *revoked, and that the entire tract passed under the tenth clause, and that they are therefore each entitled to an undivided one-seventh of the mill-tract, and by this action they demand partition of the same with an account for rents and profits. The defendants, denying in toto the claim of the plaintiffs, insist that, by a proper construction of the will the entire interest in the mill-tract passed to the sons of Henry H. Thomson, to the exclusion of the daughters; and, as a further defence J. S. R. Thomson pleads the statute of limitations as a bar to the claim of the plaintiffs to the one-fourth interest bought by him from H. H. Thomson, but

expressly waives the benefit of any such plea as to that portion now owned by him under the will, to wit, the one-sixth of the mill-tract. The defendants also insist that the plaintiffs are estopped by their conduct from claiming any interest in the land or the rents and profits thereof.

The Circuit judge held that the purchase by the testator at the sale for partition in 1852 did not operate as a revocation of the ninth clause of the will; that under that clause the "sons" took only one-eighth of the mill-tract, and that the remaining seven-eighths must be equally divided among all of the children of Henry H. Thomson; that J. S. R. Thomson's plea of the statute of limitations should be sustained, except as to the claim of Mrs. Nowell; that the plaintiffs can make no claim against the defendant Spears as to the one-fourth conveyed to him by the deed in which the plaintiffs joined; that the plaintiffs are entitled to an account of the rents and profits for a period beginning four years before the commencement of the action; that the defendants are not entitled to any compensation for the improvements, and that there is nothing in the testimony to estop the plaintiffs.

From this decree both parties have appealed upon various grounds, which raise the following questions: 1st. Did the purchase by the testator at the sale for partition in 1852 operate as a revocation of the ninth clause of the will? 2d. What interest did the "sons" take, under the will, in the mill-tract—the whole or only an undivided one-eighth? 3d. Is there anything in the case which will estop the plaintiffs from making any claim to the mill-tract? 4th. Should J. S. R. Thomson's plea of the statute of limitations be sustained as to all or any of the plaintiffs?

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5th. *Are the defendants liable at all for rents and profits? If so, from what time? 6th. Are the defendants entitled to any compensation for improvements?

1. In considering the first question—that of revocation—we shall not attempt to follow the counsel in a detailed consideration of the numerous authorities cited, but will content ourselves with extracting from these authorities what we regard the fundamental principles established by them, and then apply these principles to the case in hand. The doctrine of implied revocation arising from an alteration of the estate of the testator, rests upon two principles. First. That where there has been such an alteration in the estate of the testator after the making of the will, as would naturally imply an intention to revoke the whole or any part of the will, such an intention will be respected and the alteration will effect a revocation either in whole or in part, as the case may be. If the testator, while being possessed of a certain estate in a particular piece of property, makes a disposition of it by will, and afterwards either parts with that estate or converts it into an estate of a different nature or quality, this, of itself, may imply an intention to revoke the devise; for the fact that he has indicated an intention to give an estate of a particular nature or quality to a particular object of bounty, does not warrant the belief that he intended an estate of a different nature for the same object of bounty. Therefore, where there has been a change made by the testator in the subject of the gift, and no change made in the will, either by codicil or simple republication, an intention to revoke may be implied by such alteration in the subject of the gift. But, secondly, the authorities cited show that even where the testator, after the making of his will, parts with the estate devised "and then takes it back by the same instrument, or by a declaration of uses, it is a revocation, because he once parted with the estate." Hence, not only where the alteration of the estate was such as to indicate an intention to revoke, but even where the alteration was such as would not imply any such intention, the rule applied, and a revocation would be implied from the simple fact of the alteration. This rested upon a second principle, that a devise was in the nature of a conveyance, and, therefore, an estate acquired after the making of the will could

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*not pass under it. So that if a person possessed of an estate in certain real property devised it to A, and subsequently conveyed it away, the devise would be revoked, even though he might, by the same instrument, have again acquired precisely the same kind of estate in the property which he had conveyed away; and this was because the estate which the testator held at the time of his death, though of precisely the same nature and quality as that which he had at the time his will was made, was acquired subsequently, and, therefore, could not pass under the will. These two principles seem to have been well settled and fully recognized in England prior to the statute of 1 Vict., c. 26, and would doubtless have been fully recognized in this state (Cogdell v. Cogdell, 3 Desaus. 346,) prior to our act of 1858. 12 Stat. 700. Since that act, however, subsequently-acquired real estate may pass under a will, provided there are words sufficient to cover it, and, therefore, it seems to us that there is now no room for the application of the second of the two principles upon which, as we have seen, the doctrine of implied revocation from an alteration of the estate rests. If this be so, then the only inquiry in this case is, whether the addition to the interest of the testator in the "Mill Tract," which he acquired at the sale for partition in 1852, affords any indication of an intention to revoke the devise contained in the ninth clause of the will. Under the view which we take of the second question in this case, as will presently be seen, the "sons" of Henry H. Thomson only took under

the ninth clause one-eighth of the "Mill Tract," and there was therefore, practically, no alteration whatever in the estate or quantity of interest devised to the "sons" by that clause, and no evidence whatever of any intention to revoke. The estate and the quantity of interest devised to the sons by that clause remained precisely the same, at the death of the testator, that it was when the will was made, and it is impossible to discover any intention to revoke by the purchase of an additional interest in 1852. If it were possible for us to hold that, by a proper construction of the will, such additional interest would pass to the "sons" under the ninth clause, then it would be necessary to pursue this inquiry.

In addition to this view of the question, we

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find that the doc*trine of implied revocation from alteration of the estate did not apply in cases of partition. As is said in 1 Jarm. on Wills *134: "The rule that a conveyance in fee of freehold lands, executed for a partial purpose, revokes a will made before 1838, admits of two exceptions. The first is in the case of a partition between tenants in common or coparceners, which, by whatever kind of assurance effected, does not, in equity at least, revoke a prior devise, provided the conveyance be confined to the object of the partition, merely assuring to the testator in the lands allotted to him in severalty an estate precisely correspondent to that which he previously had in his undivided share." It is true, as has been argued, that in England, where this exception has been established, down to a comparatively recent period there was no sale for partition, but there must have been an actual partition, yet we do not see why this should affect the principle upon which the exception rests, which seems to be that partition is a special case, that it is not the free and voluntary act of the party, but that he may be compelled to make partition. Attorney-General v. Vigor, 8 Ves. 281. Hence, where partition is the sole object the rule will not apply. Rawlins v. Burgis, 2 Ves. & B. 386; Luther v. Kidby, stated in note to 3 P. Wms. 170. For, as is said in a note to 1 Jarm. supra: "The act of partition therefore furnishes no evidence of an intention to revoke." But where partition is not the sole object, and in making it other purposes are accomplished, then an intention to revoke may be implied. Tickner v. Tickner, mentioned in Parsons v. Freeman, 3 Atk. 742, 750; Brydges v. Chandos, 2 Ves. 429. So that it seems to us, when the sole object is partition, no matter how it may be effected, whether by sale or otherwise, the rule does not apply, for the reason that no intention to revoke can be implied. And even if it could be said that the estate which the testator originally had in the one-eighth of the "Mill Tract" had been parted with and acquired again subsequent to the making of the will, by virtue of his purchase at the sale for partition, that, of itself, since the act of 1858, would furnish no ground for implying a revocation, in the absence of any indication of an intent to revoke.

We are not, however, prepared to assent to the proposition that the testator ever did

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part with his original interest in the *one-eighth of the "Mill Tract," or that he subsequently acquired the same interest by the purchase at the sale for partition. On the contrary, we think there is great force in the view thrown out by Dargan, Ch., in Ex parte Geddes, 4 Rich. Eq. 304 [57 Am. Dec. 730], (though it is not the point decided in the case,) that where one of two tenants in common buys land at a sale for partition, the title of the purchaser to his own moiety would be referred to its original source, and would not be considered as derived from the sale for partition. This view is based upon the idea that at a sale for partition the master sells as the agent of the parties—that is, of the tenants in common—and if one of them buys, as he cannot become a purchaser from himself, either directly or through the medium of his agent, his title to his original share is not derived from the sale; that he held before the sale, and the sale could give him no more. There would be no change of title, so far as his share was concerned, and the result would be the same as if the other tenants in common had, without a sale, conveyed their interest to him. We therefore concur with the Circuit judge that there was no revocation of the ninth clause of the will.

2. The next question is, what interest did the "sons" take under the ninth clause of the will, in the "Mill Tract"—the whole or only one-eighth? The determination of this question involves a consideration of the proper construction of the will. We must first endeavor, if practicable, to ascertain the real intention of the testator, and, unless it is in conflict with some rule of law, give it full effect. To ascertain the intention we must resort, not to conjecture as to what was likely to be the wishes of the testator, but to the words in his will, and the circumstances by which he was surrounded at the time, and from these sources deduce his intent. We are to examine the will as a whole, and, from its terms, as applied to the surrounding circumstances, determine what was in the mind of the testator at the time he executed his will. For while it is true that in a certain sense a will speaks at the death of the testator, yet, as it was well put in the argument of one of the counsel, it speaks then what was in the mind of the testator when his will was signed. We cannot conceive

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how it can be otherwise. If it be *true, as it undoubtedly is, that we must resort to the words used by the testator to ascertain his intention, we cannot understand how certain words, used with a certain intent in

1845, can be said to have been used with a different intent, simply because the testator lived for twenty-three years after he had used them, during which time many changes in his property may have occurred, when he has not seen fit to make any change in the words used by him to express his intention. In this case it is very clear that the testator intended to dispose of his whole estate, not only that which he had at the time of making his will, but also that which he might thereafter acquire. Now, if the act of 1858 had never been passed it would have been impossible to carry this manifest intent of the testator into effect, at least so far as any after-acquired real estate was concerned, because such intent, being in conflict with a well-settled rule of law, could not be allowed to prevail, but since the passage of that act there is no difficulty in the way of carrying out such intention.

Another well-settled rule of construction is, "that all the parts of the will are to be construed in relation to each other, so as, if possible, to form one consistent whole," (2 Jarm. on Wills 741): and if there is an apparent conflict or inconsistency between the different parts, such a construction must be given, if practicable, as will reconcile such conflict and give effect to each part.

It is also well established that, while as a general rule parol evidence is not admissible in the construction of a will, yet, as said by Wardlaw, Ch., in McCall v. McCall, 4 Rich. Eq. 455 [57 Am. Dec. 733]: "In ascertaining the subject of a testator's disposition, the court may inquire into the situation of his estate, and into every material fact which is auxiliary to the just interpretation of his words, for the purpose of identifying the thing intended by the words employed." And again, at page 456, "any evidence is admissible which merely tends to explain and apply what the testator has written, and no evidence can be admitted which merely shows what he intended to write."

We must also bear in mind the fact that the language of the act of 1858, (12 Stat. 700,) which was the law in force at the time this will took effect, differs somewhat from the

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language *used when this act was subsequently incorporated into the General Statutes, p. 440, and also from the English statute of wills. 1 Vict., c. 26. The language of the act of 1858 is: "Real estate purchased or otherwise acquired after the making and publishing of last wills and testaments shall pass by and under the same, in the same manner and to the same extent as personal estate now does." So that to determine the proper construction of this act it is necessary to inquire what was the rule as to subsequently-acquired personal property. When the act of 1791, (5 Stat. 163,) which declared "that no lands or personal estate which shall be acquired by any person after the making of his or her will shall pass thereby unless the said will be republished," was repealed in so far as personal estate was concerned, by the act of 1808, (5 Stat. 573,) it left the rule, as to that class of property, the same as it was at common law. By that law the rule was, that subsequently-acquired personal property would pass under a will, provided there were any words in the will indicating an intention of the testator so to dispose of it. But where no such intention could be discovered from the words of the will, then subsequently-acquired personal property would not pass thereby. As is said by Johnston, Ch., in Garrett v. Garrett, 2 Strob. Eq. 283, decided prior to 1858, "wills of personal property, like wills of real estate, are actually nothing more than the declaration of the testator's intention as it exists at their date, and as it arises from a contemplation of the state and condition of his property at that time. But there is a material difference between the two, in this, that wills of realty are essentially conveyances, (though revocable), and therefore can operate on no lands not then belonging to the testator; whereas, wills of personalty are not only revocable but, as a general rule, ambulatory, and will operate upon after-acquired property answering to the terms of the instrument, provided it be in the testator's hands at his death. The general rule then is, that testaments take effect, or, as it is sometimes expressed, speak at the death of the testator, and are to be applied to his personal estate as it exists at that time. And this should be the construction in all doubtful cases. Where we can pronounce with confidence that the testator meant to announce an intention confined to the state of

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affairs existing at the *date of his will, either in reference to the specific subjects which he wished to pass under it, or the persons to enjoy them, or truly intended in any other way to abridge the ambulatory capacity of the instrument, the construction must be such as to conform to the special intention thus indicated or expressed."

Guided by these principles, let us consider whether the interest which the testator acquired in the mill-tract, subsequent to the execution of his will, passed under the ninth or the tenth clause of his will. What intention do the words used by him, read in the light of the surrounding circumstances, indicate? It appears, from the testimony, that at the time he made his will he only owned one-eighth of the mill-tract, and that he subsequently acquired the remaining seven-eighths. We think it absolutely certain that the testator intended to give, by the ninth clause, to the remaindermen, (the "sons," as the event has proved), precisely the same portion that he intended for the life-tenant. He gives to her "my interest or legatee's part of the Walker and Tuck bottoms, joining her lands, or my part of the mill-tract, * * * just as may suit my executor best." Now, the first inquiry which presents itself upon

reading this language is, did the testator design to give the life-tenant a different proportion of the Walker and Tuck bottoms, in case the executor should prefer for her to take that, from that which he intended her to take in the mill-tract, if that should be the one selected by the executor as the subject of the gift, or was the change of phraseology from "my interest or legatee's part" to "my part," merely accidental, or such as persons are apt to make when referring a second time to the same thing for the purpose of avoiding sameness of expression? We confess that we are unable to discover anything in the will which would indicate an intention to give different proportions of the two tracts of land referred to in this clause to the objects of bounty there named, and the most natural inference is, that the testator knowing that he only owned an undivided interest in these lands, and having in the first instance, specified what that interest was—his "legatee's part"—he afterwards simply referred to such undivided interest as "my part," without again explaining what that part was. This view is in accordance with "the situation of his estate" at the time

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*which, as we are told by Wardlaw, Ch., in McCall v. McCall, supra, we may inquire into with a view of ascertaining "the just interpretation of his words, for the purpose of identifying the thing intended by the words employed." At the time the testator's "part" of the mill-tract was the part he was entitled to as devisee (inartistically called legatee) of his father, and as things then stood, "my interest or legatee's part" "and my part" were convertible terms meaning exactly the same thing, and we are not at liberty at attribute different meanings to them. The words of the ninth clause, therefore, do not indicate an intention to give more than the interest to which the testator was entitled as devisee of his father. They may therefore be read as if the testator had, by the ninth clause, given to M. C. Thomson for life, and after her death, to the executor and his sons, one undivided one-eighth of the mill-tract, as that was his part under the will of his father; and if so read, there can be no doubt that there was no intention disclosed to give more than that proportion to the objects of bounty therein named.

But, in addition to this, the testator in the same clause uses this language: "This being all I desire she shall ever have of my estate." Now, to give to the ninth clause the construction contended for by the defendants would be, in contravention of one of the settled rules of construction, to deprive the language just quoted of any force or effect whatever. At the time that the testator used these words it is very clear that he did not intend that the life-tenant should have any more of his estate than the proportion which he then specified, which, as we have seen, was only one-eighth of the mill-tract, and any construction which would give her more would be not only not in accordance with the intention of the testator, but absolutely subversive of it. Practically the testator declares that all she shall ever have of his estate, that is, all which, under any circumstances, she can have, is his "legatee's part," or one-eighth of the mill tract, and to give her the remaining seven-eighths would be to make a new will for the testator.

But again, while it must be conceded that there are no words in the ninth clause referring, in express terms, to any estate which the testator might acquire after making his

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will, it is per*fectly certain that there are such words in the tenth clause. In that clause the testator, in express terms, makes a different disposition of property that may be subsequently acquired, for there he gives to Henry Hopson Thomson and his "children" —not "sons"—not merely all the rest and residue of his estate, but "all the rest and residue of my estate of all kinds whatsoever, both personal and real, which I now have, or which I may hereafter own, or which I may own at the time of my death." So that the question is, practically, narrowed down to this—shall the subsequently-acquired property pass under the ninth clause which, at most, can only cover it by implication or construction, or shall it pass under the tenth clause, which, in express terms, not only covers it, but gives it a different direction from that which it would take if we were to substitute our inferences as to the intention of the testator, for his intentions as expressly declared in his will? To the question so stated there cannot be a doubt as to the answer.

But this is not all. So far as the testimony discloses, the only property acquired by the testator subsequent to the making of his will was the seven-eighths of the mill-tract, bought by him in 1852, and if the construction contended for by the defendants should be adopted, the result would be to entirely defeat that portion of the tenth clause by which the testator undertook to dispose of any property which he might acquire after making his will. But under the view which we take, that clause is given its full effect, and at the same time the objects of bounty named in the ninth clause are deprived of nothing which, in our opinion, the testator intended them to have.

The difference between this case and that of Garrison v. Garrison, 29 N. J. 153, the authority principally relied upon by the defendants, is, that here there is a clause in the will—the tenth—which, in express terms, disposed of all after-acquired property, while in Garrison v. Garrison there was no such clause. There the residuary devisee claimed the subsequently-acquired property under a general residuary clause, which did not, in terms, refer to subsequently-acquired property, while here the plaintiffs claim under a

clause which does, in express terms, not only refer to all subsequently-acquired property,

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but makes a *specific disposition of it, different from that which would be made of it if it could be brought under the ninth clause. Again, the New Jersey statute seems to be different from our act of 1858, and to follow the language of the English statute, by which subsequently-acquired property passes, "unless a contrary intention shall appear by the will," while, under our act of 1858, such property can only pass where there are words in the will indicating an intention to that effect.

3. The next inquiry is as to the estoppel. In Bigelow on Estoppel, 434, it is said that: "It is now a well-established principle that where the true owner of property holds out another, or allows him to appear as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which he caused or allowed to appear to be vested in the party making the sale." In Hand v. S. & C. R. R. Co., 12 S. C. 354, this doctrine, in reference to equitable estoppel, is laid down: "When one seeks to overthrow the state of things which he has actually brought about, to the prejudice of another, a clear wrong is perpetrated, and it is no excuse that he was ignorant of his title, for that ignorance should prejudice him alone as the result of his fault or misfortune; but its consequences should not be cast off from himself upon another, for each one should bear the consequences of his own fault or misfortune. But if silence only is alleged, knowledge of his right must be made to appear, for the possession of such knowledge is an essential element of the question of the wrongful character of such silence."

Applying these principles to the case in hand, we take it the inquiry is, did the plaintiffs, by any positive acts or declarations, induce the defendants, or any of them, to purchase the land in question or shares therein, under the supposition that the persons from whom they purchased had good right to sell what they purported to sell. The mere

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silence or non-action of the plain*tiffs will not be sufficient, inasmuch as it not only does not appear that they were aware of their rights at the time of such purchases, but it does appear that they were ignorant of them, and there is not the slightest evidence warranting the belief that their silence or non-action was induced by an intention to deceive or mislead. As to the defendant Spears, we understood that it was conceded, in the argument here, that the plaintiffs were estopped, and it will not, therefore, be necessary for us to consider the question as to him.

Then as to the defendant Fowler. At the time he purchased from W. W. Thomson a one-fourth interest in the mill-tract it does not appear that the plaintiffs, or either of them, made any representations whatever to him in regard to the ownership of that property, for it was not until after that purchase that he took from them the assignment of their interest in R. L. Thomson's share, which in the assignment was stated to be an undivided one-fourth—the deed from W. W. Thomson having been made on September 22d, 1874, and the assignment on December 5th following. There can be, therefore, no pretence that the plaintiffs, by any positive act on their part, induced Fowler to become a purchaser of an interest in the mill-tract, by holding out to him the idea that they had no interest therein; and their mere silence, at the time he became such purchaser will not, as we have seen, be sufficient to estop them, when it appears they were at the time ignorant of their rights and had no intention to deceive or mislead him, especially when, to say the least, it was doubtful whether they knew of the purchase until after it was made, and when they stood in no such fiduciary relation toward Fowler as made it their duty to speak. The case as to J. S. R. Thomson is even stronger, for his purchase of a one-fourth interest from H. H. Thomson was made as far back as December, 1868, and there is no shadow of pretence that he was induced to purchase by anything said or done by the plaintiffs.

The fact that the mill-tract was excepted from the partition made in 1868 can have no effect. No question as to the ownership of that tract was put in issue by the pleadings in that case, and, of course, no such question could have been there decided. Two of the plaintiffs were then under the disability of

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infancy and the *other under the disability of coverture, and their rights cannot be prejudiced by the failure to raise the question then. They can only be held bound by what was adjudged in that case, and nothing was there adjudged as to the ownership of the mill-tract.

So, too, we are unable to understand how the fact that the mill-tract was rented to Scaife as the property of the "sons" can affect the rights of the plaintiffs. Nothing that Scaife did could operate as an estoppel against Mrs. Scaife, and certainly not as to the other two plaintiffs.

Nor are we able to perceive how the fact that the plaintiffs stood by and saw the defendants making improvements on the property can operate as an estoppel. According to our view of the rights of the parties the plaintiffs and defendants were tenants in

common of the mill-tract, and surely it cannot be contended that the mere fact that one of several tenants in common stands by and sees one or more of his co-tenants enter into possession of the common property and make improvements thereon, will estop him from asserting his right to partition.

So, too, we do not think there is anything in the case to warrant the position that there was a family arrangement by which it was understood that the brothers were to take the mill-tract to the exclusion of their sisters. There is, certainly, an utter lack of any direct evidence of anything like such an agreement, and the facts and circumstances relied upon for the purpose are not, in our judgment, sufficient to establish any such agreement. We concur, therefore, in the conclusion reached by the Circuit judge that there is nothing in the case to estop the plaintiffs, except as to any claim they may have had against the defendant Spears, as to whom the estoppel is admitted.

4. The next inquiry is as to the plea of the statute of limitations interposed by the defendant J. S. R. Thomson. We think it clear that the fiduciary relation existing between him and Mrs. Nowell prevented the running of the statute against her until such relationship was terminated, for, until that time, it was his duty to hold for her, and he could not, therefore, be regarded as holding adversely to her. The remaining inquiry on this branch of the case is whether this will protect the other two plaintiffs.

There can be no doubt but that the rule is

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well established in *this state that the minority of one of several tenants in common of land will protect the title of the others against the operation of the statute of limitations. (Thomson v. Gaillard, 3 Rich. 418 [45 Am. Dec. 778]; Lahiffe v. Smart, 1 Bail. 192,) and the question now presented is whether the principle upon which this rule rests requires that it should be extended to other cases than that of infancy. The principle upon which this rule is founded is stated by O'Neall, J., in Thomson v. Gaillard, supra, as follows: "The individual interests of co-heirs or distributees in land is co-extensive with the whole of it. * * * Each is entitled to the possession of the whole, and as against a trespasser * * * would be entitled to the writ of habere facias possessionem of the whole tract. * * * The right of entry cannot be confined to any part, but extends to all and every part. * * * As against an infant the bar of the statute could not be effectual until this disability was removed. * * * At any time during his minority, and until five years after full age, he has the legal right of entry on the land. If the right of entry of any one of the co-heirs remains, the legal title of the land is not defeated; and it follows that if it may operate to evict a trespasser from the whole of the land no title can be acquired by possession. * * * The seizin of the co-heirs is in the whole tract and their title is one, and if the statute cannot defeat it as against all, it cannot against none." (Sic.) So the same judge in Henry v. Means, 2 Hill 333, 334, says: "Notwithstanding any one of several tenants in common or distributees might sue in trespass to try titles and recover his or her share of the land, that yet his or her recovery would entitle him or her to the writ of habere facias possessionem for, and an execution of it by delivery of, the possession of the whole land. When any one of the co-tenants obtains possession his possession is that of all, and hence, if any one was entitled to recover possession, all would be of necessity so entitled."

This being the principle upon which the rule is founded by which the minority of one of several co-tenants protects those of full age from the plea of the statute, it is difficult to conceive how we can escape the conclusion that, upon the same principle, the inability of J. S. R. Thomson to plead the stat-

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ute against *Mrs. Nowell should not likewise enure to the benefit of her co-tenants—the other two plaintiffs. To make his plea of the statute available he must show an adverse possession for the requisite period to the whole of the land, and this he cannot do, because his possession could not be adverse to Mrs. Nowell as to any particular foot of the land. Before partition she was not entitled to any particular acre, but was seized of the whole, and there was therefore no particular acre of which J. S. R. Thomson could properly be said to have adverse possession, for to constitute such possession it must be open, notorious, distinct and hostile to all the world. So soon as it appears that the possession is subservient to, or by the permission of another, or that it is held under an acknowledgement of another's right, it at once loses its character of adverse possession. As is said in Angell on Limitations, § 434: "As one co-tenant cannot be disseized of any particular part of the land unless all are disseized, so the relinquishment and yielding up to one of several tenants in common by the disseizor, after a disseizin for five years, of all the right, seizin, possession and betterments which the disseizor had in and to the proportion of that tenant in common in the premises, has the effect to put all the tenants in common in the seizin and possession of their shares respectively, and to prevent the operation of the statute of limitations against any of them prior to that time. Where there were several tenants in common of the tract of land, some of whom were infants, and the attorney in fact of the guardian of the infants made known their claim to the settler, who agreed to pay the taxes and keep possession for the infants without committing waste, it was held that

this agreement enured for the benefit of the other tenants in common so as to prevent the statute from running against them." We think, therefore, that the protection afforded Mrs. Nowell from the plea of the statute of limitations must necessarily enure to the benefit of her co-tenants, the other two plaintiffs, not only in analogy to the well-settled rule in case of minority, but also in accordance with, and as a logical result of, the principle upon which such rule rests.

5. The next inquiry is as to the liability of the defendants for rents and profits. The defendants contend that inasmuch as the statute 4 and 5 Anne has been repealed by

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the General Statutes, *one tenant in common cannot now have any remedy against his co-tenants for rents of the common property received by him. That statute, however, simply declared "that from and after the said first day of Trinity Term, actions of account shall and may be brought and maintained * * * by one joint tenant and tenant in common * * * against the other as bailiff, for receiving more than comes to his just share or proportion," &c., (2 Stat. 438); and when it was repealed it simply destroyed the remedy given by it—an action of account—but it did not affect the remedy administered by the Court of Equity by virtue of its own inherent powers, which were not derived from that statute. For when the Court of Equity took jurisdiction for the purpose of partition it would proceed to decree complete relief by requiring an account for rents and profits from such of the co-tenants as may have had possession of more of the common property than their just share. Freem. on Co. Ten. & Part., § 425; 1 Story's Eq. Jur., § 655, et seq.; Backler v. Farrow, 2 Hill's Eq. 111. As said by Dunkin, Ch., in Woodward v. Clarke, 4 Strob. Eq. 170: "The practice of the court in giving an account of rents and profits of real estate depends on general principles of equity."

Again: since the adoption of the code of procedure all the previously recognized forms of action have been abolished, and there is now but one form of action for the enforcement or protection of a right or the redress or prevention of a wrong, and hence the repeal of a statute giving a right to bring a particular form of action in a specified case, cannot prevent a party from seeking any relief he may show himself entitled to, either upon legal or equitable principles, by an action under the code. We think, therefore, that the defendants may be required to account for rents and profits of so much of the common property as they may have used in excess of their shares. Volentine v. Johnson, 1 Hill's Eq. 49; Lyles v. Lyles, 1 Hill's Eq. 86; Jones v. Massey, 14 S. C. 292. But we agree with the Circuit judge that in taking this account reference must be had to the condition of the property before the improvements were put upon it by the defendants, as they are not to be held liable for such rents and profits as may be due to the im-

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provements put upon the prop*erty by them. Thompson v. Bostick, McM. Eq. 75; Hancock v. Day, Id. 69 [36 Am. Dec. 293]; Holt & Kerr v. Robertson, McM. Eq. 475. In taking this account the defendants must be allowed credit for the taxes paid by them and for such repairs as were necessary to preserve the property. This accounting, however, must be limited to the time of the commencement of this action. In Rowland v. Best, 2 McC. Eq. 317, the court said: "It is not an uncommon case for a party who lies by and permits another to occupy and enjoy property or funds of his own, under an apparent good title which he might and ought to have brought into discussion much earlier, to be restricted in his demand for an account of rents and profits or interest to the filing of the bill or four years before." This doctrine was fully recognized in Riddlehoover v. Kinard, 1 Hill's Eq. 381; Woodward v. Clarke, 4 Strob. Eq. 170; Boyce v. Boyce, 5 Rich. Eq. 268. Here it is manifest that all parties acted under an honest mistake, and we think it a very proper case for restricting the account to the commencement of the action.

6. The only remaining inquiry is, whether the defendants should be allowed anything for the improvements made by them. It is undoubtedly true, as said by Wardlaw, Ch., in Corbett v. Laurens, 5 Rich. Eq. 315, (citing the cases,) "that our cases have settled the question against the right of an improving tenant in common to the exclusive benefit of his improvements," and with this rule we are entirely satisfied, where the tenant who makes the improvements is aware, at the time, that other persons are entitled to interests in the property so improved. But where one has expended his money in the improvement of property, under the honest conviction of exclusive ownership in himself, it seems to us that there is manifest equity in allowing him the benefit of such improvements, as far as the same can be done without injury to the other co-tenants. As is said by Dargan, Ch., in a note to Williman v. Holmes, 4 Rich. Eq. 476: "The high equity to be allowed compensation for permanent and valuable improvements should prevail wherever it can be done consistently with the rights of the other parties." Accordingly, in that case it was ordered that the partition should be so made as to give to the party who had made the improvements that por-

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tion of the common property *which he had improved, without accounting for the increased value imparted to such portion by the improvements, the improved part not being greater than his rightful share, and it being shown to the court that such partition could

be made without injury to the other parties in interest. But even if such partition cannot be made, and a sale should become necessary, we see no reason why, upon the same principle, the improving tenant should not be allowed, out of the proceeds of the sale, not the cost of such improvements, but the amount which such improvements can be shown to have enhanced the value of the property. If two persons are tenants in common of a tract of land, worth, in its unimproved condition, $2000, and one of them, under an honest conviction of exclusive ownership, has made valuable improvements on the property, by reason of which its value is enhanced one hundred per cent., so that when the property is sold for partition it brings $4000, it seems strictly in accordance with the principles of equity and natural justice that the improving tenant should be allowed, out of the proceeds of the sale, the amount which his improvements have added to the value of the property, in addition to his one-half of the value of the property in its original condition; and this would work no injustice to the other tenant who would still receive what alone he was, in justice and equity, entitled to have—the one-half of the value of the property in its unimproved condition. We think, therefore, that in this case the commissioners in partition should be directed to make the partition in such way, if practicable without injury to the rights of others, as to assign to the parties who have made improvements on the common property, the portions so improved, without estimating the additional value imparted to such portions by the improvements. And if this is impracticable and a sale should become necessary, then that the parties who have made the improvements shall, in addition to their shares, be allowed out of the proceeds of the sale such a proportion thereof, as such proceeds have been increased by the improvements.

The judgment of this court is that the judgment of the Circuit Court be modified so as to carry into effect the principles herein

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*announced, and that the case be remanded to the Circuit Court for such further proceedings as may be necessary.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. 370

(Case No. 1048.)

STATE v. GATHERS.
STATE v. SMALLS.

(April Term, 1881.)

[1. *Criminal Law* ⇐1024.]

An appeal cannot be taken by the state from a judgment of acquittal in the Court of General Sessions. Const. Art. I., § 18.

[Ed. Note.—Cited in State v. Syphrett, 27 S. C. 33, 2 S. E. 624, 13 Am. St. Rep. 616; State v. Ivey, 73 S. C. 288, 53 S. E. 428.

For other cases, see Criminal Law, Cent. Dig. § 2604; Dec. Dig. ⇐1024.]

[2. *Appeal and Error* ⇐843.]

This court cannot consider merely speculative questions and give opinions upon disputed points of law, where no rights affecting parties before it are involved.

[Ed. Note.—Cited in Aultman v. Utsey, 35 S. C. 598, 14 S. E. 351; Cantwell v. Williams, 35 S. C. 603, 14 S. E. 549; Welch v. Wilmington & W. R. Co., 40 S. C. 468, 19 S. E. 72; Butler v. Ellerbe, 44 S. C. 280, 22 S. E. 425; Town of Batesburg v. Mitchell, 58 S. C. 571, 37 S. E. 36.

For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. ⇐843.]

[This case is also cited in State v. Young, 30 S. C. 407, 9 S. E. 355, without specific application.]

Before Mackey, J., Charleston, February, 1881.

These cases were an indictment against Mack Gathers for assaulting and resisting an officer, and on indictment against James Smalls for a like offence. It does not appear when the indictments were found, nor when the offence of Gathers was alleged to have been committed. The assault was made by Smalls, according to the indictment, on June 20th, 1880.

Under the charge of the presiding judge the defendants in both cases were acquitted. The state appealed.

Mr. Solicitor Jervey, for appellant, contended that the state could appeal, although the defendants could not be tried again; and cited 15 Rich. 274; 1 Bailey 651; Dudley 295, 296. With him was associated the attorney-general.

Mr. S. J. Lee, contra, cited Const., Art. I., § 18; 2 N. & McC. 16; 19 Mo. 683

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*July 5th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. We will consider these cases together. The indictment in each was for "resisting an officer" in the discharge of his duty. In the first case named in the caption the officer was "a special constable who had not given official bond," and in the case second stated he was "a police officer in the city of Charleston acting without process." The law bearing upon the two cases is not the same, and much might be said as to the rulings of the Circuit judge in both cases; but in the view which the court takes as to their right to entertain the appeals, they involve identically the same point. Under the charge of the judge the defendants were acquitted and discharged. The solicitor in behalf of the state, alleging error on the part of the judge in each case, appealed to this court and now moves for a new trial in both cases.

Whether or not the Circuit judge erred in his rulings of the law, the defendants were

acquitted and discharged and are now out of court. We cannot grant a new trial at the instance of the state. In one of the amendments to the constitution of the United States this declaration appears: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." In the case Ex parte Lange, 18 Wall. 163 [21 L. Ed. 872], it was held that "if there is anything settled in the jurisprudence of England and America it is that no man shall be twice punished by judicial judgments for the same offence." Mr. Justice Miller in delivering the judgment says: "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted. Hence to every indictment or information charging a party with a crime or misdemeanor, whether at the common law or by statute, a plea of autrefois acquit is a good defence."

In one of the earliest cases in our reports, (State v. Wright, 2 Treadway 517,) it was held that there "can be no new trial in a criminal case where the defendant is acquitted."

In the case of State v. Bowen, 4 McC. 254, Judge Nott says: "It has not been usual in

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any case of a criminal prosecu*tion to grant a new trial for any cause where the party has been acquitted. In the case of State v. Wright et al., 2 Treadway 517, the court were unanimously of opinion that a new trial ought not to be granted even in a case of misdemeanor where the defendant had been acquitted, and that case appears to have been well considered and a great many authorities are adduced in support of the opinion. "I will not say that a case may not be so circumstanced as to authorize the court to grant a new trial where the defendant has been acquitted, but I do not think the right to do so is established by the case of the King v. Mawbey, 6 Durnf. & East 619, which was relied on for that purpose." &c.

The case of State v. Edwards, 2 N. & McC. 15 [10 Am. Dec. 557], was an indictment for fighting a duel. The witnesses refused to testify and the defendant was acquitted. The state moved for a new trial and Judge Colcock said: "On the question whether such an appeal can be sustained I entertain no doubt. I think I can venture to say that no case can be found where a new trial has been granted, unless where it has been affected by the fraud or artifice of the accused. * * * Where a criminal case is put to a jury it cannot be withdrawn except by the consent of the accused or by some unavoidable accident to one of the jury or the court," &c.

If it was the duty of courts not to grant new trials in such cases upon motion of the solicitor for the state before our new constitution of 1868, that duty is now very much more plain under that instrument, which expressly and in terms declares in Section 18, Article 1., that "no person, after having been once acquitted by a jury, shall again, for the same offence, be put in jeopardy of his life or liberty."

This court cannot consider merely speculative questions and give opinions upon disputed points of law. Our duty is to pronounce practical judgments, to settle and determine the rights of parties. There must be an actual existing case to call into exercise the judgment of the court. Even in a controversy submitted without action it must appear by affidavit that the controversy is real and the proceeding in good faith.

It is said that it would be useful to settle the law involved in these cases. A mere theoretical opinion, in a supposed case,

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*would not accomplish that purpose and would be a bad precedent.

The judgment of this court is that these appeals on the part of the state, after acquittal, cannot be entertained and are dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 373

(Case No. 1051.)

STATE v. COLLINS.

(April Term, 1881.)

[1. *Witnesses* ⇐255.]

Where the superintendent and the house surgeon of a hospital referred to contemporary records of the institution simply to refresh their memory, but were thus enabled to testify from their own recollection to the facts there stated, there was no error in receiving such testimony without the production in open court of the records so referred to. This rule obtains in criminal as well as in civil cases. Authorities reviewed.

[Ed. Note.—Cited in State v. Jones, 29 S. C. 226, 7 S. E. 296; Rose v. Winnsboro Nat. Bank, 41 S. C. 193, 19 S. E. 487; Springs, Heath & Co. v. South Bound R. R. Co., 46 S. C. 109, 110, 24 S. E. 166; Hicks v. Southern Ry., 63 S. C. 572, 41 S. E. 753; Henry Sonneborn & Co. v. Southern Ry., 65 S. C. 505, 44 S. E. 77; State v. Dean, 72 S. C. 81, 51 S. E. 524.

For other cases, see Witnesses, Cent. Dig. § 888; Dec. Dig. ⇐255.]

[2. *Criminal Law* ⇐1169.]

Where testimony in a criminal case is withdrawn by the state's attorney upon the objection of the defendant, it is as if the testimony had not been admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. ⇐1169.]

Before Wallace, J., Charleston, November, 1880.

This was an indictment for the murder of Peter Broughton, by stabbing, charged to have been committed by the defendant, Cæsar Collins. The wound was given June 7th,

1880, in Charleston county, and the deceased died in the city hospital in the city of Charleston on July 20th, 1880.

The exceptions allege errors of the Circuit judge in certain rulings upon testimony. So much of the testimony as is affected by these exceptions is thus stated in the brief.

Thomas E. Newton.—Am superintendent of city hospital, and my duty to receive patients; I don't recollect that I received Peter Broughton, but, on referring to the records, believe that I did, but am ready to swear that he was admitted on June 14th, 1880; he was cut

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in chest; he remained there some time *and died July 20th; Dr. King was house physician in charge of the surgical department in which that patient was; I have refreshed my memory from a book in the hospital called the general register, and from the surgical register and my copy-press letter-book; one of these books is in the handwriting of the house physician; the entry in my book is in my handwriting, and the copy in the copy-press book is a copy of my handwriting; I keep the general hospital register; it is the first regular record; the entries are not always in my handwriting, but they are in this case; this record refreshed my memory as to details; I wish it to be understood that I can know a thing without remembering it; after looking at the book then I remember it; his death is recorded in the general register, which I keep, and in the medical and surgical register, which is kept by the house physician and the house surgeon; I know of the man's death of my own knowledge; I cannot be so sure about the dates without referring to those books; I know positively about his being admitted and treated in the hospital; I remember having to attend to his treatment; I remember his dying, and I know I had to attend to his funeral after the coroner got through; I remember those facts independent of these records. [Mr. Lee, the counsel for the defendant, objected to so much of the testimony of Mr. Newton as was given by means of refreshing his memory from the hospital records, one of which was in his own handwriting. The court overruled the objection and Mr. Lee excepted.]

Dr. Walter King.—Am house surgeon to the city hospital, and was in June and July last; I remember a patient named Peter Broughton; I did not remember this morning when he was admitted, but on looking at my record I saw that he was admitted June 14th. [Counsel for defence objected to this question and answer. Objection overruled and exception taken.]

Friday Watson.—I saw Peter to his house the morning after he was cut. Question by solicitor. What did he say? A. He said Collins cut me. [Mr. Lee objected to this question and answer. The solicitor stated that he would withdraw the question.] Q. Did he show you anything? A. He showed me his wound and said: "Look how Collins

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cut me." Q. What be*came of Broughton? A. That is all I know of him. [Mr. Lee stated that he objected to the testimony given by Friday Watson relating to the conversation had with Broughton at his house.]

These were all state witnesses.

The defendant was convicted. He appealed to this court upon the three exceptions stated in the opinion.

Mr. S. J. Lee, for appellant.

Mr. Solicitor Jervey, contra.

July 12th, 1881. The opinion of the court was delivered by

McIVER, A. J. This was an indictment for murder, in which the appellant was charged with having inflicted a mortal wound on one Peter Broughton on June 7th, 1880, from which death ensued on July 20th following. The wound was inflicted near a country store in the county of Charleston, and the deceased was removed, a few days afterwards, to the city hospital in Charleston, where, it was alleged, he died from the effects of the wound on the day above mentioned. All the testimony taken at the trial is set out in the "case," but we propose to refer to only so much of it as will be necessary for a proper understanding of the grounds of appeal. The appellant having been convicted, moved for a new trial on the ground set forth in his notice of appeal, and, upon the refusal of this motion, gave due notice of appeal upon the following grounds:

"1. Because the court erred in admitting the testimony of T. E. Newton, a witness for the state, about matters of which he had no knowledge, except by means of refreshing his memory from the records of the city hospital, which said records were not produced in court, and no opportunity afforded defendant's counsel to examine them.

"2. Because the court erred in admitting the testimony of Dr. King, a witness for the state, to facts of which he had no knowledge, except that which appeared in the records of the city hospital, which records were not proved to be in the said witness' handwriting, and said records were not produced in court, and no opportunity afforded defendant's counsel to examine them.

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*"3. Because the court erred in admitting as evidence the declarations of Peter Broughton, the alleged deceased, made to Friday Watson, a witness for the state, on the day after the altercation when said Peter Broughton was not in a dying condition, and said declarations were not made in the presence of the defendant."

The fourth ground of appeal having been very properly abandoned, need not be set out here.

The questions raised by the first and second grounds of appeal involve the considera-

tion of the rule as to a witness being allowed to refresh his memory by reference to written documents. In this respect the rules of evidence are the same in criminal as in civil cases. State v. Rawls, 2 N. & McC. 331. The rule is thus stated in 1 Stark. on Ev. 128: "If a witness has made a memorandum of facts, he may refresh his memory by referring to it; and if, by that means, he obtains a recollection of the facts themselves, as distinct from the memorandum, his statement is evidence; but if he has no knowledge or recollection of the fact except that he perused it in a book or paper, the original book or paper must be produced, and he cannot give evidence of the facts. It is not essential that the memorandum should have been cotemporary with the fact. It seems to be sufficient if it has been made by the witness, or by another with his privity, at a time when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory."

In 2 Russ. on Crimes 622, the rule is laid down as follows: "A witness, to assist his memory, may use a written entry, if it were made by himself shortly after the occurrence of the fact to which it relates; but if he cannot speak to the fact from recollection any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to nothing."

In 1 Greenl. on Ev., § 436, in speaking of the rule upon this subject, it is said that a witness "is permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry in a book. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original

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writing, provided, after inspecting *it, he can speak to the facts from his own recollection." And, again, in Section 437, this author divides the cases in which writings may be referred to by witnesses to refresh or assist their memories, into three classes: "First. Where the writing is used only for the purpose of assisting the memory of the witness. In this case it does not seem necessary that the writing should be produced in court, though its absence may afford matter of observation to the jury, for the witness at last testifies from his own recollection. Second. Where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct. In this case the writing itself must be produced in court in order that the other party may cross-examine. * * * Third. Where the writing in question neither is recognized by the witness, as one which he remembers to have before seen, nor awakens his memory to the recollection of anything contained in it; but, nevertheless, knowing the writing to be genuine, his mind is so convinced that he is on that ground enabled to swear positively to the fact," one of the illustrations given being where a witness called to prove the execution of a deed is unable to recall any recollection whatever of the fact, and yet from the fact of seeing his genuine signature as an attesting witness, he is permitted to prove the execution of the deed. In Section 438, it is said that no precise rule has been established as to the time when the writing thus resorted to should be made, but that it ought at least to have been made before such a period of time has elapsed as to render it probable that the memory of the witness might have become deficient. The cases upon the subject from our own state which have been referred to in the argument, will next be considered.

In State v. Rawls, supra, the rule was laid down in the following language: "Where a person who was a witness to a particular transaction had made a memorandum at the time of certain facts for the purpose of perpetuating the memory of them, and could at any subsequent period swear that he made the entry at the time for that purpose, and that he knew from that memorandum that the facts did exist, it would be good evidence,

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although *he might not retain a distinct recollection of the facts themselves." In this case it does not distinctly appear that the memorandum was produced in court, though it is a fair inference from what is stated that it was read from by the witness while on the stand. In O'Neale v. Walton, 1 Rich. 234, an unsuccessful effort was made to extend the rule thus laid down so as to permit a memorandum made two weeks after the occurrence to which it related, not by the witnesses themselves, though signed by them, but by an interested party, to be read in evidence. No objection was made to the use of the paper merely for the purpose of refreshing the memory of the witness, but when they stated that, independently of the paper itself, they had no distinct recollection of the facts which it contained, objection was made and sustained by the Court of Appeals, principally, as it seems, upon the ground that the paper in question was prepared by one of the parties in interest, and not by the witnesses themselves; and also, that it was prepared as long as two weeks after the occurrence which it purported to record. It is a mistake to say, as was urged in the argument here, that this case practically overruled the case of State v. Rawls. On the contrary, the authority of that case is distinctly recognized, and the court only says that the principle there laid down is not to be extended so as to cover a case like that of O'Neale v. Walton, where the memorandum relied upon is not made by the witness, but by an interested party weeks after the event.

In Ballard v. Ballard, 5 Rich. 495, a witness was offered to prove a demand and refusal in an action of trover, and being unable to say what reply the defendant made when the demand was made, without reading from a written memorandum, which, he said, "he believed stated the truth—he at first thought it was made on the day of the demand—but after he went home he afterwards said he did not think it was made on that day, but that it was made on the next day, or not long after," the plaintiff offered the memorandum in evidence, but it was not admitted. One of the questions before the Court of Appeals was as to the propriety of excluding this memorandum. The court, while recognizing the rule as laid down in State v. Rawls, and approving the declaration made in O'Neale v. Walton, that this rule should

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*not be extended as there proposed, held that the memorandum was properly excluded, and seemed to lay stress upon the fact that the memorandum "was not prepared at least until the next day, if then, after a conference." It will be observed that there was no question raised in this case as to whether the witness could, after refreshing his memory by reference to the memorandum, testify to the facts therein contained, but the question was, whether the memorandum itself could be used as evidence.

In Berry v. Jourdan, 11 Rich. 67, the rule is recognized that a witness may be allowed to refresh and assist his memory by referring to a written instrument, memorandum or entry in a book, even though such writing may not have been made by himself, provided that after reading it he can speak to the facts from his own recollection.

The case of Furman & Smith v. Peay, 2 Bail. 394, cited by appellant's counsel to show the necessity for producing in court the hospital records, was a case in which an attempt was made to prove an account for goods sold by book entries, and not a case in which a written memorandum was resorted to for the purpose of refreshing the memory of a witness, and does not, therefore, apply to this case. State v. Cardoza, 11 S. C. 239. In such a case the entries themselves constitute the evidence of the sale and delivery of the goods, and hence the necessity for the production in court of the books containing such entries. And see, too, the recent case of Bank v. Zorn, 14 S. C. 444 [37 Am. Rep. 733].

Applying the principles deducible from the foregoing authorities to the case in hand, we do not see how the first and second grounds of appeal can be sustained. It appears that the hospital records were only resorted to by the witnesses for the purpose of refreshing their memories as to certain details, dates, &c., and there was no offer or attempt to use these records as testimony, and there was no necessity for the production in court of these records. Where a memorandum or other writing is referred to by a witness simply to refresh his memory, and it is not proposed to use such memorandum or writing as testimony, but to rely entirely upon the recollection of the witness as refreshed by such memorandum or writing, there can be no necessity for producing the same in court,

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for it may be, as in the case of *State v. Cardoza, supra, that the writing resorted to for that purpose is of such a character as to be altogether unintelligible to any one but the witness himself; and yet, upon the principle of the association of ideas, it may be quite sufficient to restore the recollection of a fact which had faded from the memory of the witness.

Nor do we think there is any foundation for the objection that the records used to refresh the memories of these witnesses were not made by them. As matter of act, it seems that one of the books referred to—the general register—was kept by the witness Newton, while the other book—the surgical register—was kept by the other witness, Dr. King, and in both of the books the entries were made contemporaneously with the occurrence of the facts recorded, or at least so near the time of the occurrence of such facts as to render them practically contemporaneous. These books, as their names import, seem to contain the daily record of what occurred in the hospital, and we see no error in allowing the officers of the hospital, whose duty it was to keep these records, to refer to them for the purpose of refreshing their memories as to the facts there recorded.

As to the third ground of appeal, there seems to be some misapprehension on the part of the appellant's counsel. According to the report of the Circuit judge, as well as from what appears in the "case" as agreed upon by the parties, the testimony of Friday Watson as to the declarations of Peter Broughton, made the day after he was wounded, was not admitted, but, on the contrary, as soon as that witness stated what the deceased said, the appellant's counsel objected; whereupon the testimony was immediately withdrawn by the solicitor, and, as the Circuit judge says: "No ruling was made by the court, because there was no issue and nothing to decide." The Circuit judge also says that at the close of the examination of this same witness, Mr. Lee stated that he objected to the conversation at the house [that is, the conversation between the witness and deceased, in which the witness had stated what the deceased said to him.] No ruling was made, because the examination was closed. No motion to strike out was made. And we may add that there

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was no occasion *for such a motion, inas-

much as the objectionable testimony had already been withdrawn by the solicitor.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. 381

(Case No. 1052.)

STATE v. WHITE.

(April Term, 1881.)

[1. *Criminal Law* ⇐968.]

At the drawing of talesmen in open court, the sheriff was within the bar, but did not see the drawing of one of the names. *Held*, no ground for arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2423–2432, 2435–2444; Dec. Dig. ⇐968.]

[2. *Criminal Law* ⇐968.]

In a murder case the names of jurors were drawn from the hat by a boy supposed at the time to be under ten years of age, but who was really over that age. *Held*, that this unintentional violation of the rule of court furnished no ground for arresting the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2423–2432, 2435–2444; Dec. Dig. ⇐968.]

[3. *Indictment and Information* ⇐173.]

In an unimportant phrase of the indictment—one that could not possibly have misled and might have been rejected as surplusage—the defendant was wrongly named. *Held*, an immaterial variance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 539; Dec. Dig. ⇐173.]

[4. *Homicide* ⇐135.]

False spelling, which does not make another word representing a different thing, will not vitiate an indictment. Raysor for razor is therefore an immaterial misspelling.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 220; Dec. Dig. ⇐135.]

[5. *Indictment and Information* ⇐32.]

The conclusion "contra formam statuti" does not impair the validity of an indictment for murder at common law.

[Ed. Note.—Cited in State v. Means, 80 S. C. 406, 61 S. E. 898.

For other cases, see Indictment and Information, Cent. Dig. § 128; Dec. Dig. ⇐32.]

[6. *Witnesses* ⇐388.]

Where the purpose is to impeach the credit of a witness by evidence of his contrary statements, he should be distinctly advertised as to the time when, the place were, and the person to whom such contrary statements were made; but it is not necessary to warn him of the purpose to contradict.

[Ed. Note.—Cited in State v. Henderson, 52 S. C. 471, 30 S. E. 477; State v. Hampton, 79 S. C. 182, 60 S. E. 669.

For other cases, see Witnesses, Cent. Dig. § 1242; Dec. Dig. ⇐388.]

[7. *Witnesses* ⇐388.]

Where the witness is the defendant on trial under indictment, this rule applies if the contrary statements are offered to impeach his credit as a witness, although such statements might be admissible under the proper rules, if offered in proof of his admissions relative to the matters in issue.

[Ed. Note.—Cited in State v. Emerson, 78 S. C. 92, 58 S. E. 974.

For other cases, see Witnesses, Cent. Dig. §§ 1233–1242, 1246; Dec. Dig. ⇐388.]

[8. *Witnesses* ⇐337.]

But quere: Can the character of a defendant on trial in a criminal case, who has testified under the permission of the statute, be impeached by attacking in any manner his credit as a witness?

[Ed. Note.—Cited in State v. Robertson, 26 S. C. 119, 1 S. E. 443; State v. Norton, 28 S. C. 578, 6 S. E. 820; State v. Freeman, 43 S. C. 107, 20 S. E. 974.

For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129–1132, 1140–1142, 1146–1148; Dec. Dig. ⇐337.]

[9. *Criminal Law* ⇐761, 823.]

It being conceded that the defendant had inflicted the fatal wound, the trial-judge violated Article IV., Section 26, of the constitution,

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in charging *the jury "that no doubt a cruel, brutal and savage homicide had been committed," notwithstanding a closing admonition that the jury were the sole judges of the facts and should not be bound by his opinion upon them. This provision of the constitution considered and construed.

[Ed. Note.—Cited in Benedict v. Rose, 16 S. C. 630; State v. Summers, 19 S. C. 94; Wood v. Atlanta & C. Air-Line Ry. Co., Id. 581; State v. Jones, 21 S. C. 596; State v. Anderson, 26 S. C. 602, 2 S. E. 699; State v. Davis, 27 S. C. 611, 614, 4 S. E. 567; State v. Addy, 28 S. C. 13, 4 S. E. 814; State v. Norton, 28 S. C. 577, 6 S. E. 820; State v. James, 31 S. C. 235, 9 S. E. 844; State v. Wyse, 32 S. C. 54, 10 S. E. 612; Durham Fertilizer Co. v. Pagett, 39 S. C. 76, 17 S. E. 563; Norris v. Clinkscales, 47 S. C. 512, 513, 515, 524, 25 S. E. 797; State v. Green, 48 S. C. 145, 26 S. E. 234; China v. City of Sumter, 51 S. C. 461, 29 S. E. 206; State v. Johnson, 66 S. C. 34, 44 S. E. 58.

For other cases, see Criminal Law, Cent. Dig. § 1995; Dec. Dig. ⇐761, 823; Homicide, Cent. Dig. § 582.]

[This case is also cited and followed in State v. Henderson, 52 S. C. 470, 30 S. E. 477.]

Before Aldrich, J., Colleton, March, 1880.

The defendant, Gabriel White, was indicted for the murder of Frederick Bellinger in January, 1880. At the trial, the original panel having been exhausted, the names of talesmen including some who resided more than five miles from the court house, were placed in the hat. During the drawing, the sheriff stepped aside to speak to some one, at which moment the name of a juror was drawn, the sheriff not seeing it. These matters were excepted to at the time, and for these causes the array, when completed, was challenged. The names of the jurors were drawn from the hat by a boy eleven years of age, but supposed by all parties at the time to be under ten. The mistake was discovered before any evidence was given, and was at once objected to by the defendant's counsel.

The only point arising out of rulings upon

testimony, relates to the contradiction of the defendant, White, and is fully stated in the opinion.

The defendant was found guilty. He submitted several grounds in arrest of judgment and on motion for new trial, all of which were overruled, and the defendant was sentenced to be hung. He appealed to this court.

The report of the presiding judge upon the points decided, was as follows:

Judge's Report.

In looking over my notes of trial, I find that parts of my charge were written out and I give the language used. I commenced by instructing the jury that the misnomer in the indictment was not fatal, as it is not a material allegation and might have been left out altogether without affecting the indictment. That no doubt a cruel, brutal and savage homicide had been committed. The question is, did the prisoner at the bar kill

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the *deceased with malice aforethought? If he did, it is murder. Murder was then clearly and distinctly defined. I did tell the jury that "so cowardly is this kind of assassination considered by the appointed law-makers of the country, that they have gone so far in order to prevent it, to enact that" and read the clause at page 709 of General Statutes. The jury was dismissed to their room with the admonition that the law makes them the sole judges of the evidence and that the judge can express no opinion on the facts, or if he does they are not bound by it.

As to the talesman, I held that was a question for the jury commissioners and the court could not be delayed to try the issue of distance from the court-house, which might involve a survey.

As to the boy who drew the jury, his father informed the sheriff that he was under ten years of age; he drew the names from the hat without objection and I ruled that the objection came too late. The drawing was perfectly fair in the presence of the court.

I am not aware that the sheriff was absent from the hat while the names were being drawn, but am certain that he did not leave the court room or go outside of the bar.

As to the spelling of the word razor, I held it was the same sound and overruled the objection. No one was misled.

I made no direction under the statute of James—it was simply used as an illustration.

The appeal was taken upon the same grounds submitted to the court below for new trial and in arrest of judgment, and are substantially stated in the opinion of this court. The first seven were relied upon on the motion for arrest of judgment, and the remaining two were the grounds for a new trial.

Messrs. Tracy & Tracy and Rice & Rice, for appellants.

Mr. Solicitor Gantt, contra.

July 14th, 1881. The opinion of the court was delivered by

McIVER, A. J. The defendant was indicted for the murder of Frederick Bellinger, by

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cutting him with a razor, and, upon *his conviction, submitted motions for a new trial and in arrest of judgment upon numerous grounds set out in the "case." The Circuit judge refused the motions, whereupon this appeal is brought, based upon the same grounds. We propose to consider only those which were relied upon in the argument here, and which are as follows:

1. Because three of the talesman drawn to supply deficiencies in the jury resided more than five miles from the court-house, and one of them was placed upon the jury which tried the case.

2. Because the sheriff was not actually present and did not see the drawing of all of the talesmen.

3. Because the names of the jurors were drawn from the hat by a boy over the age of ten years.

4. Because the indictment charged that Frederick Bellinger died from wounds inflicted on Gabriel Bellinger.

5. Because the indictment charged that the fatal wounds were inflicted with a "raysor" and not with a razor.

6. Because the indictment was an ordinary indictment for murder at common law, and would not support a conviction under the statute of 1 Jac. 1, for stabbing and thrusting, "as was directed in the judge's charge."

7. Because the proof of "cutting" would not support a conviction for "stabbing and thrusting" under that statute, "as charged by his Honor."

8. Because the testimony of James Campbell, introduced for the purpose of contradicting Gabriel White, as a witness, was improperly admitted, inasmuch as White was not warned before the question was put, that the purpose was to contradict him, and was not advertised of the place at which it was alleged he had made a different statement.

9. Because the Circuit judge, in his charge to the jury, expressed his opinion, in very decided terms, as to the character of the homicide, in violation of the provisions of the constitution.

As to the first ground we do not think it necessary to make any observations, inasmuch as we are compelled to grant a new trial upon another ground, and, as the law in this respect has been changed, the same question cannot very well arise upon another trial.

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*2. The second ground cannot be sustained, for it appears that the sheriff was within

the court-room, and the Circuit judge says, "did not go outside the bar" while the drawing was going on. This, we think, was sufficient, and that it is not necessary that each of the three officers named in the statute should, at every moment of time during the progress of the drawing, have his eyes fixed on the hat or other receptacle from which the names of the jurors are drawn. The sheriff was within reach and where he could see what was going on; and probably one reason for the requirement that three officers should attend at the drawing was to provide against the very thing here complained of—the momentary inattention of one of them—inasmuch as that was likely, if not almost certain, to occur in every instance.

Again, the statute (December 24th, 1878, 16 Stat. 803), does not require that each of the officers there mentioned shall personally inspect each name as it is drawn; it simply requires the jury commissioner "to attend in open court, together with the clerk of the court and the sheriff," and under the direction of the court to draw such number of jurors as may be needed. All this was complied with in this case. These officers did "attend in open court" and "under the direction of the court" did draw the names of the jurors, and the mere fact that the sheriff, who also had other public duties to perform, stepped aside for a moment to speak to some one, cannot vitiate the drawing. In fact, if the sheriff had been absent from the court-room we do not see how the drawing would have been illegal, for the statute above cited declares that these officers shall proceed to supply the deficiency "in the same manner as the board of jury commissioners are now authorized by law to do," and by the law as it then stood the drawing was to be made by the board of jury commissioners or a majority of them. So that the absence of the sheriff only would leave a majority of the officers designated for that purpose, and we see no reason why a drawing by such majority would not be legal.

3. The next inquiry is, whether the fact that the boy by whom the names of the jurors were drawn from the hat was over ten years of age, is necessarily fatal. There is no statutory requirement upon this subject,

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but the twenty-fifth rule of the Circuit *court does require that the drawing shall be by "a child under ten years of age." This, however, is merely directory, for the purpose of securing an impartial drawing, and when the object is effected we do not see how the failure to comply with the mode prescribed by a mere rule of court for effecting that object, can be allowed to vitiate the whole proceeding. If this requirement were in the form of a statutory enactment, then, of course, no court would have the power to dispense with it. But rules of court are designed simply to secure the orderly and proper conduct of business, and it is not so essentially necessary that they should be observed as statutes, for the court may, upon proper occasions, suspend them or dispense with their strict observance. By Rule 25, it is required that "upon the trial of any person charged with an offence for which the law requires that he should be arraigned, the prisoner shall be placed in the dock." Now, surely it would not be contended that the failure to comply with this requirement would vitiate the whole proceedings.

It is not suggested, even, that any injury resulted to the prisoner from the accidental and unintentional failure to comply with this rule, and, on the contrary, the Circuit judge reports that the drawing was perfectly fair and impartial. Indeed, all parties supposed at the time that the rule was being complied with strictly. Even the father of the boy who drew the jury believed he was under ten years of age, and it was not until afterwards that he discovered his mistake by an inspection of the record, which showed that the boy was, in fact, eleven years of age. This ground cannot be sustained.

4. The next question is, as to the variance in the indictment, caused by a clerical error, doubtless, in substituting "Gabriel" for "Frederick," in one part of the indictment. The portion of the indictment in which the variance occurs, reads as follows: "That Gabriel White, * * * in and upon one Frederick Bellinger, * * * did make an assault, and that the said Gabriel White, with a certain raysor, of the value of one dollar, which the said Gabriel White, in his right hand, then and there, had and held, the said Frederick Bellinger, in and upon the left side of the neck, and in and upon the

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right arm, (of him, the *said Gabriel Bellinger,) then and there feloniously, willfully, and of his malice aforethought, did strike, thrust and cut, giving to the said Frederick Bellinger, then and there, with the raysor aforesaid, in and upon the left side of the neck, and in and upon the right arm of him, the said Frederick Bellinger, two mortal wounds," &c.

It is very manifest that the error, to which exception is here taken, is purely clerical, but still this would be fatal if it occurred in a material part of the indictment and in any way obscured the sense of the passage in which it occurred, or even tended to mislead the accused as to the precise nature or character of the charge which he was called upon to answer. Here, however, that portion of the indictment in which the error occurs might very well have been left out as surplusage, for, without it, all the facts material to the charge brought against the accused are well and sufficiently stated, and it is impossible that the accused could have been misled as to the nature or character of the charge which he was called upon to answer,

or as to any of the details respecting it. Omit the words in parenthesis, in the foregoing extract from the indictment, and there remains enough to show clearly that the accused was called upon to answer a 'charge of murder committed on the person of Frederick Bellinger, by cutting him on the neck and on the arm with a razor, and the insertion of these words could not tend, in the least degree, to obscure the sense of the passage in which they occur, or to leave any doubt upon the mind of the accused, either as to the nature of the crime with which he was charged or of the particular details attending its commission. We think, therefore, that there is nothing in this ground. 1 Chitty on Cr. L. 173, 295, 296; 1 Leach 109; Rex v. Dowlin, 5 T. R. 311; State v. Wimberly, 3 McC. 190.

5. The next question is of a kindred character, and depends upon the same general principle. The misspelling of the word "razor"—the instrument with which the wound was inflicted—cannot vitiate the indictment. The rule laid down in 1 Bish. on Cr. Pro., § 357 (2d ed.), is that a clerical error, if not of such a character as would mislead a person of common understanding, will not vitiate an indictment. It seems to be well es-

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tablished *that mere false spelling which does not alter the meaning of the term, and does not make another word different from that intended, will not vitiate an indictment. As, for instance, in 1 Leach 134, 145, where "undertood" was used for "understood," "receivd" for "received." In State v. Molier, 1 Dev. 263, "sive" for "sieve." In State v. Shepherd, 8 Ired. 195, "twelfth" for "twelfth." In State v. Hedge, 6 Ind. 330, "fifty-too" for "fifty-two," and in State v. Crane, 4 Wis. 400, "assalt" for "assault;" in all of which cases the misspelling was held to be immaterial.

The case of State v. Caspary, 11 Rich. 356, is not in conflict with these cases, for there, by the misspelling, another word different from the one intended was formed. In that case the indictment was for bastardy, and the word "father" was written "farther," and the judgment was arrested, but in that case it is said "clerical and grammatical errors which do not affect the sense will be ordinarily disregarded, but where the omission or addition of a letter makes a change of the word, so as to make another word, it becomes material when it occurs in certain parts of an indictment," and it was suggested that if the word had been written "faether," the result would have been different, "for that would not be a different word."

There is an old case decided in North Carolina about the beginning of the present century, (State v. Carter, N. C. Conf. 210, by Cameron and Norwood,) which seems to be in conflict with the position above taken. In that case, in an indictment for murder, in describing the locality of the wound, the word "breast" was written "brest," and the error in spelling was held fatal on a motion in arrest of judgment. That case, however, was decided by a divided court and no authorities were cited to sustain the decision; it does not appear to have been recognized since, and, on the contrary, is directly in conflict with two subsequent cases in the same state, (State v. Molier and State v. Sheppard, supra,) and it is expressly disapproved by that eminent author, Bishop, in his work on Criminal Procedure, Vol. I., § 354, 2d edition. We cannot, therefore, regard the case as entitled to any weight.

Now, in the case under consideration, the misspelling of the word "razor" does not re-

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sult in the formation of another word, *for we know of no such term in the English language as "raysor," and even if it be true, as asserted in the argument, although there is no evidence of the fact, that the word "Raysor," is a proper name, still we do not think that this would affect the question, for the misspelling, to make it fatal, must be such as to constitute another word designating a thing and not a person. If, for example, in an indictment for murder the weapon used should be described as a "double-barreled shot-gunn," we do not think the additional "n," in spelling the word "gun," would be fatal because there happen to be persons known by the name of "Gunn."

6. The next ground seems to be based upon a misapprehension of the judge's charge. He says that he only referred to the statute of 1 Jac. 1, by way of illustration and not as being the law under which the accused was being tried. There is nothing, therefore, for this ground to rest upon.

7. So, too, with the seventh ground. It is very manifest that the indictment was not framed under that statute, but was an ordinary indictment for murder at common law, and the conclusion, "contrary to the form of the statute," cannot impair the validity of the indictment, as such conclusion may be rejected as surplusage.

8. The next inquiry is as to the competency of the testimony of the witness James Campbell. It seems that when the prisoner was on the stand he was asked if he had not said, on January 15th, 1880, that "he would have to cut somebody," and that he denied saying so. When Campbell was offered as a witness to prove that he had made use of such language, objection was made upon the ground that the proper foundation for contradicting White had not been laid, inasmuch as when he was asked the question as to whether he had used such an expression, he was not warned before he answered of the purpose to contradict him; and, also, because he had not been advertised of the place where he was alleged to have used such language.

Where the purpose is to impeach the credit of a witness by proof that he has made statements out of court contrary to what he has testified at the trial, the rule is that the witness shall be advertised distinctly as to the

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particular circumstances attending *the contrary statement which it is proposed to prove by asking "as to the time, place and person involved in the supposed contradiction." 2 Phillips on Ev. 959; 1 Greenl., § 462. But we are not aware of any rule which requires that the witness should be warned before he answers of the intention to contradict him, in case he denies having made the statement which it is proposed to prove, in any other way than the character of the preliminary questions as to the time when, the place where and person to whom such contrary statement is alleged to have been made, would be likely to do.

So that the only real objection to Campbell's testimony, if it should be considered as offered to contradict the testimony of White and thereby discredit him, is that White was not asked, when on the stand, as to the place where the contradictory statement proposed to be proved was made. This would seem to constitute an insuperable objection to the testimony, if offered with the view to discredit White, for as Mr. Greenleaf, in the same section above cited, after laying down the rule as above stated and giving the reasons for it, says: "This course of proceeding is considered indispensable from a sense of justice to the witness," and we see no reason why a failure to comply with that portion of the rule which requires that the attention of the witness, whom it is proposed to contradict, should be called to the place where the supposed contrary statement was made, would not be just as fatal as a failure to comply with another portion of the rule which requires that the attention of the witness should be called to the person to whom such contrary statement is alleged to have been made; and this every one would concede would be an omission fatal to the introduction of the testimony to contradict the witness.

It is to be observed, however, that White was not an ordinary witness but was the party accused and, under the statute, was only permitted "to testify as to the facts and circumstances of the case," (Gen. Stat. 517,) and it may admit of grave question whether his character could be impeached either in the manner suggested or in any other way; but as this is an important question not raised in the record and not argued in this

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case, we do *not propose upon this occasion to do more than merely suggest the question, without undertaking now to decide it.

There is, however, one view under which the testimony of Campbell might be admissible. White being the party accused, it would be competent to prove any statement or declaration previously made by him relative to the matters in issue, subject, of course, to the rules regulating evidence of confessions or admissions and subject also to the rule as to evidence in reply, even if when on the stand he had been asked nothing about such previous statements or declarations, or if he had not been put upon the stand at all. What the purpose was in introducing Campbell as a witness is not very clear from the statement of the case furnished us, but we infer from the argument here that the object was to impeach the credit of White as a witness. If so, his testimony would have been incompetent upon the ground that the attention of White was not called to the place where the supposed contradictory statement was made, even if it should be regarded as competent in any way to impeach the credit of a party accused when offered "to testify as to the facts and circumstances of the case."

9. The only remaining inquiry is as to the effect of the Circuit judge expressing his opinion, in his charge to the jury, as to the character of the homicide. The Constitution, Art. IV., § 26, declares that "judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." This clause of the constitution has been construed in two cases (Redding v. Railroad Company, 5 S. C. 69), in which, in speaking of this section, it is said: "Its sole intention was to prevent judges from forcing upon juries their own convictions as it regards matters of fact. The juries are the judges of such matters and cannot properly look to the court for a controlling view of the proper conclusions of fact, nor can the court, on the other hand, employ its influence over the minds of the jurors to force upon them its conclusions in such cases." In State v. Green, 5 S. C. 66, it is said: "We are not to be understood as holding that a judge, in his charge to the jury, is to be confined to a mere narration of the evidence. While he is not as liberty to give his conclusions on any particular portion of the testimony, nor the

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*result of his judgment as to the whole, he is not restrained from comparing the various parts of it, that the jury may have before them, in as concise a form as possible, the issues upon which they are to pass, so that they may be the better enabled to apply the law to the facts presented in the cause."

While we would not be disposed to use altogether as strong terms as are employed in one of the above extracts, certainly not in reference to the case under consideration, we agree in thinking that the real object of this clause of the constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge, whose position would very naturally add great weight to any opinion he might express upon any question of fact arising in a case. While, therefore, the

judge is not expected to confine himself to a mere statement or repetition of the testimony as it was delivered, but may place it before the jury in the order in which it relates to the propositions which it is adduced to support or contradict, by pointing out the questions of fact which arise and calling the attention of the jury to the evidence applicable to such questions, yet he should carefully avoid expressing any opinion which he may have formed from the facts, leaving it for the jury to draw their own conclusions unbiased by any impressions which the testimony may have made upon the mind of the judge.

In this case there does not seem to be any question as to the fact that the prisoner was the person who inflicted the fatal wounds, and the only question, therefore, for the jury to determine was the character of the homicide. This being the case we think it was a violation of the rule for the judge to say to the jury "that no doubt a cruel, brutal and savage homicide had been committed." This certainly was expressing to the jury, in very decided terms, the opinion which the judge had formed from the testimony of the character of the homicide, and was well calculated to influence the minds of the jurors in the determination of the important inquiries in the case, whether the character of the homicide was such as to make it murder, manslaughter or reduce it to a killing in self-defence. It is very true that no one who knows the distinguished judge who presided at the

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trial of this *case would for a moment suspect that in using this language he had the slightest design to influence the jury, but still its natural, and we may say, its inevitable tendency would be to incline the jury to take the same view of the character of the homicide as that taken by the presiding judge.

The admonition given to the jury at the close of the charge, though eminently proper, "that the law makes them the sole judges of the evidence, and that the judge can express no opinion on the facts, or if he does they are not bound by it," was not, in our opinion, sufficient to do away with the effect of the previous expression of opinion as to the character of the homicide in question. For the jury are not only not bound by any expression of opinion by the judge as to the facts, but the object of the constitutional provision is to preserve the jury from being in any way influenced by the judge's opinion as to the facts, and when, as in this case, a very decided opinion is expressed by the judge as to the real point in issue—the character of the homicide—we think it not unlikely that some or perhaps all of the jury may have been influenced by such an expression of opinion from so high a source, and that, therefore, a new trial should be granted.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the case be remanded to that court for a new trial.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. 393

(Case No. 1053.)

HYATT v. McBURNEY.

(April Term, 1881.)

[1. *Mortgages* ⇐479.]

At the suit of C., owner of a prior mortgage, the Supreme Court of the United States held such mortgage unsatisfied, and directed a foreclosure and sale against the purchasers of the mortgaged land, who were parties to that cause; but H., a mortgagee of the purchasers, was not a party, and his rights were reserved; H. then brought his action in the state court upon the bonds and mortgage held by him, mak-

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ing parties defend*ant his mortgagors, and also C., who, after action brought, but before answer, became, at the marshal's sale, the purchaser of the lands in dispute. The State Circuit judge decreed that the prior mortgage was fully paid and satisfied as to the plaintiff here, (to which finding of fact no exception was taken by C.,) but, in deference to the contrary decision in the United States court, binding the other parties to this action, directed an inquiry whether the plaintiff might not, without difficulty, realize on his bonds, so as to save to C. the land in dispute. *Held*, that the court could not require the plaintiff to pursue any other remedy than the foreclosure, to which he was primarily entitled, under his mortgage contract.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1395; Dec. Dig. ⇐479.]

[2. *Equity* ⇐426.]

Equities between co-defendants may sometimes be adjusted and enforced, but not in disregard of the legal rights of the plaintiff.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1000; Dec. Dig. ⇐426.]

Before Pressley, J., Charleston, March. 1880.

This action was commenced October 15th, 1879, by Mary A. Hyatt and Joaquin Delmonte as executors of Edmund Hyatt, deceased, and Mary A. Hyatt, Mary E. Hyatt and Julia Delmonte, devisees and heirs-at-law of said Edmund Hyatt, against William McBurney, William Hasseltine, Alfred L. Gillespie and Thomas R. McGahan, members of the late firm of Hyatt, McBurney & Co., and Caroline Carson.

In 1856 William A. Carson died, leaving of force a last will and testament, whereby he directed his executors to sell the residue of his estate, and to hold the proceeds in trust for his wife and children, according to the shares as therein specified. By virtue of this power Alexander Robertson and John F. Blacklock only qualified executors, sold a plantation called Dean Hall, in Charleston district, to Elias N. Ball, on March 3d, 1857, for $50,000, of which $35,000 was on credit, secured by bonds and a mortgage to the ex-

ecutors of the premises. In June, 1857, the debts of the estate being paid, the executors transferred these bonds and the mortgage to themselves as trustees of Mrs. Carson and her two children, under the will.

In 1861, Mrs. Carson and her eldest son (who attained his majority in 1863), and Blacklock, the trustee, left Charleston, and were beyond the limits of the Confederate States until after the war. The younger son of Mrs. Carson did not attain his majority until after the war.

On May 7th, 1863, Elias N. Ball, for $100,-

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000, conveyed the *Dean Hall plantation to Edmund Hyatt, William McBurney, William Hasseltine, Alfred L. Gillespie and Thomas R. McGahan, in proportion to their interests in the capitol and profits of the copartnership of Hyatt, McBurney & Co. On May 8th, 1863, Edmund Hyatt released his interest and title to Dean Hall to the partners, and on the same day sold his interest in the firm to the other partners, receiving in payment their bond for $40,000, secured by a mortgage of Dean Hall. About the same time Ball paid to Robertson, trustee, the balance due on his bonds, and the mortgage of Ball was afterwards marked satisfied by Robertson. All of these payments in 1863 were in Confederate treasury notes.

Mrs. Caroline Carson, after the war, being then a citizen of New York, and having purchased her sons' interest in the Ball bonds and mortgage, brought her action against McBurney, and afterwards against the other partners and Ball, for a foreclosure of the Ball mortgage, and to have its satisfaction canceled. See Robertson v. Carson, 19 Wall. 94, and McBurney v. Carson, 9 Otto 569. Hyatt (a citizen of New York) was not made a party to this action, and in holding the mortgage unpaid, and its satisfaction fraudulent, the court say that its decree would not affect Hyatt's right. Decree of foreclosure was rendered.

In 1876 Edmund Hyatt died, and this action was commenced by his executors, heirs and devisees. After complaint filed, but before answer put in, Dean Hall was sold by the marshal under the order of the United States Circuit Court, and purchased by Mrs. Carson, for $5000.

By order of Judge Aldrich, it was referred to Master Clancy to take testimony, and upon his report Judge Pressley rendered the following decree:

In this case plaintiffs seek to foreclose their mortgage on Dean Hall plantation, which secures a debt due them by McBurney & Co. Their co-defendant, Mrs. Carson, held an older mortgage on said plantation, which one of the executors to whom the mortgage was given, satisfied during the late war. That satisfaction was set aside as fraudulent and void by the Supreme Court of the United States, in a case to which McBurney & Co. were parties, but plaintiffs

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here were not parties to *that case. I find here not a shadow of fraud, either in the circumstances attending the said satisfaction, or in the nature of the payment, and the very high character of all parties to that transaction, would rebut even strong proof of fraud, if such had been produced in the case. In the absence of all proof in that respect, I follow the decisions of the Supreme Court of this state, and hold that plaintiffs have a valid mortgage on said plantation, discharged of the said older mortgage.

But the obligors of the bond which plaintiffs' mortgage secures, being parties to the decision of the United States court, are bound by it. It is a final adjudication of their rights, and I am bound to respect it. In doing so I must give it full effect if that can be done without impairing the lien of the plaintiffs. They are not entitled to enforce payment of their bond out of property which the said decision gives to Mrs. Carson, if they can, without difficulty or expensive litigation, enforce payment by the obligors, who are bound by the said decision. Were I to decree that, my profession of respect for that decision would be only a flimsy pretence.

It is, therefore, ordered that this case be re-committed to Master Clancy, to take testimony and report whether the plaintiffs can, without difficult or expensive litigation, procure payment from the obligors of said bond otherwise than by the foreclosure of their said mortgage.

The code, as construed by the Supreme Court of this state, requires that every case, without regard to the pleadings be decided according to right. To that end leave must be granted to amend the pleadings, even after the hearing. If Mrs. Carson be advised that amendment of her answer be necessary, leave to amend it according to the claim set up by her at the hearing, is hereby granted.

From this decree the plaintiffs appealed to this court upon the grounds—

1. That his Honor was in error in holding that the plaintiffs are not entitled to foreclose their mortgage until it is ascertained that they cannot in some other way make their money, for such ruling in effect alters and changes the contract between the par-

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*ties and deprives the plaintiffs of the benefit and advantage of their security.

2. That such a defence, if it could have been entertained at all, came too late upon the hearing of the cause upon the merits, and that his Honor erred in allowing Mrs. Carson leave to amend her answer "according to the claim set up by her at the hearing."

Upon the points decided by this court, an abstract of the arguments is given.

[For subsequent opinions, see 17 S. C. 143; 18 S. C. 199.]

Messrs. McCrady & Son, for appellants.

1. The United States court did not give this property to Mrs. Carson; it only held her mortgage to be a subsisting lien. She is now a purchaser and has only such title as the United States courts could give. That decree was understood to be at variance with the decisions of this state, and she was warned what Hyatt could do, and our mortgage being held valid, we clearly have right to foreclose. The Circuit decree permits Mrs. Carson to amend her answer by asserting a claim to a decree against McBurney for that debt to Hyatt, which her land is compelled to pay. But Mrs. Carson has no warranty from McBurney and others, she takes no title through them, and can have no protection in a court of equity as against them. 3 How. 333; 11 Wall. 232. Her authority (Dixon on Subrog. 28) does not sustain her position, Mrs. Carson is not a subsequent creditor, and see Id. 29, and Spears Eq. 37. But the defendants here have not answered and Mrs. Carson, a co-defendant, can have no relief not demanded in the pleadings. 1 Hill Ch. 147; 2 Sch. & Lef. 690. Nor can a decree be made between co-defendants here, because no such decision is required to give the plaintiff his rights. 3 Hare 637; 5 Russ. 45; 27 Beav. 515; 11 Cl. & Fin. 661.

2. But the defence came too late. 9 S. C. 334; 5 S. C. 285. It would make a new case.

Mr. A. G. Magrath, contra.

Hyatt standing simply as a junior mortgagee was no proper party to the case of Carson v. McBurney. The nature of the

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*title of McBurney and his partners has been adjudicated. That is the title which was mortgaged to Hyatt. His rights were reserved, but they were only the rights of a junior mortgagee—to redeem, &c. It is really the old case in Hyatt's name. The property was purchased for the partnership, and as such is bound by the former decree, all the partners in the state being parties. The comity due to the United States court should prevent a different judgment. But Hyatt should be forced to proceed on his bonds, as Mrs. Carson would be entitled to recover from McB. what Hyatt obtained from her land. Dixon on Subrog. 22, 28; 1 Strob. Eq. 52; 1 Hill Ch. 35, 228; 12 Wheat. 594; 93 U. S. 96. And such decree may be awarded between co-defendants. 1 Hill Ch. 147; 2 Sch. & Lef. 710.

July 16th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. In December, 1862, Hyatt, McBurney & Co., of the city of Charleston, purchased from Elias N. Ball a citizen of South Carolina, a certain tract of land known as Dean Hall, situate in Charleston county, at the price of $100,000. This tract had been purchased in 1857 by Ball from the executors of W. A. Carson, deceased. Ball had given his bond for the purchase money, with a mortgage of the premises to secure its payment. This bond and mortgage had been satisfied with the executors of Carson by Ball about the time he sold to Hyatt, McBurney & Co.

A short time after this purchase by McBurney & Co., Hyatt concluded to withdraw from the firm, and he conveyed his interest in the Dean Hall property to the surviving members of the firm, to wit, William McBurney, William Hasseltine, Alfred Gillespie and Thomas R. McGahan. Upon the withdrawal of Hyatt, the firm was found indebted to him some $40,000. For this sum McBurney & Co. gave their bonds, with a mortgage of the Dean Hall land to secure their payment.

After the war, Mrs. Caroline Carson, one of the legatees and devisees of her husband, and who had become sole party interested in the estate, being a resident of the State of New York, instituted proceedings in the United States court, denying that the Ball mortgage had been legally satisfied, (it had

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been paid off *during the war with Confederate money,) and praying that it might be set up against the Dean Hall tract and be foreclosed. Hyatt was not made a party to this proceeding, but the other members of the late firm had been. This case was heard on Circuit and was taken to the Supreme Court. The satisfaction of the mortgage was held fraudulent and a foreclosure ordered. It was expressly stated, however, that as Hyatt had not been made a party, the decree would not affect his rights.

After this foreclosure decree in favor of Mrs. Carson in the United States court, as above stated, and before the sale of the land, Mr. Hyatt instituted this action in the state courts, claiming the foreclosure of his mortgage. To this proceeding Mrs. Carson, being made a party, appeared and set up as a defence the illegality of the satisfaction of the Ball mortgage and also the decree of foreclosure of the United States court as an estoppel to plaintiff's action. In the meantime she had purchased the land under this foreclosure decree.

The case was referred to W. D. Clancy, Esq., one of the masters of the court, to take testimony and report the same. Upon the coming in of this report Judge Pressley found, as matter of fact, that "there was not a shadow of fraud either in the circumstances attending the satisfaction of the Ball mortgage or in the nature of the payment by Hyatt, McBurney & Co. to Ball," and he decreed, as matter of law, that the plaintiff had a valid mortgage on said plantation discharged of the older or Ball mortgage, under which Mrs. Carson claimed.

There has been no appeal from either this

finding of fact or law by the Circuit judge. The judge, however, further decreed "that the obligors of the bond which plaintiff's mortgage secures being parties to the decision of the United States court, are bound by it. It is a final adjudication," says Judge Pressley, "of their rights, and I am bound to respect it. In doing so I must give it full effect, if that can be done without injuring the lien of the plaintiffs. They are not entitled to enforce payment of their bond out of property which the said decision gives Mrs. Carson, if they can, without difficulty or expensive litigation, enforce payment by the obligors, who are bound by the said decision. Were I to decree that, my profession of re-

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spect would be only a *flimsy pretense. It is therefore ordered that this case be recommitted to Master Clancy to take testimony and report whether plaintiffs can, without difficulty or expensive litigation, procure payment from the obligors of said bond otherwise than by foreclosure of said mortgage. The code, as construed by the Supreme Court of this state, requires that every case, without regard to the pleadings, be decided according to the right. To that end leave must be granted to amend pleadings even after the hearing. If Mrs. Carson be advised that amendment of her answer be necessary leave to amend it according to the claim set up by her at the hearing is hereby granted."

The plaintiffs appealed, and the appeal brings up the correctness of this position of the decree.

The Circuit judge held that the mortgage under which Mrs. Carson claimed had been satisfied; that the mortgage of the appellant was a valid and subsisting lien on the plantation and expressly discharged from the older mortgage of Ball. Under these circumstances, we cannot see how the appellants, if they demand it, can be denied their right to foreclose their mortgage. This was the contract between the parties, and it belongs to a class of contracts which can be specifically enforced through the courts.

The mortgage of the appellants did not give them the right to pursue other property of the mortgagor, but it gave a specific lien on the Dean Hall plantation; none other. The contract was, that under this mortgage the mortgagee should have the right through the courts to a decree of sale of that plantation on failure of the mortgagors to meet their obligation. The decree denies this right, and requires the appellants to give up the lien which they contracted for, and to pursue property over which they have no lien.

The action of the appellants is primarily an action in the nature of an action in rem. If they do not obtain a judgment by which the specific property embraced in the mortgage is set apart for the payment of their debt, they can only have a general one on the bonds of the mortgagor, upon which they would be compelled to issue executions, so as to reach such leviable property of the respondents as they might be able to find. In

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other *words, the contract made by the parties themselves is ignored and a new one substituted by the court.

As has already been stated, the Circuit judge found that the mortgage under which Mrs. Carson claims had been paid off and extinguished by Ball, the mortgagor, before he conveyed to Hyatt, McBurney & Co., and that the mortgage of the appellants was the only valid lien upon the land. Mrs. Carson has not appealed from this portion of the decree. These facts, then, stand as established before this court, and cannot now be disputed by her. Such being the fact, much of the argument, pressed with great zeal and force by her counsel, is inapplicable and cannot be considered, because the questions to which it was addressed are not before the court.

The only question before the court is, was the Circuit judge in error when he declined to allow the appellants the benefit of the remedy which they sought, and which the facts of the case, as found by the Circuit judge and admitted, so far as this case is concerned, by all of the parties, including Mrs. Carson, entitled them to demand? Was the Circuit judge in error in denying to appellants this remedy and in turning them over to another, which the appellants did not seek, and are now unwilling to receive, being different from that for which the parties contracted?

Sometimes there may be equities between defendants which should be adjusted, and when they properly arise in a case the court has power, under the code, to enforce them; but in endeavoring to have justice done between defendants, the legal rights of the plaintiffs should not be disregarded and overthrown.

What is the equity of Mrs. Carson in this case, to which the rights of the appellants have been subordinated? The decree fails to furnish any tangible equity upon which the court can found a judgment in her favor. She does not claim that appellants have a lien upon two funds, either of which would satisfy appellants' debt, and that she has a lien upon one of these, and, therefore, that appellants should be thrown upon the other. She does not show that she has paid to appellants a debt to which the doctrine of subrogation would attach. No principle of recognized equity is invoked. Her only claim

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is that the United *States court has previously held that as between herself and the other defendants her mortgage was good. To that decision, however, the appellants were not parties, and the court, in pronouncing judgment, expressly declared that it

would not bind the appellants. This decision, therefore, is not res judicata as to them, and it has no binding force here.

Now, while we have a profound respect for the United States court, and admire the learning and ability which has always characterized its decisions, and while we would most cordially yield to its authority in a case where all parties interested in the question acted upon were before the court, yet in a case like this, where all the parties in interest were not before the court, and where the rights of the absent parties were expressly reserved, and where the matters in issue have since been adjudicated by our own courts, with all parties interested present, from which adjudication there has been no appeal, we feel constrained to sustain that judgment, although it is different from that of the United States court.

We think that the appellants, by virtue of the Circuit decree, which held that the mortgage of appellants was the only lien upon the land in question, and from which respondents have not appealed, became entitled to have said mortgage foreclosed, according to the usual mode in such cases, and that it was error in the Circuit judge to postpone this established right of appellants to the claim of respondents.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded for such further proceedings as may be necessary to enforce the principles of this opinion.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. *403

*(Case No. 1054.)

STATE v. CLARK.

(April Term, 1881.)

[1. *Criminal Law* ⇨1134.]

This court declined to consider exceptions to a refusal of the Circuit judge to grant a new trial, as they alleged no errors of law.

[Ed. Note.—Cited in State v. Haines, 36 S. C. 514, 15 S. E. 555; State v. Hayes, 69 S. C. 299, 48 S. E. 251.

For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986–2998, 3056, 3067–3071; Dec. Dig. ⇨1134.]

[2. *Death* ⇨61.]

The Circuit judge committed no error in permitting an experienced physician to give his opinion that deceased was dead before a certain train passed over the body, although such opinion was founded upon facts testified to by others, and not upon matters coming under his own observation.

[Ed. Note.—Cited in Easler v. Southern Ry. Co., 59 S. C. 318, 37 S. E. 938; Nickles v. Seaboard Air Line Ry., 74 S. C. 129, 54 S. E. 255.

For other cases, see Death, Cent. Dig. § 80; Dec. Dig. ⇨61.]

[3. *Criminal Law* ⇨921.]

A witness upon the stand repeated a remark made by him when he found a bloody handkerchief in the coat-pocket of deceased—"this looks like he was hurt before the train hurt him;" the presiding judge refused to rule this remark out of the evidence, but in his charge told the jury that they should not regard it. *Held*, that this furnished no ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2206–2209; Dec. Dig. ⇨921.]

Before Hudson, J., Lexington, June, 1880.

The defendant, Squire Clark, was indicted in February, 1880, for the murder of Walter Scott Hook, in Lexington county, on October 8th, 1879. The deceased was found dead upon the railroad track at day-dawn on October 9th, the body showing unmistakable signs of having been run over by one or more trains of cars. The theory of the state was that deceased was killed before any train passed over the body; the defendant relied upon an alleged insufficiency of proof to establish such fact, or to connect him with the killing. Defendant introduced no testimony.

Dr. W. L. Addy, the eighth witness for the state, testified as follows: Have practiced medicine for thirty years; examined the dead body of Hook; head mashed badly, face not run over, apparently; on the right side of the neck, under the jaw-bone, there was a gash of several inches, as if by a sharp knife; made the post-mortem examination at the depot; I never viewed the spot where the body was found; I heard the description of the blood; if killed by a train the

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blood would be scattered more *than the witnesses have here described, and not pooled; I found no bullet in the body; I give it as my opinion that the body was dead when the train struck it.

Cross-examination.—I say so because the blood was pooled and not scattered along and around; I made no chemical examination of the blood; the appearance of the wound will not enable an expert to tell whether the same was done before or after death; I have not had much experience in surgery.

The matter complained of in the 12th exception is fully stated in the report of the presiding judge.

The defendant was convicted, moved for a new trial, and, it being refused, appealed to this court upon twelve exceptions. It is unnecessary to report the first ten; the others were as follows:

11. Because, it is respectfully submitted, that his Honor erred in ruling that the opinion of Dr. Addy, upon the question as to whether the deceased was alive when the 11 P. M. train passed over the spot where the body was found, was competent testimony, and it is submitted that his Honor, after he heard the answer and explanations by Dr. Addy, should have withdrawn his evidence upon that point from the jury.

12. Because his Honor erred in ruling in the remarks made by the witness, Bieman, to

Capt. Griffith over the body on the morning of October 9th, 1879, in regard to the supposed blood upon the handkerchief found in the coat-pocket of deceased.

The report of the Circuit judge is as follows:

The defendant was convicted, and thereupon moved the Circuit Court in arrest of judgment, and, failing in that, for a new trial, upon the same grounds upon which he has appealed to the Supreme Court, and which are embodied in the "case."

These grounds, twelve in number, all refer to the insufficiency of proof, except the 11th and 12th, which allege errors in the rulings of the presiding judge. The case rested exclusively upon circumstantial evidence, and I omitted nothing, so far as I remember, in my efforts to explain to the jury the rules of law by which they were to be governed in weighing circumstantial evidence. I endeavored specially to impress upon them the fundamental rule that the circumstances estab-

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lished when *taken together must be consistent with the theory of defendant's guilt, and inconsistent with any other hypothesis; and hence if the facts proved could be explained upon the theory of a killing by the engine and cars of the railroad as satisfactorily as upon the theory of defendant's agency in the homicide, he could not be convicted; nor should he be convicted if the facts found left their minds in doubt as to which theory to refer the killing. I further told them that the surrounding facts and circumstances of time, place, &c., made a prima facie case of killing by the railroad train, and that, before they could convict the defendant, they must find from the other evidence in the case, sufficient proof to rebut this presumption and to satisfy them of defendant's guilty agency beyond a reasonable doubt. In every particular I endeavored to throw around the defendant every safeguard vouchsafed to him under the law applicable to the facts of the case.

Two errors in my ruling and instructions are assigned by the defendant's counsel viz., the 11th and 12th grounds on motion for new trial.

Dr. Addy, an experienced physician, made the post-mortem examination of the dead body of Hook, which had been removed from the spot on the railroad where it was first found. That spot and the scene around it he did not see. This medical expert, after listening to the testimony of those who did view the ground, was permitted to give his opinion as to the length of time the body had probably been dead, and whether or not it was probably dead before a certain time when, by the schedule, the first train passed the road that night. This was allowed, because I regarded it a matter peculiarly competent for an expert to testify to, especially an expert who had himself made the post-mortem examination, and had attentively listened to the statements of those who found the dead body, and described its appearance, position and surroundings. But I took special pains, in charging the jury, to say to them that the opinions of experts, whilst competent testimony, were not to be taken by them as proof of facts, but, on the contrary, should be weighed carefully, and with cau-

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tion. Such opinions were often errone*ous, and only constituted evidence for a jury to weight along with the other testimony.

The assignment of error in the 12th ground, I did not think well taken. The witness, Bieman, was present with Hawes and Griffith when they came to the dead body on the track. In giving a description of the body, its condition, the signs of blood, the state of the clothing, &c., he stated that in one coat-pocket on which there was no blood a bloody handkerchief was found, upon the discovery of which he remarked to Captain Griffith: "This looks like he was hurt before the train hurt him." I was asked to rule out this remark, but declined to do it, regarding the exclamation or remark of the witness of no consequence, but the fact discovered as alone worthy of weight with the jury. In my charge I so instructed them, telling them that the fact stated, and not the witness' impression, should be considered by them.

The case was earnestly and ably argued on both sides, and submitted to a very intelligent jury. I refused the motion in arrest of judgment and for a new trial, because I was not made conscious of error in my rulings, and because there was evidence sufficient to sustain the verdict of the jury.

Messrs. H. W. Rice and T. S. Arthur, for appellant.

An expert cannot give an opinion on subjects of general knowledge. 1 Phil. on Ev. 778, 779; 1 Greenl. on Ev. 490; 1 Smith's Lead. Cas. 286; and if the facts are doubtful and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence, what is his opinion in the case on trial, though he may be asked his opinion upon a similar case hypothetically stated. 1 Greenl. on Ev. 492; 1 Whart. & Stille's Med. Jur., §§ 288, 289. Here the jury being fully competent to draw conclusions from facts, the expert should have confined himself to facts. 2 Whart. & Stille's Med. Jur. (3d ed.,) § 1245.

The 12th exception complains of a ruling which was clearly erroneous. The evidence received was the opinion of a non-expert, and was wholly inadmissible.

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*Mr. Solicitor Bonham, contra.

July 16th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The accused has been twice tried—charged with the murder of Wal-

ter Scott Hook. Upon the first trial he was convicted, but a new trial was granted him by the Circuit judge, and now, upon the second, he has been convicted again. Upon this, his second conviction, he moved the court below in arrest of judgment, and failing in that for still another trial, on various grounds. These motions were refused by the Circuit judge, and he now appeals to this court.

His grounds of appeal are twelve in number. The first ten embrace exceptions expressed in different forms, to the finding of the jury as to matters of fact, and they attack the verdict for insufficiency of proof. These have been passed upon by the Circuit judge upon motion for a new trial. The evidence against the accused seems to have been circumstantial entirely. In view of this fact the judge, in his charge, threw every possible safeguard around the prisoner. He appears to have impressed fully upon the minds of the jurors the fundamental rule in such cases —that the circumstances established, when taken together, must be consistent with the theory of the defendant's guilt, and inconsistent with any other hypothesis. Under this charge the jury solved these circumstances against the accused, and pronounced him guilty. We see no error of law growing out of these ten exceptions on the part of the Circuit judge in refusing a new trial, and, therefore, they need not be considered further.

The last two exceptions—the 11th and 12th —assign errors of law in the rulings of the Circuit judge, and are properly before us.

The Circuit judge, in his report of the case, states that Dr. Addy, "an experienced physician, made the post-mortem examination of the dead body, which had been removed from the spot on the railroad where it was found." That spot and the scene around it he did not see, but after listening to the testimony of those who did view the ground, Dr. Addy was permitted by the court to give his opinion as to the length of time the body had probably

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been dead, and whether or not it was *probably dead before a certain train passed the road that night upon schedule time. The ruling of the judge that this testimony was competent, is the basis of the 11th exception.

Mr. Greenleaf, vol. I., Section 440, says: "That in questions of science, skill or trade, or others of like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted as to cause of death or disease or the consequences of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other objects of professional skill; and such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself as proved by other witnesses."

Dr. Addy, as stated in the report, was an experienced physician, and was in law an expert as to all matters embraced within the range of his profession. Had he seen the dead body, therefore, when first found on the railroad track, there could be no doubt that his opinion as to the length of time it had been dead would be competent, on the ground that he was an expert, and this fact is within the range of his profession.

But this principle, as appears from the authority already cited, does not confine the opinion of the expert to facts coming under his own observation alone, but it permits him to found and express his opinion upon facts testified to by others. This was all that was done in this case, and the authority from Greenleaf seems to be directly in point. It fully warranted, in our judgment, the ruling of the Circuit judge as to the competency of Dr. Addy's opinion.

One of the witnesses who was present when the dead body of the unfortunate Hook was found on the railroad track, in giving a description of the body, its condition, the signs of blood, the state of the clothing, &c., stated that in one coat-pocket on which there was no blood, a bloody handkerchief was found, upon the discovery of which, he further stated, that he remarked to the others present: "This looks like he was hurt before the train hurt him." The judge was asked to rule out this remark, which he declined to do, regarding it, as he says, as the mere exclama-

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*tion of the witness at the time, and of no consequence, the fact discovered alone being worthy of weight with the jury.

In his charge he so instructed the jury, telling them distinctly that the fact stated and not the impression of the witness should be considered by them. Even if the admission of this remark, which is the foundation of the 12th exception, was improper, of which we are not satisfied, the judge, in his charge, in effect ruled it out, as he pointedly instructed the jury that they were not to consider it.

The judge, in the conclusion of his report, states that he refused the motion in arrest of judgment and for a new trial, because he was not made conscious of any error in his rulings, and because, in his opinion, there was sufficient evidence to sustain the verdict.

In view of the awful fate impending the accused, we have carefully examined the case, but we see nothing whatever which can be interposed in his behalf. He has now been tried twice. On the first trial the Circuit judge, before whom he was then tried, out of tenderness, no doubt, granted a new trial. Upon the second trial all the safeguards vouchsafed to him by the law were thrown around him by the judge who then tried him. He was again found guilty. We see no error in the rulings excepted to, and there is no

other alternative but that the law shall take its course.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 409

(Case No. 1055.)

STATE v. TONEY.

(April Term, 1881.)

[1. *Animals* ⇐45.]

It is not necessary to a conviction of malicious trespass for injuring a cow, to prove malice towards the owner of the cow. State v. Doig, 2 Rich. 179, recognized and followed.

[Ed. Note.—Cited in Kibler v. Southern Ry., 62 S. C. 270, 40 S. E. 556; State v. Davis, 88 S. C. 238, 70 S. E. 811, 814, 34 L. R. A. (N. S.) 295.

For other cases, see Animals, Cent. Dig. § 125; Dec. Dig. ⇐45.]

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[2. *Infants* ⇐66.]

*The capacity of an infant under fourteen years of age to commit the crime of malicious trespass is a question to be determined from the facts of the case; independent evidence of such capacity is not essential.

[Ed. Note.—Cited in Elkins v. South Carolina & G. R. Co., 64 S. C. 558, 43 S. E. 19; State v. Nelson, 88 S. C. 125, 70 S. E. 445.

For other cases, see Infants, Cent. Dig. § 172; Dec. Dig. ⇐66.]

Before Thomson, J., Sumter, February, 1881.

This was an indictment against Wesley Toney, Reece Toney and Lawrence Toney, for malicious trespass. The report of the presiding judge is as follows:

"The said defendants were indicted for malicious trespass. The act charged was the beating and wounding, against the act of assembly, of a cow of D. E. Keels, the prosecutor. The proof was that on November 1st, 1880, the cow was seen in Wesley Toney's lot or cow-pen. The prosecutor said he was thirty or forty yards from the cow-pen and not seen. He saw some one at the cow-pen—his cow was in the pen. Lawrence Toney and another son of Wesley Toney were there—two dogs there—W. Toney was outside of pen; one or both of the dogs had hold of the cow. The cow was very gentle and tame * * * cow lost parts of both ears from biting, and she could not eat for some time. W. Toney did not seem to do anything. Reece Toney struck cow with a rail; one of the dogs had hold of cow. Reece and the other son were setting dogs on; clapping their hands and halloaing, and keeping cow in pen, &c.

"Wesley Toney, for the defense, said: The cow had been in his field, supposed all night, and he directed Reece Toney to drive the cow out of the field. The cow when driven jumped into the cow-pen—he told Reece Toney to open the bars of the lot, and let the cow out, and the cow then went away. The fences of the field and cow-pen were from four feet to neck or chin high. He said the dogs got on the cow, but denied it was by his orders.

"The age of Lawrence Toney was not proved, but it seemed to be admitted he was not fourteen years of age. He was a well-grown boy, apparently at least over twelve years. The facts in the main were not in dispute; the questions were made under requests to charge presented to the court.

"The jury were charged that this was a

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statutory offence, and *the act of assembly was to be construed strictly. That where by the act the intent constitutes an element of the offence, it must be proved. That express proof of malice against the owner of the animal was not required. That if the prosecutor's cow was willfully beaten and wounded, and the act was unlawful and without excuse, and the owner of the animal known, that the offence of malicious trespass was complete. And the jury were asked as an illustration, would the defendants have done the same injury to a cow of a son or brother, the ownership of the animal being known? That the malice intended by the act could be inferred from the circumstances proved without proving direct malice to the owner of the animal.

"In the case of Lawrence Toney it was left to the jury to determine if malice did not supply age. The prisoner was before them in court, his conduct and acts had been stated in the testimony. Was he conscious that his act was wrongful, or could he discern between right and wrong? If so, he was responsible. That the law looked to capacity for evil as a measure of responsibility as much or more than an infant's having attained the age of fourteen years. Did his acts and conduct show this capacity? Then if guilty he was responsible. The jury found Wesley Toney not guilty. Lawrence Toney and Reece Toney guilty."

Lawrence Toney and Reece Toney appealed to this court upon the following exceptions:

1. His Honor was requested to charge the jury that it was necessary for the state to prove malice on the part of the defendants against the owner of the property alleged to have been injured. His Honor refused to make this charge, and instructed the jury that if at the time the cow was injured they "believed that the defendants knew the owner and connected in their minds the owner with the animal," it was sufficient. The defendants excepted to this as error of law.

2. His Honor was requested to charge the jury that the defendant, Lawrence Toney, was entitled to an acquittal, as according to the testimony he was an infant under the age of fourteen years, and there was no evi-

dence rebutting the presumption of law that he was incapable of committing a crime. His Honor refused to make this charge and the defendants excepted.

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*Mr. Jos. H. Earle for appellant.

There must be proof of malice towards the owner. 14 Rich. 249; 2 Rich. 179; 2 Bish. Cr. L., § 997; 2 East Cr. L. 1072; 2 Leach 594, 595; 3 Dev. & Bat. 130; 7 Ala. 728; 12 Ired. 329; 3 Yerg. 278; 1 Minn. 292; 10 Iowa 115. Lawrence was improperly convicted. 1 Bish. Cr. L., § 368; 4 B. C. 23; Broom's Leg. Max. 233; Archb. Crim. Pl. (8th ed.) 11.

Mr. Solicitor J. J. Dargan, contra.

July 16th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. In this case the defendants were indicted for malicious trespass. The act charged was the beating and wounding, against the act of assembly, a cow of Keels, the prosecutor. The presiding judge was requested to charge the jury that it was necessary for the state to prove malice on the part of the defendants against the owner of the property alleged to have been injured. He was further requested to charge that the defendant, Lawrence Toney, was entitled to an acquittal, as, according to the testimony, he was an infant under the age of fourteen years, and there was no evidence rebutting the presumption of law that he was incapable of committing crime. His Honor refused to charge as requested. The defendants were convicted, and Reece Toney and Lawrence Toney have appealed.

The appeal assigns as error in the judge his refusal to charge as requested upon the two points stated.

The terms used in the act under which these defendants have been indicted and convicted are "unlawfully," "willfully" and "maliciously." These terms are not synonymous, and were not intended to express the same idea. They have each a different signification and import different degrees of guilt. As was said by the learned judge in the case of State v. Alexander, 14 Rich. 249, "an act may be unlawful and so involve legal responsibility, without being either willful or malicious, or it may be both unlawful and willful without being malicious. They constitute an ascending scale in culpability—a legal climax."

All of these elements are necessary to the

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crime denounced in *the act in which these terms are employed, and they must all be proved upon the trial or the defendant is entitled to an acquittal. But what is the true import of the word malicious as used in the act? Does it necessarily embrace the idea of hatred towards the owner of the property injured?

Several authorities have been furnished by the appellant's counsel, both from England and some of the adjoining states, construing statutes in which these words are used, which sustain this view. But in the face of the case of State v. Doig, 2 Rich. 179, we cannot declare that to be the law of South Carolina. In that case Wardlaw, J., said: "Malice is a term of art implying wickedness, and excluding a just cause or excuse. It is implied from an unlawful act, willfully done, until the contrary be proved." Clearly implying that such act may be willful without being actually malicious. In that case the defendant was indicted for breaking down a portion of the canal on Broad river, owned by the state. There was no charge or proof that this was done out of ill-will towards the state, yet he was convicted and punished.

The accepted legal meaning of the term malice, as found in the best lexicographers, is wickedness, and even in the most startling of all crimes—that of willful murder—it is not necessary to show personal ill-will towards the victim of the murderer. Where the heart is devoid of social duty and totally bent on mischief, which may be implied from the character of the act, a party may be convicted even of murder without the slightest proof of personal ill-will towards the deceased.

Under the authorities in this state, then, it would not have been good law for the judge to have charged in this case that defendant could not be convicted in the absence of proof of express malice towards the owner of the cow beat and wounded by the defendants.

This brings us to the second question raised by the appeal. Lawrence Toney was between seven and fourteen years of age. He claimed, through his counsel, that as he was under fourteen the judge should charge "that there was no evidence rebutting the presumption of law that he was incapable of committing crime."

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*It is true at common law an infant under fourteen is prima facie doli incapax, and before he can be convicted it should appear to the court that he is doli capax, and is able to discern between good and evil. 4 Blackstone 24. But this principle when enforced most rigidly, would not have demanded of the presiding judge in this case to have charged the jury that there was no proof before them rebutting this presumption, unless it be sound doctrine, as contended by the appellants, that in a question of this kind there must be direct and positive proof as to the fact of capacity independent and outside of the facts and circumstances of the transaction itself.

Out of tenderness to infants—the case with which they may be misled—their want of foresight and their wayward disposition, no

doubt, the evidence of malice, which is to supply age, should be strong and clear beyond all doubt and contradiction; 4 Bl. Com. 28; Archb. Crim. Pr. & Pl. (8th ed.) 11; but we find no authority for the position that this evidence must be outside of the facts of the offence itself, and must be directed expressly to the question of capacity. There was no error, then, in the judge submitting this case to the jury upon its own facts, leaving it to them to say whether, under all the circumstances, the offence charged had been committed, both as to the actual beating of the cow and the capacity of the parties charged.

It is the judgment of this court that the judgment of the Circuit court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 414

(Case No. 1056.)

DUNCAN, MALONY & CO. v. BROWN.

(April Term, 1881.)

[1. *Execution* ⟸163.]

Notice to set aside an execution should be served upon the real parties in interest; service upon the attorney who renewed the execution is not sufficient.

[Ed. Note.—Cited in Ferguson & Miller v. Gilbert & Co., 17 S. C. 31.

For other cases, see Execution, Cent. Dig. § 475; Dec. Dig. ⟸163.]

[2. *Attorney and Client* ⟸104.]

A stay of execution upon terms is not a grant of affirmative relief to the plaintiff in the execution.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 92, 93, 1020; Dec. Dig. ⟸104.]

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*Before Aldrich, J., Barnwell, July, 1880.

Motion made at Chambers, July 3d, 1880, in behalf of H. M. Myers, executor of Gideon S. Brown (who died in 1878), to set aside renewal execution of Duncan Malony & Co. against G. S. Brown, issued May 11th, 1880, by Robert Aldrich, as attorney for the plaintiffs, upon grounds affecting the regularity and validity of the renewal. The opinion states the case.

Mr. J. C. Davant, for appellant.

Mr. Robert Aldrich, contra.

July 16th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. In this case a motion, after notice, was made before his Honor, Judge Aldrich, to set aside an execution upon certain grounds, not necessary now to be noticed.

The notice of the motion, with the affidavits upon which it was made, was served upon Robert Aldrich, Esq., the attorney who had renewed the execution in question, but no notice or summons of any kind in connection with the proceeding had been served upon the parties plaintiff therein. Upon these facts being brought to the attention of the judge he declined to hear the motion, upon the ground that the proper parties were not before the court—the judge holding that the service upon Mr. Aldrich alone was no service upon the parties interested in the execution, and he made the following order:

"The motion is refused, with ten dollars costs to the plaintiff. This is the second motion to stop the sale, made just before the day of sale, which necessarily increases the costs and expenses, and, as the property liable is said to be scant, it is not just to increase the expenses. But as there may be merit in the motion, and no great harm can result by a short delay, it is further ordered if the moving party do pay the costs of this and the expenses of the sales heretofore advertised, the sheriff be restrained from making the sales advertised, and, upon notice to the parties in interest, the motion be set down for hearing on Wednesday, July 14th, 1880."

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*To this order Myers excepted, and has appealed to this court upon the following grounds:

"1. That his Honor erred in holding that the service of the motion papers is not the service required by law.

"2. That his Honor, in effect, grants affirmative relief against the moving party in the terms imposed for a rehearing of his motion, and erred therein.

"3. That the renewal of the execution was contrary to law, the execution void, and his Honor erred in refusing to set it aside."

Section 432 of the code provides that "where a party shall have an attorney in the action, the service of papers shall be made upon the attorney instead of the party." This section is invoked in behalf of the appellant in this case.

In our opinion this section applies only after action begun by the service of summons or notice, as the case may be, upon the proper parties. After these have been brought into court then service of all subsequent papers may be made upon the attorneys. But it would be extending the operation of this section far beyond its legitimate purpose and intent to hold that the service of an original summons or notice on the supposed or actual attorney of a party is sufficient to institute original proceedings against him and make him a party to the cause.

For the appellant, then, to get relief under this section, it should appear that action had already commenced against the respondents by the service upon them of the proper no-

tice; that they had already been made parties to the proceeding, and that the notice now served was a notice as to some further proposed action in the progress of the case, and, also, that Mr. Aldrich was their attorney. Do these facts appear? The proceeding here is by motion, and is in the nature of a special proceeding, as contra-distinguished from an ordinary action. Its purpose is to set aside an execution alleged to have been illegally issued. The proceeding is outside and beyond the execution and is intended to assail it. To this proceeding the respondents are necessary parties, and they were entitled to have notice served directly upon them before they could be regarded as in court, or before they could be represented either in person or by attorney.

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*Mr. Aldrich was their attorney in the execution, but this does not make him their attorney in this new proceeding, which is intended to attack the execution. With the entry of the execution the duty of Mr. Aldrich ceased in that case. Treasurers v. McDowell, 1 Hill 185 [26 Am. Dec. 166]; Poole v. Gist & Roddy, 4 McC. 259; Hyams v. Michel, 3 Rich. 303.

Such being the fact, it is apparent that the real parties in interest here have had no legal notice whatever, and they are not properly before the court. We see no error, therefore, in the ruling of the Circuit judge that after judgment obtained and execution entered, the duty of the attorney ceased, and in any subsequent proceedings to set aside the judgment and execution, or stay the same, notice must be served on the real parties in interest. This not having been done, he was right in declining to hear the motion on its merits.

The second exception complains that the presiding judge, in effect, granted affirmative relief against the appellant in the terms imposed for a rehearing of the motion. We do not so understand the order. The judge held that the motion, in its present status, could not be heard for the want of parties, but as there might be merit in it he provided for a rehearing upon notice to the proper parties, and in the meantime he stayed the execution upon terms, allowing the appellant the privilege of availing himself or not of the order, as he might be advised, to renew his motion. We do not see any affirmative relief in this to the parties who were not before the court and against the appellant.

The third exception raises a question as to the validity of the execution. In our opinion the execution was not before the court. The motion was dismissed, and properly dismissed, on account of defect of parties. In the absence of these parties any adjudication of the merits of the motion involving the validity of the execution, would have been nugatory. It would have been an ex parte judgment, having no effect whatever on the rights of the respondents.

The judgment of this court is that the order of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. *418

*(Case No. 1057.)

BENNETT v. SANDIFER.

(April Term, 1881.)

[*Appeal and Error* ⇐⇒898.]

In a trial de novo in the Circuit Court on appeal by the defendant from the judgment of a trial justice, the plaintiff is entitled to open and reply; and the denial of this right is appealable to this court.

[Ed. Note.—Cited in Mitchell v. Fowler, 21 S. C. 300; Kennington v. Catoe, 68 S. C. 475, 47 S. E. 719.

For other cases, see Appeal and Error, Cent. Dig. § 3665; Dec. Dig. ⇐⇒898.]

Before Thomson, J., Barnwell, October, 1880.

The opinion states the case.

July 18th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This case was submitted without any argument on either side. The brief itself is very imperfect and perfunctory, but we gather from it that Miles Bennett sued Riley Sandifer in a trial justice court on an account of $36, the price of six thousand brick, at $6 per thousand, and got a verdict for $15, from which the defendant appealed to the Court of Common Pleas. When the case was reached on the call of the calendar, both sides insisted on the right to open and close. Judge Thomson denied this right to the plaintiff and accorded it to the defendant, for whom the jury found. The plaintiff appeals to this court and moves for a new trial, on the ground of error in the said ruling of the Circuit judge.

The general rule certainly is that the plaintiff who makes a claim shall have the opening and reply, unless the defendant shall admit the plaintiff's cause by the pleadings and take upon himself the burden of proof, under Rule 59 of the Circuit Court Rules, p. 32. We see nothing tending to show that such was the course here. Does it alter the case that this was an appeal from a trial justice court, in which the defendant was the appellant? The same rule above cited, also declares that "on all motions or special matters, either springing out of a cause or otherwise, the actor or party submitting the same to the court, should, in like manner, begin and close."

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*It does not appear upon what ground the judge accorded the position of "actor" to the defendant. We are not informed as to the character of the defence, whether it was simply a denial of the plaintiff's account, payment of it, or a counter claim. It does, however, appear that the case involved more than $10, and that it was submitted to a jury; and we, therefore, infer that the appeal was upon an issue of fact and "not upon a question of law only," which would have carried it before the judge on the evidence taken below. Assuming, then, that it was an issue of fact, the effect of defendant's appeal was simply to give a new trial in the Circuit Court. Code, § 369. In such case the process originally issued, but not the evidence taken below, shall be returned to the court above, and the "issue shall be tried in the same manner as in actions commenced in the Circuit Court." Code, 4th subdiv., § 383. Although this trial "de novo," was the effect of defendant's appeal, the plaintiff was still the "actor" and entitled to open and close his case. How else could the case be tried? Such is necessarily the practice in all new trials as in original trials, upon the universal principle that he who affirms must prove, and that no one can be required to prove a negative.

Whether the ruling complained of was such an error of the law as may be corrected on appeal to this court, is not so clear. There is a class of rulings which must necessarily be left to the discretion of the Circuit judge, such as continuing cases, granting further time to answer, &c. There are others not final, but administrative in character, which are not appealable to this court. The amendment of the code (15 Stat. 868), gives this court the right to review final judgment, and any intermediate order "necessarily affecting the judgment." It is not always easy to decide whether a ruling necessarily affects the judgment. It is especially difficult if it does not touch directly the question of law or fact constituting the cause of action or the defence, but is one of those rulings made in the progress of a case relating to its conduct and the order of proceeding falling under the general head of practice. Can we say that it would "necessarily affect the judgment," whether the plaintiff or defendant had the opening and reply? Yet the right is considered, by those who know best, as of great consequence. Orders

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may be made as to the mode of *trying a case, which would as certainly "affect the judgment" as if they related directly to the law and evidence involved.

In the case of Blakely & Copeland v. Frazier, 11 S. C. 134, this court held that a defendant had the right to have the venue changed to the county where he resided, and that the refusal to grant an application for that purpose was an error in a matter involving a substantial right material to his defence, and appealable. The court says: "The jurisdiction of this court extends to all appeals from intermediate orders and final judgments in actions where such order or judgment involves the merits. 15 Stat. 868. An order involving merely the exercise of discretion on the part of the court making it, is not appealable, as error of law cannot be alleged as against such an order. 1 Wait's Pr. 465. When, however, the order affects a substantial right, necessarily affecting the judgment, it must be regarded as affecting the merits. The term 'merits' is not very clearly defined. It certainly embraces more than the questions of law and fact, constituting the cause of action or defence. As it regards the principle of construction, the necessary means of attaining an end stand upon the same grounds of privilege as the end itself. * * * Whatever can be regarded as affecting the necessary means of obtaining a judgment, must be regarded as affecting the judgment itself."

We think the general rule which gives to the plaintiff the opening and reply "in actions commenced in the Circuit Courts" should have been held to apply to "the new trial"—the mode provided by the law to give to the appellant the benefit of his appeal. Such is the usual course in ordinary new trials. The ruling deprived the plaintiff of a substantial right material to his case, and thereby necessarily affecting the judgment. Johnson v. Wideman, Dud. 327; Brown v. Kirkpatrick, 5 S. C. 268.

The judgment of this court is, that the judgment of the Circuit Court be reversed and the case remanded to that court for a new trial.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. *421

*(Case No. 1058.)

SHULER v. BULL.

(April Term, 1881.)

[1. *Bastards* ⇐3.]

The principle expressed in the maxim pater est quem nuptiæ demonstrant should have full influence, but the question of the paternity of a child born in wedlock is one of fact to be determined upon competent evidence, and such evidence is not limited to the proof of impossibility of access.

[Ed. Note.—Cited in Wilson v. Babb, 18 S. C. 69, 72.

For other cases, see Bastards, Cent. Dig. § 5; Dec. Dig. ⇐3.]

[2. *Wills* ⇐634.]

Personal property was bequeathed by will to the executors to hold in trust for the use of

A during life, and after her death to be equally divided among her children. *Held*, a vested remainder in the children.

[Ed. Note.—Cited in Tindal v. Neal, 59 S. C. 11, 14, 36 S. E. 1004.

For other cases, see Wills, Cent. Dig. § 1495; Dec. Dig. ⇦634.]

[3. *Husband and Wife* ⇦8.]

A release of a child's share in such vested remainder, executed by her husband in 1867, was effectual to release the wife's interest upon the falling in of the life-estate in 1874, both husband and wife surviving. Cases reviewed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 21; Dec. Dig. ⇦8.]

[4. *Constitutional Law* ⇦93.]

The constitutional provision, giving the property of a married woman to her as her separate estate, did not affect the marital rights of the husband, vested and exercised before the adoption of the constitution, in 1868.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 200; Dec. Dig. ⇦93.]

Before Thomson, J., Orangeburg, May, 1880.

Action commenced September 9th, 1874, by Zipporah R. Shuler, against William H. Bull and Waring Bull. Pending suit Waring Bull died, and the action was continued against W. H. Bull alone. The nature of the plaintiff's claim and of the defences are stated in the opinion. The release relied on by defendant was executed in 1867, during the pendency of a suit instituted in the Court of Equity in 1866, by Lincey M. Burkett, Dorcas E. Griffin, D. G. B. Shuler and Z. R. Shuler, his wife, against William H. Bull and Waring A. Bull, executors and trustees under the will of William Bull, deceased, for account, payment of interest, &c. This release was as follows:

Know all men by these presents: That we, Lincey M. Burkett, Dorcas E. Griffin, David G. B. Shuler, and Zipporah R., his wife, do hereby release and forever discharge William H. Bull and Waring A. Bull from all liabilities, debts, claims or actions or suits at law or in equity, which he is under or liable to us, or either of us, by reason of any bequest or legacy to Lincey M. Burkett and her children, under the will of William Bull, the father of the said Lincey M. Burkett and

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William H. *Bull, of which the said William H. Bull and Waring A. Bull were the executors and trustees, or by reason of any receipts by them received, or payments or investments by them made in regard to the same from the beginning of the world to the date of these presents.

Witness our hands and seals this fourteenth day of January, anno domini one thousand eight hundred and sixty-seven.

Lincey M. Burkett. [L. S.]
Dorcas E. Griffin. [L. S.]
David G. B. Shuler. [L. S.]
Zipporah R. Shuler. [L. S.]

It was duly witnessed. D. G. B. Shuler and his wife, Zipporah, both survived Lincey M. Burkett, who died in August, 1874. Other facts are stated in the opinion.

The Circuit decree was as follows:

These questions, in order, are: The illegitimacy of the plaintiff, the alleged investment of the funds in Confederate securities, and the release. The defendant excepts, because, as he alleges, the testimony proves the illegitimacy of the plaintiff, and that the referee erred in not finding that as a fact. The referee does not, in words, say that he regarded the plaintiff legitimate; but unless he is of opinion that an illegitimate child of Lincey M. Burkett could take under the terms of the will, he must have regarded the plaintiff legitimate to reach his conclusion of law.

The referee has found as a fact that Lincey M. Burkett was living with Andrew Keller when the plaintiff was born. There is proof that Z. Burkett was in the country, and was living after plaintiff's birth. The relations of Andrew Keller and Lincey M. Burkett were such that he may be—the court may go further and say he was, probably—the father of the plaintiff. The proof, however, upon a question of this kind, is peculiar. To bastardize the issue of a married woman, non-access of the husband must be proved. Proof of probable paternity by another man than the husband is not enough. In a word, the question is not so much who is the father of the child, as, could the husband have had access to the wife. Reasons of policy, public decency, and the peace of families, require the observance of the principle, "Pater est quem nuptiæ demonstrant."

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The usual *proof adduced to overcome this presumption is the absence of the husband beyond the seas, or of facts showing that the husband could not have been the father of the child.

There is no question as to the paternity of Lincey M. Burkett's oldest child; and the evidence impresses the court that fidelity in these relations was not a marked characteristic of Lincey M. Burkett.

Is the proof of non-access of the husband so complete that Z. Burkett could not have been the father of the plaintiff? Though undoubtedly strong, the proof does not seem of that conclusive kind required in these cases—proof that there could not have been access of the husband. Upon this point the court concurs in the conclusion of the referee, that the plaintiff takes under the will as a child of Lincey M. Burkett.

The plaintiff, when she executed the release, was a married woman, though of age. Her interest was a remainder, to take effect in possession upon her mother's death. To make this transaction valid, her interest

should have been assigned or released through the intervention of the court.

Giving effect, however, to the release as an act of her husband, with what has she parted? May she not yet claim a settlement? This she can do until her husband reduces her expectant legacy into possession. The husband cannot transfer a greater interest than his own. He has never reduced the legacy to possession, nor could he during the life-estate.

The executors were aware of the wife's rights; indeed, they were trustees to preserve her rights until division was made according to the will. Whatever interest the husband had, they may have, but no more. But the relation of trustee and cestui que trust existed between the plaintiff and defendant. This required on the part of the trustee the utmost fairness of dealing in a settlement, and especially when the transaction was with one who had but lately attained her age. The circumstances under which the release was given, what knowledge of her rights was communicated to the plaintiff, the consideration of the release, how much, if paid, are not clear, and strengthen the plaintiff's statement that she did not have full information to which, in such a settlement, she was entitled. The court con-

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curs in *the conclusion of the referee, that the release is no defence or bar to the suit.

In directing the payment of a specific sum of money, the referee went too far. The plaintiff seeks equity, and must do it. An account must be taken, and in taking the account, whatever sum she received from the executors at the time the release was given, must be included as a credit; but not money received by her husband. So, too, the question of investments in Confederate securities must be considered, and any payment legally made by the executors for the plaintiff connected with the legacy.

It is ordered, adjudged and decreed: That the exceptions to the referee's report upon the defences of illegitimacy and the release be overruled. That the exception as to an account be sustained, and that it be referred to T. B. Whaley, Esq., as special referee to take an account between the parties, including in the accounting any money or payment received by the plaintiff connected with her release, but not money received by her husband; that he consider the question of alleged investments by the executors in Confederate securities, and also take in the accounting any payments made by the executors to the plaintiff connected with the legacy. That, if need be, he summon witnesses and take testimony in reference to the said matters, and make his report of actions to this court.

Defendant appealed.

Mr. W. J. De Treville,† for appellant.

The evidence shows that the plaintiff was illegitimate, and the old rule declared by the Circuit decree is exploded. The modern doctrine is that there is a presumption of legitimacy, but it may be rebutted by proof. 1 Phil. on Evid. (4th Am. ed.) 630; 3 Id. 600; 2 Greenl. on Evid., § 150; Reeve Dom. Rel. 271; 2 Whart. on Evid., §§ 1, 298–300; 1 S. C. 87; 5 Car. & P. 604; 4 T. R. 356; 1 Sim. & Stu. 150, 153; 8 East 193; 1 Strange 52; 2 Id. 925, 1076; 13 Ves. 58; Tyler on Inf. & Cov. 233. As to release. The signature

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of the husband bound both himself and *wife. 2 Rich. 331; Clan. on Husb. & W. 110; 2 Chit. on Cont. 1149; Com. Dig., "Release," E; Shep. Touch. 333; 1 Salk. 326; 12 Ves. 473. If plaintiff took at all she took a vested interest, assignable by her husband. 1 Rich. Eq. 78; 2 Jarm. on Wills (5th Am. ed.) 459; 2 Brown's Ch. 75; 1 Russ. 220; 4 Rich. Eq. 276; 1 Roper on Husb. & W. 227, 237; 2 Kent 135; 2 McC. Ch. 372.

The right which the husband had in 1867 could not be divested by the constitution of 1868. Wells Sep. Prop. Mar. W., §§ 13–24; 2 Kern. 207; 3 Id. 288; 101 Mass. 339; 1 Bay 252; Potter Dwar. 162–166; 15 Wall. 623; 16 Id. 317; 11 S. C. 71; 4 Wheat. 518; 1 How. 311; 2 How. 608; 2 Comst. 245; 17 Barb. 160.

Mr. M. J. Browning, contra.

The presumption of legitimacy can be rebutted only by peculiar and satisfactory proof that the husband could not be the father. 5 Coke 989; 2 Best on Evid. 625; 1 Sim. & Stu. 153; 10 Rich. 66; 1 Desaus. 595. The release is void because plaintiff was a married woman, and her husband could not assign or release her interest. 5 Rich. Eq. 566; 10 Rich. Eq. 387; 2 Hill Ch. 63; 1 Story Eq. Jur. 191–2, 204–233; 1 S. C. 435; 2 Bay 112; 14 Rich. Eq. 27; 1 N. & McC. 37; 6 S. C. 19; 2 Story Eq., § 1413; 1 Russ. 1; 3 Id. 65.

Mr. S. Dibble in reply.

July 18th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. William Bull died in 1852, leaving by will a legacy amounting to $1704 in the hands of his executors, the defendants, W. H. Bull and Waring A. Bull, (the latter of whom has since died,) in trust for the use of his daughter, Lincey M. Burkett, during her natural life, and after her death to be equally divided among her children. The interest on this fund was regularly paid to Mrs. Burkett during her life. She died in August, 1874, leaving the plaintiff and another daughter, Dorcas, surviving her.

†Here, as elsewhere, points not decided by the court, are omitted, as also the authorities cited to sustain them.—Reporter.

In September, after her death, the plain-

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tiff instituted this ac*tion against the defendant to recover this legacy, claiming to be a child of the said Lincey. The defendant answered the complaint with a general denial as a first defence, and pleading as a second defence a written release signed by Lincey M. Burkett, Dorcas E. Griffin, David B. Shuler and the plaintiff, his wife, Zipporah R. Shuler, dated January 14th, 1867, under seal, a copy of which will be found in the "case."

The cause at this stage was referred to T. B. Whaley, Esq., as special referee, "to hear and determine the issues therein."

The referee found as matter of fact: 1. "That the sum of $1704 came into the hands of the executors of William Bull, as alleged in the complaint.

2. "That Lincey M. Burkett, the life tenant, died August 12th, 1874, leaving two children, Dorcas E. Griffin and the plaintiff surviving her.

3. "That the plaintiff was born in 1843 while her mother lived with one Andrew Keller on the premises of F. N. Hart.

4. "That the plaintiff united with her husband, sister and mother in the execution of the release, but without due information or knowledge of her rights.

5. "That Waring A. Bull died since the commencement of this action."

He found as matter of law: 1. "That plaintiff is entitled to one moiety of the fund with interest, thereon from August 12th, 1874.

2. "That plaintiff is not bound or estopped by the release.

3. "He adjudged and ordered that defendant pay the plaintiff the sum of $1157.65 and the costs," submitting with his report the testimony.

To this report of the referee the defendant excepted, assigning as error: 1. That the referee did not report as to the investments by the executor of the trust funds in Confederate currency during the war.

2. That he did not report as to the legitimacy of the plaintiff; and

3. That he erred in reporting that plaintiff executed the release without due information and knowledge of her rights, and that she was not estopped thereby.

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*The cause, upon this report and exceptions, was heard by Judge Thomson at the May Term of the court for Orangeburg, 1880.

Judge Thomson decided that the exceptions of defendant as to the illegitimacy of plaintiff and as to the release be overruled, and that the case be remanded to the referee for an accounting between the parties; upon which accounting he directed that the question of investment in Confederate currency by the executors be considered.

The defendant appealed from this decree upon the following grounds:

1. "Because his Honor erred in finding that plaintiff is the legitimate child of Lincey M. Burkett and entitled to take under the will of William Bull.

2. "Because his Honor erred in finding the release no defence or bar to the present action."

For the proper adjudication of the questions raised it is not necessary for this court to express any opinion as to the paternity of the plaintiff.

Pater est quem nuptiæ demonstrant is the general rule, and ordinarily, as was well said by Judge Thomson, "reasons of policy, public decency and the peace of families require the observance of this principle." But while this is true as a general rule, and was formerly adhered to with considerable strictness, yet it has undergone some change and relaxation, and now evidence may be introduced to overcome the presumption arising from marriage.

Shakespeare in his drama of King John, act I., scene 1, gives us a trial before the Aula Regis, the king himself being present in person, Fitz-Peter being chief justiciar, in a "legitimacy case" as it was called, which involved the legitimacy of one who was said to be the illegitimate son of Richard Cœur de Lion. In that trial the doctrine pater est quem, subject, however, to the exception of the absence of the husband extra quartuor maria, was contended for, and Lady Faucombridge having remained in England while her husband was employed in Germany, the defendant was found illegitimate, much stress being given to the testimony of Dowager Queen Eleanor, who declared that the defendant had a "trick of Cœur de Lion's

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face," and that "she read in his com*position the token of her son, and she was sure that she was his grandame." So by the advice of Lord Chief Justice Fitz-Peter, judgment was given for the plaintiff, while the defendant, kneeling before the king, rose Sir Richard Plantaganet. Lives of the Chief Justices vol. I., p. 43.

Judge Thomson ruled as matter of law, in substance, that nothing short of proof of impossibility of access could overthrow the presumption arising from marriage, and he based his decree upon the fact that the evidence did not show that this impossibility existed in this case.

We think that Judge Thomson contracted the principle applicable to such cases within too narrow a boundary, and in endeavoring to solve correctly the delicate question of fact which was before him, he applied an incorrect principle of law. The law as it now stands is: That a question of paternity is in itself a question of fact, to be determined like any other question of fact—by testimony, the principle pater est quem nuptiæ demonstrant having its full influence, sub-

ject, however, to such competent evidence as in the judgment of the jury may be sufficient to overthrow it; and this may be done by proof other than impossibility of access. It may be done by showing non-access, or any other facts which may satisfy the minds of the jury.

True, out of regard to the sacred interest involved in the marriage relation, the happiness and reputation of families, the character of children, and the public peace, evidence of this character should be watched with great care and admitted with great caution by the courts; but such testimony is competent, and, when admitted, is entitled to be considered.

Judge Thomson in his decree said: "Is the proof of non-access of the husband so complete that Z. Burkett could not have been the father of the plaintiff? Though undoubtedly strong, the proof does not seem of that conclusive kind required in such cases —proof that there could not have been access of the husband." In the absence of this proof, and on account of its absence he found as matter of fact that plaintiff was legitimate.

In State v. Shumpert, 1 S. C. 87, Moses, C. J., quoting from 2 Greenl. on Ev. 125, said: "A child born during coverture is presumed to be legitimate; proof of non-access, or any-

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*thing else which plainly shows that, in the course of nature, the husband could not be the father of the child, removes the force of this presumption. If the husband and wife had the opportunity of intercourse this merely strengthens the presumption of legitimacy." And, again, he says: "The rule is stated in clear terms in the answer of the Lord Chief Justice in the celebrated Banbury Peerage case, 1 Sim. & Stu., 153, where he says: "That the fact of birth of a child from a woman united to a man by lawful wedlock is generally by the law of England prima facie evidence that such child is legitimate. That such prima facie evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between husband and wife as by the laws of nature is necessary in order for the man to be in fact the father of the child." The same doctrine is laid down in Reeves Dom. Rel., 271; in Phil. Evid. 630, and in numerous decided cases in England.

Under the force of these authorities, without going into the question whether in this case the evidence was sufficient to establish the illegitimacy of the plaintiff, we think that Judge Thomson reached his conclusion upon this question of fact by the light of a principle which he incorrectly applied as a principle of law, and in this respect that he erred.

The next question is as to the effect of the release. The referee found as matter of fact that the plaintiff executed the release without due information or knowledge of her rights. In this finding Judge Thomson concurred, and he held the release to be no defence or bar to this suit.

From the view which we take of this case it is not necessary to determine whether this finding is fully sustained by the weight of the evidence, or whether the evident preponderance is the other way. The release here was not only executed by the plaintiff, but it was also executed by her husband. They signed it at the same time. There is no evidence in the case, nor is there any finding either by the referee or the judge as to the information of the husband as to the matters intended to be settled by the release. In the absence of all proof on that subject we must take it for granted that he at least understood what he was doing, and while no judgment of the court, in his

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absence as a *party, will be conclusive upon him, yet his acts, unassailed, may bind others.

Now, what interest did the plaintiff take under the will of her grandfather in the legacy in question? and what effect did the release, executed by her husband, with full understanding as to its purport and effect, have upon that interest?

The will is not set out in the case, but in the complaint it is stated that William Bull died in 1852; that he directed, inter alia, that the legacy should be held by his executors in trust for the use of his daughter during her natural life, and after her death to be equally divided among her children. At the time of the execution of this will the plaintiff was near ten years of age; her sister, Dorcas, had also been born. The will was made, no doubt, with the knowledge of these facts on the part of this old man, and these grandchildren of his were in all probability especial objects of his bounty. They took a vested remainder in the legacy given to their mother for life. This vested remainder was in personal property, and the interest of the plaintiff was personal estate. To what extent did the marital rights of the husband attach to this interest, is the important question now to be considered. William Bull, the grandfather, died years before the adoption of the constitution of 1868. At that time the marital rights of the husband did not only attach to all personal property in the possession of the wife at the time of the marriage, but authorized him to reduce to possession all such as rested in action, or had not been reduced to possession by the wife.

The interest of the wife here was a chose in action, her title being complete, but the payment postponed to the death of her mother. In some respects it was like a note or bond, due at a future day. Did the husband have the right to assign or release this future payment upon a present considera-

tion? Was his assignment and release such a reduction to possession as his marital rights authorized and empowered him to make of the personal estate of his wife?

At first, in this state, the right of the husband to assign the interests of the wife, not in possession, seemed to depend upon the fact whether the interest in question was vested

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or contin*gent, using these terms in their technical sense. And it was said, in the case of Terry v. Brunson, 1 Rich. Eq. 78, "that a vested right of the wife may be effectually assigned by the husband, but her contingent interest will survive to her against his assignee, even though the assignment was made for a valuable consideration and with her concurrence." In Larey v. Beazley, 9 Rich. Eq. 119, it was ruled "that where the wife has an expected interest in chattels, whether such interest be vested or contingent, legal or equitable, no act of the husband, or of any third person, investing the husband or wife, or both, with the present or particular estate, will operate to vest the future or expectant interest of the wife in her husband."

Other cases since have recognized this principle, but this does not touch the question here. It decides that there can be no merger of the remainder of the wife by the husband obtaining the particular estate upon which it depends. In such case the remainder will still exist as the right of the wife. But the doctrine of merger is not involved in this case.

In Reese v. Holmes, 5 Rich. Eq. 562, Chancellor Johnstone, who delivered the opinion in the case of Terry v. Brunson, supra, in a very elaborate and full discussion of all the cases upon this subject, both in England and in this state, in a circuit decree which was adopted as the opinion of the Appeal Court, announced the conclusion to be: "That neither the husband nor the wife alone, nor the husband and wife acting jointly, have the power during coverture, without the sanction of the court, to assign the wife's vested remainder in slaves expectant upon the termination of a life estate therein, so as to defeat the right of the wife to the remainder when it falls in, should the husband then be dead; should the husband be alive when the remainder falls in, and he then have the right to reduce it to possession, his previous assignment will, it seems, hold good." Chancellor Johnstone, with that earnest desire always to be right, which was a beautiful and prominent trait in his character, and with that frankness which characterized all his judicial utterances, in the discussion of this case admitted that his language in the case of Terry v. Brunson had not been sufficiently guarded, and that his meaning was loosely and inaccurately expressed. He says

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that the words *vested and contingent, used in that case, were intended in the sense of accrued and yet to accrue.

In Duke v. Palmer, 10 Rich. Eq. 380, following the case of Reese v. Holmes, supra, it was held that where the wife has an expectant interest in chattels, though a transfer or concurrence in the transfer of her interest by herself and husband will not bind her if she be the survivor when the expectancy falls in, yet if, at that time, they both be living, and he be capable of reducing the expectancy to possession, they will both be bound by the transfer. This appears to be the law in this state, as held in several cases cited in Reese v. Holmes and Duke v. Palmer, supra.

Now, in this case the husband and wife were both alive at the falling in of the estate of the life tenant. Is there anything to prevent the principle held in these cases from applying? Section 8, Article XIV. of the constitution of 1868, in reference to the rights of married women, is relied upon. The life estate fell in after the adoption of the constitution, and it is contended that the plaintiff being at that time entitled to the possession of this legacy, and not until then, she was entitled to it free from the marital rights of her husband.

As we have seen, the interest of the plaintiff in the legacy was a vested remainder, the title to which passed to her at the death of her grandfather. It was in her when she married and during coverture. Upon this vested title the marital rights of her husband attached, at least so far as to give him the right to reduce the property into possession if it should fall in at any time during coverture; and in addition to this, as held in the cases of Reese v. Holmes and Duke v. Palmer, he had the right to contract with reference to this interest of his wife, whether it was a vested or contingent interest, subject to the peril only of his wife being the survivor at the time when this interest should fall in. This being so, to subject his contract now to a new condition and a new peril, by virtue of subsequent legislation, either by legislative enactments or constitutional provisions, would be in violation of well-established principles. A state can no more impair an existing contract by a constitutional

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provision than by an act *of the legislature —both are within the prohibition of the federal constitution. Gunn v. Barry, 15 Wall. 628 [21 L. Ed. 212]. The law which exists at the time and place of making a contract enters into and forms a part of it. Walker v. Whitehead, 16 Wall. 317 [21 L. Ed. 357]. True, it is said in both Reese v. Holmes and Duke v. Palmer, supra, that the validity of the assignment of the husband depends, not only upon both being alive when the expectancy falls in, but, also, that he shall then be capable of reducing this expectancy into possession.

The right to reduce to possession this expectancy was one of the rights embraced in the jure mariti when this plaintiff married. This right had vested in D. B. Shuler, the husband, before the adoption of the constitution of 1868. This capacity to act under this right attached and became complete upon the marriage. Now, without undertaking to speculate as to the manner in which this capacity might have been lost before the falling in of the expectancy, it is enough to say that in our opinion the constitution of 1868 did not, and could not legally create such incapacity. This would be divesting vested rights. We think that the release set up as a defence in this case having been executed by the husband, and there being no proof or allegation that he was without due knowledge and information, it should have been held as a bar to this action.

The judgment of this court is that the judgment of the Circuit Court be reversed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. *434

*(Case No. 1059.)

STATE v. SCOTT.

(April Term, 1881.)

[1. *Indictment and Information* ⇐129, 132.]

Several distinct felonies by the same persons may be joined in the same indictment; where they all grow out of the same transaction they may be tried together, but the jury should be instructed as to the effect of a general verdict of guilty; where they do not grow out of the same transaction, it is the duty of the court to require the presiding officer to select one of the felonies and confine himself to that.

[Ed. Note.—Cited in State v. Smith, 18 S. C. 156; State v. Norton, 28 S. C. 576, 577, 6 S. E. 820; State v. Woodard, 38 S. C. 355, 356, 17 S. E. 135; State v. Beckroge, 49 S. C. 486, 487, 27 S. E. 658; State v. Burbage, 51 S. C. 288, 28 S. E. 937; State v. Bouknight, 55 S. C. 356, 33 S. E. 451, 74 Am. St. Rep. 751; State v. Smith, 57 S. C. 491, 492, 35 S. E. 727.

For other cases, see Indictment and Information, Cent. Dig. §§ 414, 447; Dec. Dig. ⇐ 129, 132.]

2. This case distinguished from State v. Fant, 2 Brev. 487.

[3. *Criminal Law* ⇐780.]

The Circuit judge committed no error in saying to the jury, that if the testimony of the accomplices, witnesses for the state, was corroborated as to one of the defendants, that this would warrant the jury in finding all of the defendants guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859–1863; Dec. Dig. ⇐ 780.]

[4. *Criminal Law* ⇐913.]

There being in the indictment counts for arson, burglary and grand larceny, an arrest of judgment for arson does not operate to arrest the judgment on the other counts, but, there being a general verdict of guilty, furnishes good ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2137; Dec. Dig. ⇐913.]

[5. *Criminal Law* ⇐510½.]

Evidence that an accomplice had stated out of court that which he had sworn upon the stand, would not be corroboration of his testimony, and is incompetent.

[Ed. Note.—Cited in State v. McIntosh, 94 S. C. 442, 78 S. E. 327.

For other cases, see Criminal Law, Cent. Dig. § 1135; Dec. Dig. ⇐510½.]

[6. *Criminal Law* ⇐510.]

[Cited in State v. Prater, 26 S. C. 207, 2 S. E. 108; State v. Green, 48 S. C. 147, 26 S. E. 234, to the point that the testimony of an accomplice is competent, and, though uncorroborated, may be the basis for a verdict of conviction.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126; Dec. Dig. ⇐ 510.]

[7. *Criminal Law* ⇐878.]

[Cited in State v. Glover, 27 S. C. 605, 4 S. E. 564, to the point that a general verdict of guilty must be understood to apply to that count in the indictment charging the highest offense, where there is supporting testimony.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098–2101; Dec. Dig. ⇐ 878.]

Before Thomson, J., Hampton, October, 1880.

Indictment against Asa Scott and five others for arson, burglary and grand larceny. The opinion states everything that is to be learned from the meagre brief in this case.

Mr. W. P. Murphy, for appellant, cited 4 Humph. 194; 2 McLean 325; 10 Ga. 46; 29 Ala. 62; Roscoe's Cr. Ev. 122, 123, 188; 11 S. C. 275; 3 Strob. 523, note; 1 Metc. 13; 14 S. C. 628; 7 S. C. 283; 14 Rich. 169.

Mr. Solicitor Gantt, contra, cited Archb. Cr. Pl. 30; 1 McM. 190; 7 Rich. 490; 3 Hill 1; Cheves 105; 9 Rich. 355; 14 Id. 169; Whart. on Am. Cr. L. 151, 302; 4 Strob. 270; 10 S. C. 191; 11 S. C. 196.

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*July 18th, 1881. The opinion of the court was delivered by

McIVER, A. J. The indictment in this case contained a count for burglary, a count for arson and a count for grand larceny. The jury rendered a general verdict of guilty, upon which the defendants moved, before the Circuit judge, to arrest the judgment and for a new trial, substantially upon the following grounds:

1. Because there was an improper joinder of offences in the indictment.

2. Because the judge erred in instructing the jury that where two or more persons are on trial and the testimony of an accomplice is relied on, which is corroborated as to one of the accused and not as to the others, this will warrant the jury in finding all of the defendants guilty.

These motions were refused by the Circuit judge, except so far as the motion to arrest the judgment for arson was concerned, which was granted, whereupon the defend-

ants appeal upon the grounds above stated, and upon the additional grounds that the arrest of the judgment for arson operates as an arrest of the whole judgment; and that the testimony of C. L. Peeples, to the effect that he had heard the two accomplices, who were introduced as witnesses by the state, make the same statements, out of court, not in the presence of the accused, that they made while on the stand.

First, as to the question whether the offences named can be joined in the same indictment. The rule upon this subject seems to be that there is no valid objection to the joinder of several distinct felonies in the same indictment, and that such joinder constitutes no ground for demurrer or motion in arrest of judgment. 1 Chitty on Cr. L. 253; Young v. King, 3 T. R. 98; State v. Johnson, 3 Hill 1; State v. Tidwell, 5 Strob. 1; State v. Nelson, 14 Rich. 172 [94 Am. Dec. 132]. But where the several felonies charged all grow out of the same transaction, the jury should be distinctly instructed as to the effect of a general verdict of guilty, which is understood to find the highest offence charged, if there is testimony to support it, in order that they may shape their verdict so as to conform to their real convictions by finding upon each count separately. State v. Nelson, supra; State v. Priester,

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*Cheves 105. If, however, distinct felonies are charged in separate counts, not growing out of the same transaction, then the proper practice is to require the prosecuting officer to select one of the felonies and confine himself to it, even though no motion to that effect should be made by the accused. State v. Nelson, supra.

The case of State v. Fant et al., 2 Brev. 487, though, at first view, somewhat in conflict with these views, is not really so. In that case Fant was indicted, as keeper of a tavern, for allowing the other defendants to game in his house, and the others were indicted for gaming, the punishment in the former case being a fine of $50, and in the latter case a fine of $25. So that in Fant's case there were not only different offences joined in the same indictment, but different persons were charged with different offences in the same indictment. It does not distinctly appear whether the defendants were all charged in the same count, but the inference is that they were, for the statement is: "The defendants were all included in one indictment, which did not state any particular place where the offences were committed." The judgment was arrested by the Circuit judge "because two distinct offences were laid in the same indictment," and all that is said upon this point by the Court of Appeals is: "The judgment was properly arrested on the first ground of objection to the conviction. The offences are distinct different in their nature, and admitting of different degrees of punishment, and ought not to have been combined in the same indictment."

The probability is, as we have said, that there was but one count in the indictment, but even had there been two, the case would not be decisive of the one now under consideration, for in that case different persons were indicted for different offences in the same indictment, while here the same persons are charged in different counts of the same indictment with different offences; and the court in Fant's case, which was an indictment for misdemeanor, certainly could not have intended to decide that the same persons could not be charged in different counts of the same indictment with different misdemeanors, as that would be opposed to the current of the authorities.

In this case it does not appear whether the

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felonies charged *all grew out of the same act, for although it is asserted in the argument that such was the fact—that the building was broken into, robbed and then set fire to—yet as these facts do not appear in the "case" as prepared for argument here, we cannot regard them as entering into the case which we are called upon to decide. It does not appear, however, either that any instruction was given to the jury to shape their verdict so as to show what particular felony they intended to find the prisoners guilty of, or that the prosecuting officer was required to elect upon which count he would proceed, and, therefore, we think there should be a new trial.

The next inquiry is, whether the Circuit judge erred in saying to the jury that if the testimony of the accomplices was corroborated as to one of the defendants, this would warrant the jury in finding all of the defendants guilty. It seems to be very well settled that the testimony of an accomplice is competent, but that the usual practice is for the presiding judge to advise the jury not to convict upon the uncorroborated testimony of an accomplice. 2 Stark. on Ev. 23, 24; Roscoe on Cr. Ev. 120, 121; 1 Greenl. on Ev., § 380; State v. Wingo, 11 S. C. 275, note. But these authorities also show that it is not necessary that the accomplice should be corroborated in every particular; but that where he is corroborated in some portions of his testimony material to the issue, the jury may regard this as sufficient to warrant them in giving credit to his whole story.

The object of the corroboration is not to add strength to the proof of the fact as to which the accomplice may be corroborated, but to test the credibility of the accomplice; and if the jury find that he is truthful in regard to some of the matters in issue, they may regard him as entitled to credit in other matters as to which he is not corroborated. As is said in 2 Stark. on Ev. 24: "It seems

that it is not necessary that the accomplice should be confirmed in every circumstance, or with respect to each of the prisoners against whom he testifies. If it were necessary to confirm his evidence in all points, his testimony would be useless. * * * His evidence upon points where he is confirmed by unimpeachable evidence is useless: the question is, whether he is to be believed upon points where he receives no confirmation.

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and of *this the jury are to form their opinion from the nature of his testimony, his manner of delivering it and the confirmation which it receives, derived from other evidence which is unsuspected. If, upon such consideration, his character be established as the witness of truth, he is credible in matters where he is not corroborated."

See, also, Rex v. Jones, 2 Camp. 133, in which four prisoners were convicted upon the testimony of an accomplice, whose testimony as to one of the prisoners was not corroborated, and the case being referred to the twelve judges they held unanimously that the conviction was legal. So in Roscoe on Cr. Ev. 120, 121, it is said: "Where on the trial of several prisoners an accomplice who gave evidence was confirmed in his testimony with regard to some of the prisoners, but not as to the rest, Bayley, J., informed the jury that if they were satisfied by the confirmatory evidence that the accomplice was a credible witness, they might act upon his testimony with respect to others of the defendants, though, as far as his evidence affected them, he had received no confirmation." It is true that in 1 Greenl. on Ev., § 381, it is said that there are differences of opinion upon this subject, some judges holding that when several prisoners are on trial confirmation should be required as to all before they can all be safely convicted; but we think the rule laid down by Starkie, in the passage above cited, is more in accordance with principle.

Indeed, as long as the testimony of an accomplice is competent and as long as the jury are the exclusive judges of the credibility of witnesses, we see no reason why a jury may not convict upon the uncorroborated testimony of an accomplice, provided they are satisfied of the truthfulness of his testimony; and if corroboration in certain particulars or as to certain of the parties charged satisfies them that credit should be given to the whole testimony of the accomplice, they certainly would be fully warranted in acting upon such testimony. See State v. Brown, 3 Strob. 508. We do not think there was any error in that portion of the charge which relates to this subject.

The next inquiry is, whether arresting the judgment for arson operated as an arrest of the entire judgment. We do not see how the position taken in this ground of appeal

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can be sustained. We *are not informed as to the ground upon which the Circuit judge arrested the judgment for arson, but we can very well understand that where an indictment contains several counts one of them may be so defective in form as not to warrant any judgment upon it, and if in such a case the judgment be arrested as to such defective count, we know of no reason, and have heard none suggested, why this should affect in any way the other good counts or prevent judgment being rendered upon them.

While, therefore, we do not think the ground as taken can be sustained, yet we do think that this furnishes a good ground for a new trial. The verdict was a general verdict, and according to the rule above stated, as laid down in State v. Nelson, such a verdict is understood to apply to the highest offence charged in the indictment, where there is testimony to support it; and although we are not informed as to the testimony in this case, yet it may be that the testimony was sufficient to convict under the count charging arson, but not sufficient to convict of either of the other offences charged; and as no judgment can now be rendered under the count for arson, it may be that these defendants have received judgment for offences of which the jury did not intend to convict them. In this uncertainty we think it proper that the defendants should have the benefit of another trial. State v. Anderson, 1 Strob. 455.

The only remaining inquiry is as to the competency of the testimony of Peeples. It is not very clear from the statement furnished us what were the exact facts or how this question arose, but as well as we can understand it, Peeples was offered by the state as a witness to corroborate the testimony of the two accomplices who had also been used as witnesses by the state, and that for this purpose he was allowed to prove that these accomplices had made the same statements out of court that they made while on the stand as witnesses. If this be a correct statement of what occurred, then we think that the testimony of Peeples was incompetent. Davis v. Kirksey, 2 Rich. 176.

It would certainly be no corroboration of an accomplice to prove that the statement made by him under oath conformed to that which he had previously made while not under oath. That is not our idea of corrobora-

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tion. The facts sworn to by the ac*complice must be shown by other witnesses, or by circumstances, to be true, in whole or in part, not merely that he has previously stated the same facts. The object of the corroborating evidence is to test the truthfulness of the accomplice, and surely the fact that he has, while not under oath, told the same story which he tells upon the stand affords no such test. The accomplice goes upon the stand

under a cloud, with the presumption against his truthfulness, but when it is shown by independent unimpeachable evidence that some of the facts material to the issue, which he has sworn to, are true, that may satisfy the jury that his whole story is worthy of credence. The testimony of Peeples did not furnish any independent evidence of the truth of any of the facts testified to by the accomplices, and therefore lacked the essential element of corroborative evidence.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the case be remanded to that court for a new trial.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. 440

(Case No. 1060.)

MOORE v. SANDERS.

(April Term, 1881.)

[*Wills* ⇐601.]

A will provided as follows: "I give, devise and bequeath my whole estate both real and personal, all that I now possess or may hereafter become possessed of, to my beloved son Matthew. Learning that the law takes cognizance of the intention, even when illegally expressed, I desire to express my wish, as strongly and emphatically as I can do so by will, that my beloved son Matthew shall inherit, possess and own, in fee simple, all my worldly goods—to dispose of as he may think fit. But should he die without leaving a will, then the whole to go" over. *Held*, that the limitation over depended upon a condition subsequent, which was void because repugnant to the estate devised, and that Matthew held, in fee simple absolute, a tract of land derived under this will.

[Ed. Note.—Cited in Robinson v. Ostendorff, 38 S. C. 75, 16 S. E. 371; Chavis v. Chavis, 57 S. C. 176, 35 S. E. 507; Robert v. Ellis, 59 S. C. 151, 37 S. E. 250; Joyce v. Bode, 74 S. C. 173, 54 S. E. 239; Smith v. Clinkscales, 85 S. E. 1067; Adams v. Verner, 86 S. E. 213.

For other cases, see Wills, Cent. Dig. § 1340; Dec. Dig. ⇐601.]

[This case is also cited in Howze v. Barber & Drennan, 29 S. C. 472, 7 S. E. 817, without specific application.]

Before Thomson, J., Sumter, February, 1881.

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*This was a controversy without action instituted in February 1881. The will here construed bears date January 4th, 1868. The opinion states the case.

Mr. Jos. H. Earle, for appellant, cited Co. Lit. 112, b, note 144; 2 Roper on Leg., § 1460; 1 Hill's Ch. 367; 6 Ves. 100; 1 Jarm. on Wills 593; 16 Ves. 135; 8 Cow. 277.

Messrs. Blanding & Blanding, contra, cited 7 Bligh 56; 2 Williams on Ex'rs (2d Am. ed.) 789; 4 Kent 270; 1 Jarm. on Wills (Perk. ed.) 677; 19 Johns. 20; 8 Rich. 88.

July 20th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This is a case submitted without action under section 389 of the Code. It appears that Matthew S. Moore, the respondent, bargained to sell and convey, in fee simple, a certain tract of land to George M. Sanders, the appellant, for $3500. Moore offered and is still ready to execute titles, but Sanders declines to accept his deed, alleging that Moore cannot convey in fee. Moore's title is derived from the will of his mother, Mrs. Sarah J. C. Elliott, deceased. So much of this will as it is necessary to consider, is in the following language: "I give and bequeath my whole estate, both real and personal, all that I now possess or may hereafter become possessed of, to my beloved son, Matthew S. Moore. Learning that the law takes cognizance of the intention, even when illegally expressed, I desire to express my wish as strongly and emphatically as I can do so by will, that my beloved son, Matthew S. Moore, shall inherit, possess and own, in fee simple, all my worldly goods, to dispose of as he may think fit. But should he die without leaving a will, then the whole to go to my grandchildren, share and share alike. The child or children of any grandchildren who may die before such division taking the share which the parent would have been entitled to had said parent lived to the period of said distribution or division."

Upon the hearing below Judge Thomson decreed that the estate devised to Moore is a fee and that he is able to make good and sufficient titles to Sanders. Sanders except-

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ed to this decree. *His appeal brings up the single question: "Did Moore take under the will of Mrs. Elliott a fee indefeasible in the land in question?

It will be seen on reading the will that Mrs. Elliott in the beginning of the clause above, bequeathed and devised to her son, the respondent, her entire personal property, and also a fee in all of her real estate; and if there was no other provision in her will, no difficulty whatever could have arisen as to its construction. She, however, with the view, as she thought, more distinctly to declare her intention, went further, and, as is not uncommon in such cases, instead of more clearly expressing her purpose, said just enough to create doubt and to demand the assistance of the courts to ascertain and declare what she really did mean. After giving her whole estate to her son, in the first part of the clause above quoted, in the latter she directed that if her son should die without leaving a will, then the whole should go to her grandchildren, share and share alike. It is here that the ambiguity arises. It is contended that this portion of the clause attached a

condition to the estate previously given, which, if not complied with by Moore, will forfeit the estate, and, therefore, that he is not able to convey a perfect title, absolute and indefeasible.

Conditions are of two kinds—conditions precedent and conditions subsequent. A condition precedent is a condition upon the happening of which an estate will vest. A condition subsequent defeats an estate already vested. It is contended that this is a condition subsequent.

It is a general rule as to conditions subsequent, that to be valid they must not be repugnant to the estate given or devised. They must not be an exception to the very thing, that is, to the substance of the gift; if so, they are void, and the estate granted will stand unaffected by such conditions. Thus, in Blackstone Bank v. Davis, 21 Pick. 42, it was held that "a condition in a grant or devise that the grantee shall not alienate, is void, because repugnant to the estate." Also in Bradley v. Peixoto, 3 Ves. 324, it was held that an exception to the very thing itself by way of condition is null. 2 Bl. C.; 2 Washb. on Real Prop. 6, lay down the doctrine clear-

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ly that a condition subsequent, in*consistent with and repugnant to the amplitude of the powers of the estate granted is void, and, therefore, no condition.

Now, test this clause of Mrs. Elliott's will by this principle. It is conceded that an estate in fee was devised in the first instance by Mrs. Elliott to her son. The power of alienation belongs to a fee; in fact it is the very essence of a fee. Is the condition which the latter portion of the clause attempts to attach to the devise inconsistent with and repugnant to this devise? The performance of the condition would require Moore to die in possession of the real estate devised to him. In no other way could he leave a will disposing of it.

The condition, then, is a direct and positive restriction upon his powers of alienation. The will invests him with a fee, but the condition strikes at the very substance of this fee, and if valid would take away and destroy its most important and essential quality—the power of sale. A fee may be defeated by a condition which is independent of the estate granted upon the happening of which the estate is lost; but a condition, the effect of which is to cut down a fee to a less estate, is void because repugnant to the fee. Such is the character of the condition in this case, and according to the authorities cited is void.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

15 S. C. 443

(Case No. 1061.)

GUNTER v. GRANITEVILLE MANUFACTURING COMPANY.

(April Term, 1881.)

[1. *Jury* ⇐135.]

The plaintiff in a civil case having declared that he had no objections to the jury as it then stood, cannot challenge two jurors afterwards drawn to supply vacancies caused by the defendant's challenges. Huff v. Watkins, ante 82 [40 Am. Rep. 680], affirmed.

[Ed. Note.—Cited in Burckhalter v. Coward, 16 S. C. 444; Ward v. Charleston City Ry., 19 S. C. 524, 45 Am. Rep. 794.

For other cases, see Jury, Cent. Dig. § 606; Dec. Dig. ⇐135.]

[2. *Negligence* ⇐1.]

Wharton's definition of negligence approved.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. ⇐1.]

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[3. *Trial* ⇐261.]

*Unless propositions submitted as a whole in requests to charge are wholly correct, it is not the duty of the trial-judge to charge them, or any part of them.

[Ed. Note.—Cited in Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 271, 15 S. E. 562; Martin v. Suber, 39 S. C. 535, 18 S. E. 125; Mitchell v. Charleston Light & Power Co., 45 S. C. 158, 22 S. E. 767, 31 L. R. A. 577; Lowrimore v. Palmer Mfg. Co., 60 S. C. 171, 38 S. E. 430.

For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. ⇐261.]

[4. *Master and Servant* ⇐265.]

If injury to a servant results from the negligent act of the master or of his representative, the master is prima facie liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. ⇐265.]

[5. *Master and Servant* ⇐108.]

If such injury results from defective machinery, or the negligent act of a co-servant, the master is not responsible unless the proof shall go further and show that the master's negligence in purchasing and overlooking his machinery, or in employing and supervising his servants, was the cause of his having defective machinery in use and negligent servants engaged.

[Ed. Note.—Cited in Darwin v. Charlotte, C. & A. R. Co., 23 S. C. 535, 55 Am. Rep. 32; Whaley v. Bartlett, 42 S. C. 472, 20 S. E. 745; Sims v. Southern Ry., 66 S. C. 525, 45 S. E. 90; Wilson v. Virginia-Carolina Chemical Co., 78 S. C. 384, 58 S. E. 1019; Hicks v. Southern Ry. Co., 38 S. E. 731, 866.

For other cases, see Master and Servant, Cent. Dig. § 203; Dec. Dig. ⇐108.]

[6. *Master and Servant* ⇐247.]

If, however, in any of these cases, it should appear that the negligence of the injured party contributed to the injury in such degree as to become one of the proximate causes thereof, so as to relieve these other causes from being the entire cause, this would be a good defence.

[Ed. Note.—Cited in Carter v. Columbia & G. R. Co., 19 S. C. 28, 45 Am. Rep. 754; Darwin v. Charlotte, C. & A. R. Co., 23 S. C. 537, 542, 55 Am. Rep. 32; Guess v. Railway Co., 30 S. C. 166, 9 S. E. 18.

For other cases, see Master and Servant, Cent. Dig. §§ 795–800; Dec. Dig. ⇐247.]

[7. *Master and Servant* ⟸101, 102.]

[Cited in Charping v. Toxaway Mills, 70 S. C. 477, 50 S. E. 186, to the point that the master is bound to provide reasonably safe and suitable place and appliances for work.]

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. ⟸101, 102.]

[This case is also cited in Ex parte Johnson, 19 S. C. 497, to the definition of negligence.]

Before Thomson, J., Aiken, September, 1880.

This was an action by Marina S. Gunter against the Graniteville Manufacturing Company, a body corporate, commenced October 4th, 1879, for injuries to the plaintiff in the August preceding, resulting in the loss of her right eye, to her damage $10,000. The defendants admitted the injury, but alleged that it was the result of an accident incident to her employment, was caused by a fellow-servant, and by her own gross negligence. The defendant denied the allegation of the complaint that the injury resulted from defective machinery, and from the negligence of the defendant in repairing a loom during work-hours. Upon these issues the case was tried, the evidence conflicting.

The opinion states the facts relating to the challenge of jurors.

The plaintiff requested the court to charge the jury inter alia—

3. If, through the negligent repairing of machinery the plaintiff is injured, then the defendants are liable, the master being liable for the repairer's negligence.

5. It is the duty of the employer to advise the employé of all such latent defects that he has no obvious means of knowing, and if the defendants failed to do so, and by reason of such neglect the plaintiff is injured, then the defendants are liable.

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*7. That if the jury find that Mr. Collville had notice that the loom was unsafe, and that he neglected to have such loom repaired, and by reason of such neglect the plaintiff was injured, then the defendants are liable, notice to Mr. Collville being notice to the company.

8. That if the plaintiff gave notice to Mr. Collville of the defects of the loom, and was promised it should be repaired, she is not, as a matter of law, guilty of contributory negligence by remaining, and if the injury afterwards occurred through the negligence of the defendants, the plaintiff is entitled to recover.

The defendants requested the court to charge the jury inter alia—

2. That if the jury find that the plaintiff contributed to the accident, or by the exercise of ordinary care could have prevented it, then the verdict must be for the defendants.

3. That even if the defendants are found to be negligent because of any defects in the looms, or want of repairs thereon, if the plaintiff, by the exercise of ordinary care could have avoided the accident, she cannot recover.

4. That even if the defendants are found to be grossly negligent because of any defects in the looms, or want of repairs thereon, if the plaintiff, by her want of care, contributed in any wise to the accident, she cannot recover.

5. That if the jury conclude that the accident was caused by some defect in the looms, not open, but latent, not known to the president, or directors, or superintendent of the company, whose duty it was to furnish suitable machinery, then the verdict must be for the defendants.

6. That if the jury conclude that the accident was caused by some defect in the looms, whether known to the witness Harling, or not, he being merely a fellow-servant of the plaintiff, engaged in the same common business, and having no power to hire or discharge hands, furnish or change machinery, the superintendent, who alone had said powers, having no knowledge of said defect, then the verdict must be for the defendants.

8. That the plaintiff, when she entered into the employment of the defendants, as a laborer in their factory, assumed all the

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*risks incident to said employment, and that negligence of co-servants is one of said risks; hence, if the jury find that she was injured by the negligence of Harling, her co-laborer, she cannot recover, and the verdict must be for the defendants.

13. That in order to find a verdict for the plaintiff, the jury must be satisfied that the misfortune happened without the fault or negligence of the plaintiff, but from the gross negligence of the defendants.

His Honor charged the plaintiff's request as follows, to wit: The 3d, 7th and 8th, in the words as requested. As to the 3d and 5th request, he charged as follows: "I charge as requested by the plaintiff, but you must first find that the defect really existed, and that it was the immediate cause of the injury."

He refused to charge the 5th and 6th requests of the defendants. He charged their 2d request, modified as follows: "That if the jury find that the plaintiff contributed to the accident from want of ordinary care, or by the exercise of ordinary care could have prevented it, then the verdict must be for the defendants." He charged their 3d request modified as follows: "That even if the defendants are found to be negligent because of any defect in the looms, or want of repairs thereon, and the defects are not the proximate cause of the injury, if the plaintiff, by the exercise of ordinary care, could have avoided the accident, she can-

not recover." He charged their 4th request, modified as follows: "That even if the defendants are found to be grossly negligent because of any defects in the loom, or want of repairs thereon, and the defects are not the proximate cause of the injury, if the plaintiff, by her want of care, contributed in any wise to the accident, she cannot recover." He charged their 13th request, modified as follows: "That in order to find a verdict for the plaintiff the jury must be satisfied that the misfortune happened without the fault or negligence of the plaintiff, but from the want of proper care on the part of the defendants."

The Circuit judge also charged the jury that in order to find a verdict for the plaintiff, they must find that the loom which inflicted the injury was, as is alleged in the complaint, that is, "unsafe, defective, and insecure."

The judge also instructed the jury, "That the acts of the employés were governed by

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the rules of the company. Harling *had his duties to perform, Collville, boss of the section, his, the weavers theirs, and the spinners theirs. That these duties were performed by the several employés under rules made by the corporation. That the company thus became responsible for Harling's performance of his duties, and for his negligence in their performance. That if plaintiff were injured by his neglect to repair the defects of the loom, and such duty were imposed upon him, and that these defects were the immediate cause of the injury to the plaintiff, then the defendant was responsible."

The presiding judge refused to charge according to the 8th request of the defendant, as it was expressed. The 8th request was subjected to or modified by the instruction given under the 4th request to charge.

The jury rendered a verdict for the plaintiff for $2,000.

Defendants appealed, upon the following grounds:

1. In that his Honor erred in permitting the plaintiff to challenge George Cook and F. P. Woodward, jurymen who were drawn from the supernumeraries after a full jury had been presented to the plaintiff for selection, and she had failed to challenge any member thereof.

2. In that his Honor erred in not charging the jury as requested by the defendants, in their requests to charge numbered 2, 3, 4, 5, 6, 8 and 13.

3. That his Honor erred in charging the jury that the company were responsible for Harling's negligence, and if the jury found that the plaintiff was injured by his negligence, then the defendants were liable.

4. That his Honor erred in not submitting to the jury the question whether Harling was a fellow-servant or not.

5. That his Honor erred in charging as requested by the plaintiffs, in their requests to charge, numbered 3, 5, 7 and 8.

[For subsequent opinion, see 18 S. C. 262, 44 Am. Rep. 573.]

Mr. D. S. Henderson, for appellants.

Mr. G. W. Croft, contra.

July 20th, 1881. The opinion of the court was delivered by

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*SIMPSON, C. J. The plaintiff, while in the employment of the defendant as an operative in the weaving department of a cotton mill of defendant, was injured by a shuttle being thrown with great force from one of the looms at or near which her duties required her to be stationed. The shuttle struck in the right eye of the plaintiff with such force as to cause its total blindness.

This action was brought to recover damages for this injury. The complaint alleged negligence on the part of the defendant, in that the loom was unsafe, defective and insecure; and, further, that at the time of the injury the said loom was being repaired during work hours of the mill, and while the plaintiff was compelled, in performance of her duty, to be so near the same as to greatly endanger her person.

The defendant denied the right of the plaintiff to recover, and relied upon three defences:

1. "Because the injury was an accident incident to the employment of the plaintiff, the risk of which she took upon herself.

2. "Because, if it was more than an accident, it was caused by the negligence of a co-laborer and not by the defendant.

3. "Because the accident and consequent injury were due and caused by the gross negligence and carelessness of the plaintiff."

Upon the issues thus made up the jury rendered a verdict for the plaintiff for $2,000. The defendant has appealed upon grounds which will now be considered:

First. In the organization of the jury, after a full jury had been presented to the parties litigant and the plaintiff had announced "no objection to the jury as it then stood," the defendant exercised his right of peremptory challenge as to two. Two others from the talesmen were then called. To these the plaintiff objected; and although she had declined to exercise her right of challenge in the first instance she was permitted to do so as to these two persons called to supply the places of the two challenged by the defendant. To this ruling the defendant excepted, and this forms the first ground of defendant's appeal.

In a recent case, Huff v. Watkins, ante 82 [40 Am. Rep. 680], the exact point raised here was decided, and we need not now go beyond that decision. It sustains fully the exception of the defendant here, and must govern in the construction to be placed upon Section 26,

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*Chapter CXI. of General Statutes in reference to challenges to jurors in civil cases. It is unfortunate that that decision was not announced before the trial of this case below, as much trouble, time and expense would thereby, no doubt, have been prevented. The court, even now, would be gratified if this difficulty, which lies at the very threshold of this case, could be removed, but this cannot be done except by overruling the case of Huff v. Watkins, which the court, notwithstanding the earnest argument of the able counsel of plaintiff, does not feel authorized to do. Upon this ground, then, if upon no other, the case must be remanded to the Circuit Court for a new trial.

This opinion might close at this point, but several other important questions are raised in the other grounds of appeal, which, if decided now, might relieve the case from some embarrassment and contribute, on the second trial, to a more speedy and effectual administration of the law as applicable to cases of this kind. With that view the other grounds involved will be now considered.

There are three classes of cases in which a party may receive injury while in the employment of another, and for which he may become entitled to an action for damages, dependent upon the facts in each case. First, where the injury is the result of a direct act of the employer—either negligent or otherwise—or of a representative of his. Second, where the injury is the result of an act of a co-laborer with the employee. And, Thirdly, where it results from defective instruments or machinery with which the employee is furnished to do his work. In these several classes there are always both questions of fact and of law. For instance, in the first a question of fact may arise whether the party defendant is the employer or a subordinate principal. In the second, whether the party causing the injury is a co-laborer; and, in the third, whether the machinery is unsafe and defective, and, if so, whether known or unknown to the employer. These questions of fact, with such others as may be involved, when they arise in the case, must of course be tried by the jury. The questions of law must be decided by the court. And in a case like this—sounding in damages—which is a case at law, the only questions which can be brought to this court, by way of appeal, are

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the *questions of law passed upon or omitted by the Circuit judge to which exception has been made. With this statement, let us examine the questions presented here.

It is not contended that the injury in this case resulted directly from any positive act of the defendant as employer. The allegation is that it resulted from unsafe and defective machinery, which was improperly undergoing repairs during work hours by the direction of the defendant.

The defendant served numerous exceptions to the charge of the judge, assigning errors both of omission and commission, refusals to charge and incorrect charges. It will not be necessary to take up these exceptions seriatim. Taken as a whole, they raise four questions of law, as presented in appellant's points and authorities.

The first involves the law as to contributory negligence. The second as to the degree of proof of defects in the machinery, which must be brought home to the master or employer. The third as to the liability of the master for the negligence of a fellow servant with the party injured. And the fourth as to the degree of negligence required to make the master liable to his servant. These are the points which have been mainly discussed before this court, and to these we will confine our opinion.

Inasmuch as negligence is a thread which runs through and is common to all these questions, it will not be amiss to understand clearly at the beginning what is the meaning of this. Mr. Wharton, Section 1, page 1, defines negligence as correctly as it can well be done. He says "that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under existing circumstances would not have done, the essence of the fault being either in omission or commission."

Now, as to contributory negligence. This involves an inquiry into the question how far negligence, as above defined on the part of the injured party, will relieve the party whose act is complained of as the cause of the injury.

This is a very important question to the business interests of the country. There are indeed but few industries which can be carried on by a single individual, and conse-

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quently but few in*dustries that this question does not touch. Capital and labor, employers and employees, masters and servants, are all absolutely necessary to progress, and the combination of these relations reach out and affect every interest of society. It is no wonder, then, we find that this question has been often and thoroughly discussed—discussed by some of the ablest judges, most distinguished lawyers and elementary writers of the country. It will not be our purpose to follow this discussion into the numerous cases where the different phases have been considered. What is important here is to reach the result; to ascertain what has been settled.

We have found some confusion and seeming conflict in some of the cases, but we think that the following proposition may be regarded as well established.

The question in all the cases seems to be: Has the damage or injury complained of been occasioned entirely by the negligence

or improper conduct of the defendant, or notwithstanding such improper act of defendant, would the injury have been avoided but for the negligence or want of ordinary care of the plaintiff? In the former case the plaintiff is entitled to recover. In the latter the defendant is entitled to the verdict. And this principle applies whether the injury complained of is alleged to be caused by the negligent act of the employer or a co-laborer, or resulting from defective machinery. In other words, the courts cannot undertake in these cases to solve the problem how far such party may have contributed to the unfortunate result, and by this means assess the damages on each pro rata. The only question that can be considered is: Has the defendant entirely caused the injury? If so, he is responsible. If, however, the injury could have been avoided by reasonable or proper care on the part of the plaintiff, then the defendant is held harmless. R. R. Co. v. Jones, 5 Otto [95 U. S.] 442 [24 L. Ed. 506]; Wilds v. Hudson River R. R. Co., 24 N. Y. 430; Philadelphia and Reading R. R. Co. v. Hummell, 8 Wright (Penna.) 375.

In this state, in the case of Conlin v. Charleston, 15 Rich. 201, this doctrine was recognized. The court said: "That where one has himself contributed to the cause of the damage of which he complains he cannot recover against another who also con-

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tributed *to the same cause." This additional remark, however, was made, "but this may be understood of the proximate and not any remote or collateral cause." That is, the contributory act of the plaintiff must not be simply a remote or collateral cause, but it must be proximate.

This remark would seem at first to have been intended as a modification of the general principle announced above as extracted from the cases decided elsewhere. But upon an examination of the cases referred to by the court, this will be found to be a mistake. Judge Moses, in making this remark, referred to the cases of Witherly, Adm'x, v. Regent's Canal Co., 104 Eng. C. L. 2; Tuff v. Warman, 2 C. B. (N. S.) 740. In these cases it was held that where the negligence or default of plaintiff was in any degree the direct or proximate cause of the damage he was not entitled to recover, however great might have been the negligence of the defendant. But if the negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might, by the exercise of ordinary care, have avoided it. It must be understood, in this connection, that the term "proximate" does not mean the sole and direct cause, but it includes all such acts or omissions as may have contributed to the injury complained of, and there may be more than one proximate cause. Sherman on Neg., 10, 33, 34.

Now, apply the test of these principles to the charge of the judge. He seems to have charged in general terms, "that if the plaintiff contributed to the accident from want of ordinary care or by the exercise of ordinary care could have prevented it, then the verdict must be for the defendant." This, though not in the precise language of the request, was in substance in accordance with the principles announced above, and standing alone, would not be objectionable. But he charged further, "that if the defendant was found to be negligent, grossly or otherwise, because of any defect in the looms, or want of repairs thereof, and the defects thereof are not the proximate cause of the injury, if the plaintiff, by the exercise of ordinary care, could have avoided the accident, she cannot recover." This charge, when analyzed, conveyed the idea that there

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could be but one proximate cause, *and if that was the negligence of the defendant, whether gross or otherwise, then, although the injury might have been avoided by ordinary care on the part of the plaintiff, still she would be entitled to recover. This, we think, was narrowing the principle extracted from the cases already cited too much, and was stating it too much against the defendant.

We do not think the cases of Conlin v. Charleston, Witherly, Adm'x, v. Regent's Canal Co., and the case of Tuff v. Warman, supra, will bear this construction. In these cases, as was held in the often-quoted Donkey case of Davis v. Mann, 10 M. & W., 46, the principle applied was that where it appeared from the evidence that the proximate cause of the injury—in the sense that the plaintiff in no way contributed thereto—was not the negligence of the plaintiff, and the injury could have been avoided or prevented by ordinary care on the part of the defendant, then the injury is to be ascribed to his gross negligence—for which he may be held responsible — notwithstanding there may have been remote and collateral negligence by the plaintiff. In a case of that kind it devolves upon the defendant to show that he could not have prevented the injury by the exercise of ordinary care.

The judge failed to state the principle in this limited form. He held the defendant responsible if the jury found the defects in the loom proximate cause of the injury, without regard to the fact whether the negligence of the plaintiff contributed directly as an additional proximate cause or not.

Now, as to the second point: What is the extent of the employer's responsibility for injuries growing out of defective machinery? The plaintiff requested the judge to charge: That if the accident was caused by defects in the loom—not patent, but latent—not

known to the president or other controlling officers of the company, then the verdict must be for the defendant, and even if this defect was known to Harling, Harling being a mere fellow-servant, that plaintiff could not recover. The judge refused. We think he was right in refusing to charge thus broadly. The liability of an employer for defective machinery does not depend on the fact that the defects are latent and unknown, but it depends on the question of proper

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care in select*ing this machinery and keeping it in repair. If the employer has been careless and reckless in the purchase and fitting up the machinery, or if its defects could have been discovered by the exercise of reasonable care, either in the purchase or afterwards, the fact that they were not discovered and were unknown, will not, and ought not of itself, to shield the employer. Wood on Master and Servant, §§ 416–418; Sherman on Neg., § 87. Whether Harling was a fellow-servant was a question of fact and not a question of law. What constitutes a fellow-servant, and what an officer representing the company, would be a question of law, but whether a particular individual is the one or the other would be a question of fact. The judge, therefore, could not properly have charged as defendant requested, as the request assumed that Harling was a fellow-servant.

Next, as to the liability of the master for the negligence of a co-servant with the party injured. The respondent requested the judge to charge "that whether a middleman represents the company, and whether the injuring party and employee were of a common employment, were questions of fact for the jury." And the appellant requested him to charge "that when the plaintiff entered the service of the company as a laborer in the factory she assumed all the risks incident to said employment, and that the negligence of co-servants is one of said risks. Hence, if the jury find that she was injured by the negligence of Harling a co-laborer, she cannot recover." The judge declined to charge as thus requested.

A part of both of these requests he might have charged. He could have charged the latter portion of respondent's request, and he could have charged that an employee assumes the risks incident to his employment—one of which is the negligence of a co-servant. Sherman, § 88; Wood, § 422. But, as a whole, he could not have properly charged either request. Whether a middleman represents the company, is a question of law. Whether such an one is a middleman is a question of fact. And whether Harling was a fellow-servant was a question of fact.

Where requests are made for the charge of the judge upon propositions submitted as a whole, unless they are correct as a whole, it is not his duty to disconnect them, sus-

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taining such as *are sound and rejecting such as are unsound. He is to consider them as presented, and sustain or reject accordingly.

The judge, in overruling these requests, did charge that Harling was performing his duties under rules and regulations of the company; that the company thus became responsible for Harling's performance of his duties and for his negligent performance; that if plaintiff was injured by his neglect to repair the defects of the loom, and such duty was imposed upon him, and that these defects were the immediate cause of the injury, the defendant was responsible. We think this, as a whole, was error, because questions of fact are intermingled and decided with questions of law, and because the principles of law laid down are stated stronger against the appellant than the decided cases warranted.

It does not follow that because different employees act in different departments of the same general business that they are not fellow-servants. And the fact that one acts in one department and one in another, does not impose any greater responsibility on the employer in case of injury by one to the other than when they are both in the same department. The question is: Were they co-servants in the general business? And the test is: Were they acting under a common employer, and in the same general business? Wood, § 425. This being established, then they assume the risk of each other's proper performance of duty, the employer being responsible for failure to exercise proper care in the original employment of his servants and in ascertaining their qualifications after they are in his service, Wood, § 416.

As to the degree of negligence of which the master must be guilty in order to be held responsible for an injury to his servant, the judge was requested by the appellant to charge that the measure was gross negligence. The judge laid down the rule to be the want of proper care. We see no error in this. A master is liable to his servants for his own negligence, and the measure of his negligence, when applied to him, must be the same as when applied to others. The case of Brickman v. South Carolina R. R. Co., 8 S. C. 198, does not fully sustain the position of appellant. In that case the Circuit judge had prescribed gross negligence as the true

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measure of defendants' *responsibility. From this there was no appeal, and the Supreme Court said: "It would be difficult to state the law more favorably for the defendants." The court also said, "as neither party alleges error in the limitation of the liability of the defendants to a case of gross negligence, it is unnecessary for the court to look into the state of the law on that subject."

We think that the same rule should apply to both master and servant.

In conclusion, it may not be improper to recapitulate the legal propositions herein adjudged as applicable to this and similar cases. Where an injury has happened to a servant or employee the master's liability is fixed as follows: If the injury results from the master's own negligent act, or from that of one of his representatives, he is prima facie liable. If it results from defective machinery or the negligent act of a co-servant with the injured party, he is not responsible unless the proof shall go further and show that the master's negligence or want of reasonable care in purchasing and overlooking his machinery or in employing and supervising his servants, was the cause of his having defective machinery in use, and negligent servants engaged. And in all these cases, if it should appear in the defence that the negligence of the injured party, in the sense in which that term has been defined above, contributed to the injury in such degree as to become one of the proximate causes thereof so as to relieve the other causes mentioned from being the entire cause, then this will be a good defence.

The limitations above as to the master's responsibility for the acts of a co-servant with the party injured is a departure from the general common law rule imposing liability upon the master for injuries by servants to third parties. This departure was announced first (says Mr. Wood) in the year 1841, in this state, in the case of Murray v. Railroad Co., 1 McM. 385 [36 Am. Dec. 268]. Previous to this in England, in the case of Priestly v. Fowler, 3 Mees. & W. 1, a similar principle had been adopted in reference to appliances and machinery, but as to co-servants, as Mr. Wood says, our state seems to have been the pioneer in this new departure, and in the case of Murray v. Railroad Co., supra, essentially laid the foundation for the doctrine which has since been adopted both in England and in all the American states, as the true rule upon this subject.

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*The next year after the decision in Murray v. Railroad, the case of Farwell v. Boston, &c., R. R. Co., (in Massachusetts,) 4 Metc. 49, came before that eminent judge, Judge Shaw, who not only endorsed this doctrine, but sustained it in as able an opinion as perhaps ever came from the pen of that distinguished jurist. The principles herein announced will be found sustained in Sherman on Neg., ch. II., 24, et seq.; ch. X., 65; Wood on Mast. & Serv., ch. XVI., 795, and in many cases referred to in the notes. They are not only sustained by abundant authorities, but they are founded upon principle, justice and public policy. An employee enters the service of another upon contract; it is a voluntary service; he knows when he engages that he is to be surrounded by fellow-servants; he knows, too, that this will expose him to risks other than such as his own conduct may create; he is aware that the machinery is complex, and, to some extent, dangerous, and he is presumed to contract with full knowledge of all the risks incident to these things, and, therefore, to assume them.

To hold the employer as an insurer against the negligence of fellow-servants, or against all defects of appliances, would be a deathblow to some of the most important enterprises upon which the material progress of the country depends. Under such a principle no one would be safe in engaging in any industry beyond the reach of his own eyes, and the management of his own hands. It would hamper and cripple labor, and destroy capital. In justice, however, to the employee, the employer should not be entirely exempt. The rule is the one adopted—a medium line—which holds the employer responsible for that part of the work which falls to him, either personally or through his agents, i. e., the proper selection and superintendence of both his operatives and his machinery. He is a guarantor that all reasonable and proper care shall be exercised in the performance of these duties, and his liability should be limited to a failure to meet his obligations in this respect.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. *458

*(Case No. 1064.)

WILLIAMS v. IRBY.

(April Term, 1881.)

[1. *Justices of the Peace* ⇐90.]

In a trial justice's court the defendant may orally answer a written complaint.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 306; Dec. Dig. ⇐90.]

[2. *Pleading* ⇐384.]

The defendant having orally pleaded a general denial, he could not introduce evidence of a counter-claim; notice was necessary.

[Ed. Note.—Cited in Badham v. Brabham, 54 S. C. 402, 32 S. E. 444.

For other cases, see Pleading, Cent. Dig. §§ 1296–1298; Dec. Dig. ⇐384.]

[3. *Replevin* ⇐12.]

A demand originating in contract cannot be pleaded as a counter-claim in an action for the recovery of a specific chattel.

[Ed. Note.—Cited in Talbott & Sons v. Padgett, 30 S. C. 172, 8 S. E. 845; Ludden & Bates v. Hornsby, 45 S. C. 120, 22 S. E. 751; Sparks v. Green, 69 S. C. 226, 228, 48 S. E. 61; Pee Dee River Lumber Co. v. Fountain, 90 S.

C. 126, 72 S. E. 885; Woodruff Machinery Mfg. Co. v. Timms, 93 S. C. 103, 76 S. E. 114. For other cases, see Replevin, Cent. Dig. § 106; Dec. Dig. ⟸12.]

[This case is also cited in Burr v. Brantley, 40 S. C. 543, 19 S. E. 199, without specific application.]

Before Aldrich, J., Marlborough, September, 1880.

Action by Thomas W. Williams against Harriet Irby, commenced in December, 1879, and tried by a trial justice in March, 1880. The opinion states the case.

[For subsequent opinion, see 16 S. C. 372.]

Messrs. Caston & McIver, for appellant.

Mr. A. A. Pollock, contra.

July 21st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. During the year 1879 the plaintiff (appellant) carried to defendant's (respondent's) gin certain cotton of his own to be ginned and packed into a bale. The bale having been ginned and packed, was at respondent's gin on December 9th, 1879, when appellant demanded it of respondent. The delivery was refused, and appellant commenced action before a trial justice, alleging the facts as above stated, demanding judgment in his complaint for the recovery of the cotton or for the sum of $68, in case possession could not be had, with $20 damages for the detention. The answer of respondent was made orally, and was as follows: "The defendant puts in a general denial."

On the trial of the case the defendant, without previous notice, offered evidence to show a prior indebtedness of plaintiff to defendant on an old account of $20, and also

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a balance of rent due *for the year 1879. The evidence was objected to by plaintiff as not in reply to the case made. This objection was overruled by the trial justice and the evidence was admitted, which established a certain balance due for rent in 1879.

Upon this evidence the trial justice decreed: "That the defendant, as landlord, was entitled to a balance of rent for the year 1879; that the amount of cotton taken exceeded the amount to which defendant was entitled as rent by two hundred pounds of cotton, which was worth, at twelve cents per pound, $24; and that this amount of cotton was wrongfully taken, and that the plaintiff was damaged thereby $10 in addition to the value of the said two hundred pounds of cotton." He then decreed for plaintiff $34 and costs. From this judgment both plaintiff and defendant appealed to the Circuit Court.

The plaintiff appealed on numerous exceptions; when condensed, however, they present but three grounds:

1. "That the trial justice erred in permitting evidence of a counter-claim, without notice, after issue joined upon a general denial of the facts alleged in the complaint.

2. "Because the trial justice erred in allowing defendant to answer orally after service of written complaint upon him.

3. "Because the trial justice, after having found that the cotton was taken, as charged in complaint, erred in holding that defendant, as landlord, had the right to hold the cotton, and out of it to enforce payment of plaintiff's indebtedness to him for rent," &c.

The defendant appealed upon the ground: "That the trial justice erred in not dismissing the complaint on his motion; because, as was patent, no affidavit had been filed and served at the commencement of the action as required, as he claimed, by Section 74 of code."

Upon the hearing of the appeal, Judge Aldrich rendered the following order: "I have examined and considered the testimony. It appears to me that the trial justice has done substantial justice to the parties litigant. The appeal is dismissed."

From this judgment of Judge Aldrich the plaintiff has appealed, assigning as error, in substance, that the presiding judge overruled his exceptions to the judgment of the

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trial justice, and *that, disregarding these exceptions, which raised questions of law, the judge based his judgment on what appeared to him to be "substantial justice between the parties litigant."

Section 91 of the code, Subdivision 2, provides that the pleadings in trial justices courts may be either oral or in writing. Appellant contends that while this section permits the pleadings to be either oral or in writing, yet that they apply to the whole pleadings, embracing the pleading both of plaintiff and defendant; that a proper construction of this section requires the pleadings on both sides to be the same. If the one is in writing the other should be so also, and the same as to oral pleadings; and inasmuch as the complaint in this case was in writing, it was error to permit the defendant to answer orally.

If this is the true construction of this section of the code, it would, in effect, give to the plaintiff, who always pleads first, the power to determine whether the case should be conducted upon oral or written pleadings. We do not think that this was the intent of this section. No doubt it would be much better in all cases that pleadings on both sides should be in writing. If this were so, much uncertainty and confusion, which often occurs from loose pleadings, would be prevented; and if it was within the power of this court to establish such a rule it might be wise to do so, but this court has not been invested with such power. It is our province to construe and declare, not to enact. In our judgment the section under consideration allows either party to plead either in writing

or orally, as he may see proper, without regard to the pleadings on the other side, "the substance of the pleadings to be entered by the trial justice on his docket." There was no error, then, in the Circuit judge disregarding this exception.

The exception as to the counter-claim, we think, should have been sustained. In the first place, even had it been a proper counter-claim, one which, under the rules of pleadings, could have been legally set up as a defence to this action, yet it was objectionable here on the ground that no notice, either orally or in writing, had been given. It seems that the first that plaintiff heard of it was when the testimony of defendant was entered upon after the plaintiff had closed his case.

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*Subdivision 4, Section 91 of the code, provides that the answer of defendant may contain a denial of the complaint or any part thereof, and also a notice, in a plain and direct manner, of any facts constituting a defence or counter-claim. In this case the answer of defendant was nothing more than a general denial. This answer put in issue the allegations only in the complaint.

The testimony, according to well-understood rules governing trials, should, under the code, have been confined to the matters thus put in issue. "Under the general denial of the code, evidence of a distinct affirmative defence is not admissible. The only evidence which the defendant is entitled to give is limited to a contradiction of the plaintiff's proofs, and to the disproval of the case made by him." Pom. on Rem., § 660. It was a mistake, then, to allow the defendant to travel beyond the record and to introduce a defence which made its first appearance in the testimony which was offered to sustain it, and which the plaintiff objected to. This objection being overruled, exception was taken on appeal to the Circuit Court. In our judgment this exception should have been sustained on the grounds above referred to.

We think, too, that it was fatal upon another ground. The answer of defendant must contain either a general or specific denial of the material allegations in the complaint, or a statement of new matter constituting a defence or counterclaim. Code, § 172. If a counter-claim is relied on, it must be one existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action, arising also on contract, and existing at the commencement of the action. Code, § 173.

The demand set up in this action by the defendant does not appear to be embraced in either of the classes of counter-claim provided for in this section of the code.

The plaintiff's action was for the recovery of a specific chattel—a certain bale of cotton.

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The defendant's counter-claim orig*inated on a contract, either actual or implied. It was in no way connected with plaintiff's foundation of action, and it is apparent that it could not be sheltered under either one of the specifications contained in Section 173. Mr. Pomeroy, in Section 767 of his admirable work on Remedies and Remedial Rights, says: "It would seem that in an action to recover the possession of specific chattels no counter-claim is possible, unless, perhaps, equitable relief may be demanded under some exceptional circumstances."

The claim of defendant here is not based upon an equitable right. His claim is a clear, legal claim—a claim growing out of contract—for the enforcement of which he has a plain and adequate remedy at law. He cannot, therefore, invoke the exceptional circumstances, which, it seems from the authority above cited, will sometimes allow an exception to the general rule. He must stand on the general rule, and that rule shuts out his defence. The Circuit judge, we think, was in error in not sustaining this exception of the plaintiff.

The discussion of the last exception of plaintiff has, in effect, determined his third exception. It will be, therefore, unnecessary to discuss that. The defendant has not appealed, and we do not regard the point made by him before the trial justice, and submitted in his points and authorities, as before us.

The judgment of this court is, that the judgment of the Circuit Court be reversed and that the case be remanded to that court for a new trial.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 462

(Case No. 1065.)

MECHANICS' AND FARMERS' BUILDING AND LOAN ASSOCIATION v. DORSEY.

(April Term, 1881.)

[1. *Building and Loan Associations* ⇨33.]

At a time when there was no statute regulating the rate of interest on money lent, a building and loan association was chartered,

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with power to *make such rules and by-laws as were not repugnant to the constitution and laws of the land; afterwards a usury law was enacted, limiting the rate of interest to seven per centum per annum. *Held*, that contracts

of the association subsequently made were subject to the provisions of this law.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 49; Dec. Dig. ⟸33.]

[2. *Building and Loan Associations* ⟸33.]

A member of a building and loan association received $1000, the full amount of his subscription to five shares of the capital stock, agreeing to pay monthly therefor (in addition to his installments of stock subscription,) $5 for interest and $7.25 for premium bid, total, $12.25 per month, or $147 per annum, until the assets of the association were worth $200 for every share. *Held*, that this was a greater rate of interest than seven per cent. per annum, and was, therefore, usurious.

[Ed. Note.—Cited in Thompson & Co. v. Gillison, 28 S. C. 538, 544, 6 S. E. 333; Buist v. Bryan, 44 S. C. 126, 21 S. E. 537, 29 L. R. A. 127, 51 Am. St. Rep. 787; Equitable B. & L. Ass'n v. Vance, 49 S. C. 409, 27 S. E. 274, 29 S. E. 204.

For other cases, see Building and Loan Associations, Cent. Dig. § 57; Dec. Dig. ⟸33.]

3. Columbia Building and Loan Association v. Bollinger, 12 Rich. Eq. 124 [78 Am. Dec. 463], recognized and followed.

[4. *Building and Loan Associations* ⟸26.]

[Cited in Pollock v. Carolina Interstate B. & L. Ass'n, 51 S. C. 424, 29 S. E. 77, 64 Am. St. Rep. 683, to the point that a loan made by a building association to one of its members is not a partnership contract.]

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. ⟸26.]

[This case is also cited in Equitable B. & L. Ass'n v. Vance, 49 S. C. 402, 27 S. E. 274, 29 S. E. 204, and distinguished therefrom.]

Before Mackey, J., Richland, October, 1879.

The plaintiff association commenced business under its charter in the city of Columbia in 1873. The defendant, John Dorsey, became a member of the association in January, 1878, by purchasing five shares for $295. In the same month defendant borrowed $1000 on these five shares, upon the terms mentioned in the opinion of this court. His bond did not call for the repayment of the principal sum borrowed, it being the scheme of the association that it was his shares of the capital stock received in anticipation. The bond was secured by mortgage of real estate. Defendant continued his payments under his bond until he had paid the sum of $189.75, after which no payments were made. This action was commenced September 27th, 1879, for foreclosure of the mortgage, alleging that defendant was in arrears nine months of subscription, interest and premium, and that the principal sum was, therefore, due also. The defence was usury.

This association was chartered February 15th, 1872. 15 Stat. 39. The usury law was passed December 20th, 1877. 16 Stat. 325. The loan was made January, 1878.

The Circuit judge, after a statement of the case and a review of authorities, concluded his decree as follows:

I am constrained, therefore, in accordance with the overwhelming weight of the decisions in this state, dating from the eighteenth century to the present time, supported by

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many most elaborate *decisions of the highest courts, both of this country and of England, to declare that in my judgment the statute of usury has been violated in the case under consideration.

It is the opinion of the court that the interest paid to the association plaintiff by the defendant, John Dorsey, should be credited upon the dues that should legally have been collected by the plaintiff, to wit, $5.83 per month, which is the interest, monthly, on $1000, at the rate of seven per centum per annum. The amount in interest, installments and premiums paid into the association plaintiff from January, 1878, to November, 1879, by the defendant, John Dorsey, was $174.75. The amount to which the association was entitled from the same date to November, 1879, at seven per centum per annum, was $134.09, leaving a balance of $40.66 in favor of John Dorsey.

It is therefore ordered, adjudged and decreed—

1. That the complaint be dismissed, with costs.

2. That the balance of $40.66 be placed to the credit of the defendant, John Dorsey, on the books of the association plaintiff, who shall apply the same at the rate of $5.83 monthly, to the satisfaction of the defendant's dues, until the said amount of $40.66 shall have been exhausted.

The plaintiff appealed upon the following grounds:

1. Because his Honor erred when he held that the bond was usurious.

2. When he allowed any interest at all to the plaintiff, it being clear law that if it was usurious no interest whatever can be collected.

3. When he did not decree and adjudge that the plaintiff should recover the principal sums loaned, under the act relative to usury, assuming that the judge was right in finding the contract was usurious.

4. Because the whole decree is erroneous throughout, and in conflict with all the law and decisions both for and against usury.

Mr. John T. Sloan, Jr., for appellant.

The contracts of building and loan associations have been held to be exempt from the operation of the usury laws. In England:

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*37 E. C. L. 335; 1 Exch. 494; 6 Hare 87. In United States: 46 Ga. 172; 22 Gratt. 233; 27 Conn. 282; 43 N. H. 195; 27 N. J. 223; 25 Barb. 264; 13 Gray 157, 168; 1 McArthur, 385; 2 Quart. L. J. 347.

These contracts are not within the letter or spirit of the usury law. 7 Barn. & C. 453; 1 Cowp. 112; 4 Denio 264; 22 Barb. 118.

Mr. J. E. Burke, on same side, cited the following additional authorities: 8 Eng. L. & Eq. 57; 3 Eng. L. & Eq. 157; 15 Id. 478; 3 Stockt. 382.

Mr. Andrew Crawford, contra.

July 21st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The respondent, a stockholder to the extent of five shares, at $200 each, in the appellant association, on January 19th, 1878, under the rules and regulations of the association, obtained a loan of $1000 from said company. To secure this loan he gave his bond with mortgage of real estate, conditioned to pay to the association monthly payments of $17.25, itemized as follows: $5 for monthly subscription on his shares; $5 for interest on the sum advanced to him at the rate of six per cent. per annum, and $7.25 for the monthly premium which he contracted to give for the loan—in all $17.25.

This sum was reached in this way: The company was made up of those who had shares therein at $200 per share. These shares were not paid up in full at once, but were to be paid monthly at the rate of $1 per month. The money thus paid was to be lent out to stockholders in amounts not exceeding $200 per share, at the rate of six per cent. per annum. The privilege to borrow, however, was dependent upon the premium which might be offered at public bidding for the money proposed to be lent. The company, under the charter, was authorized to continue its operations until each share should amount to $200. In other words, the company expected, by lending out the monthly receipts on shares, the monthly

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receipts of interest, and *the premiums, to be able ultimately to return to each stockholder his stock of $200 per share, and when this time arrived the company was to end.

As has been stated, the respondent, being a stockholder of five shares, borrowed $1000, the full extent of his privilege. He obtained this sum at public sale, agreeing to give a premium of $1.45, which premium was to be paid monthly, and amounted to $7.25 for five shares. For this amount, and for the monthly interest, as also the monthly subscription on his five shares, he gave his bond above referred to with the mortgage, the monthly payments, as therein stated, being in the aggregate $17.25.

The respondent failing to meet his bond, according to its terms, this action was commenced to foreclose the mortgage. As a defence, the respondent interposed the plea of usury. The Circuit judge sustained this plea, and the appeal here presents the single question whether the contract is or is not usurious.

The association was chartered in 1872, and organized soon thereafter. At this time there was no law in this state making contracts usurious at any rate of interest; but when the contract sued on in this case was made, the act of 1877, known as the statute of usury, had been passed, and was of force. The respondent relies on this statute.

If the rules and regulations by which the association exercised the right and power to lend their assets, at public sale, to the highest bidder at a premium, in addition to a regular fixed interest thereon, had been a part of the original charter of this association, or had been incorporated therein as by-laws, then a question might arise whether, even though the contract was in violation of the act of 1877, that act could apply.

In the case of Bibb County Loan Association v. Richards, 21 Ga. 592, the decision was placed upon the ground that the charter had adopted the constitution and by-laws of the association as a part of the law by which it was regulated, and the charge being according to it, could not be illegal. So, here, if the constitution and by-laws of this association authorizing it to lend its money at a premium, to be ascertained by public sale, in addition to six per cent. interest, had been adopted as a part of the charter, it might be

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a question whether a subsequent act *could divest the company of this right; but such was not the case. No constitution or by-laws had been adopted. On the contrary, the second section of the act gave power to the association to make such rules and by-laws for its government as are not repugnant to the constitution and laws of the land. This section limits the power of the association to the adoption of such rules and regulations as may not conflict with the constitution and laws of the land, and, by necessary implication, negatives any rules and regulations which may be in conflict, whether they were in conflict at the time of their adoption, or become so by subsequent enactments. So that the main question before us is still whether the contract of respondent is usurious, as in conflict with the act of 1877.

The expectation of the association, if it could be fortunate and successful in its operations, was that at the winding up each shareholder would be entitled to $200 for each of his shares. This being a reasonable hope, founded upon the experience of such institutions, it was not supposed to be an unsafe proceeding to allow each stockholder to borrow the amount to which he would ultimately become entitled at the winding up, in advance, to wit, $200 per share. But to make the business profitable and the more certainly to ensure the result desired, some arrangement had to be devised to secure upon the money lent out a greater per cent. than six per cent., the regular established interest. Hence, the plan of permitting each shareholder to draw in advance of the wind-

ing up of the concern the amount which he would no doubt become entitled to at that time; but, getting it thus in advance, he was required to pay not only the interest but such premium as other shareholders, who desired the money also, might force him at public sale to pay. Each shareholder, by paying up his monthly dues of $1 on his shares and remaining quiet, might legitimately expect to get back, at the termination of the business, $200 per share. If he desired, however, to get the use of this money before the winding up, he was entitled to borrow it at the rate of six per cent., and such premium as the public sale might force upon him. This was the scheme. Was it usurious?

Usury is giving more than the legal rate of

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interest for the use *of money. Under the act of 1877 the legal rate is seven per cent. Dorsey borrowed $1000 from this association. This money, he expected, would be his at the end of the association, but he was not entitled to it, as owner, until the end. He borrowed it years in advance of the time when it should be his: until then it belonged to the association, and until then he contracted to pay not only six per cent. for the use of it, but an additional sum of $7.25 per month, $77 more than the legal rate of seven per cent. The interest on $1000, at seven per cent., would be $70. Dorsey, according to his contract, was to pay $147, to wit, $60 at $5 per month, styled interest, and $87 at $7.25 per month, styled premium: just $77 per annum more than the act of 1877 allowed.

Now, although this amount is designated as part interest and part premium, can the fact be disguised that Dorsey has contracted to pay this amount for the use of the money which he obtained from the association? He may have been willing to give this large premium to this company because he was a shareholder thereof, and because, on this account, he was interested in making the operations of the company successful; but, nevertheless, was he not giving the sum which he contracted to give for the use of the money which he obtained? Suppose a stranger had borrowed this money upon the same terms, and the amount which he contracted to pay for the use of it had been split into fragments—a part styled interest, a part premium, and a part expenses, or something else, could any court hold such a contract other than an evasion of the act forbidding more than seven per cent. for the use of money? If so, the act had as well be repealed. The ingenuity of money lenders could easily devise plans by which more than seven per cent. could be realized, if simply styling the excess by some other name than interest, can pass the courts.

There may be a doubt as to the wisdom of any act limiting the per cent. which parties shall charge for the use of money. There may be a doubt whether legislation upon this subject is not as injurious as legislation attempting to regulate and control the contracts of parties in reference to corn or cotton, or any other article of commerce and

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trade. But there can hardly be a *doubt that a contract of this kind, where—cover it up as you may—it is apparent that a party has contracted to pay $77 per annum more than the legal interest, is in violation of the act which forbids the taking of more than this interest. It is useless, however, to discuss the question upon general principles, or upon the construction which shall be given to this special contract. This court is bound by authority, and when a question has been decided by our own courts, as long as that decision stands—whether wise or unwise—whether destructive of the interests to which it applies or not, it must be enforced, unless so apparently wrong as to demand overruling.

We regard the question here as settled by the case of Columbia Building and Loan Association v. William Bollinger, 12 Rich. Eq. 124 [78 Am. Dec. 463], in which a very learned and able opinion of the distinguished Chancellor on the Circuit, Chancellor Carroll, was overruled by the Supreme Court. That case and this are almost identical. The charters of the two companies were nearly the same; the by-laws almost exactly alike. A stockholder in that company, as in this, borrowed in advance a certain sum of money, which, he expected, would ultimately be his. He borrowed at public bidding, as in this. He contracted, as here, by bond and mortgage, to pay the monthly interest. The premium, instead of being paid monthly, was deducted at the time of the contract. This was paid in cash, instead of by monthly installments. This is the only difference between the cases. Is this a difference in principle? We do not so understand it. The court, in that case, held the contract usurious. Judge O'Neall, with that strong conviction which characterized all of his opinions, declaring "that there was no doubt about it," and, but for the earnest and able decree of Chancellor Carroll, he would not have thought it necessary even to look into the authorities on the subject.

The argument of Chancellor Carroll, and the opinion of the Supreme Court overruling it, present the two opposing views on this subject. The decree of Chancellor Carroll is based upon two prominent grounds: First. That the dealing of the parties was a transaction between partners and in reference to partnership funds, and was not a loan. He

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cited Silver v. Barnes, *6 Bing. N. C. 180, and several English authorities. Second. That the money advanced to Bollinger was but that which he, Bollinger, would get when the corporation wound up, and if he was

willing to deduct $300—the premium—because he was getting the money in advance, there was nothing illegal in this. In that case, as has already been stated, the premium was deducted at the time the contract was made instead of being contracted to be paid in monthly installments, as the interest was to be paid. The Chancellor thought that, in this respect, it was like a party agreeing to take less for a debt than the amount actually due, and, having executed the contract, he could not afterwards dispute or repudiate it.

These positions, which are the only ones that can be taken with any plausibility in support of such a contract, after full consideration by the Supreme Court, were overruled, and the contract of Bollinger was declared usurious. We are bound by this decision. It is therefore unnecessary to go into a discussion of the authorities referred to by Judge Mackey, showing the feelings and tendency of the courts on the subject of usury. The case of Bollinger is controlling.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 470

(Case No. 1066.)

CHAPMAN v. LIPSCOMB.

(April Term, 1881.)

[*Reference* ⇐2, 47.]

The master's act (16 Stat. 608) does not withhold from that officer jurisdiction to hear and determine issues of law and fact in a common law action, when empowered to do so by a consent-order of reference; and the trial in the Circuit Court should be had upon his report and the exceptions taken thereto.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 2, 78; Dec. Dig. ⇐2, 47.]

Before Fraser, J., Richland, November, 1880.

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*Action by William W. Chapman against Thomas J. Lipscomb, as superintendent of the South Carolina penitentiary, commenced in August, 1879.

The case is stated in the Circuit decree, which is as follows:

An action was brought by the plaintiff to recover one hundred and seventy-one thousand brick, or the value thereof.

The defendant denied plaintiff's right to recover, and set up, by way of defence, amongst other things, that defendant entered into an agreement with J. A. & J. P. Bondurant for the manufacture of brick; that the services and contribution of material and labor to be furnished by each party were set out in a written agreement, a copy of which is exhibited in the answer; that he was to receive one-half of the brick made; that under terms of the agreement he was entitled to the brick, and to show this an account should be ordered by the court between himself and the said J. A. & J. P. Bondurant, under whom the plaintiff claims.

Issue being thus joined between the parties, an order was made by the presiding judge, November 22d, 1879, "to take testimony and determine all issues of fact and law" in the cause, and to report to the court. This order was consented to, in writing, by the attorneys of both parties. In pursuance of this order the master heard the case, and has filed his report and the testimony. Exceptions to this report have been duly filed and served by the defendant.

When the case came before me to be heard, the defendant's counsel raised the objection that the Circuit judge had no right, even with the consent of parties, to order the reference. Under the old practice, there was no such thing as a trial by referees in cases at law; and on the chancery side of the court a reference to the master was for the purpose of "information" to the court. So far as I have been able to investigate the matter, there was in this state, previous to the adoption of the code, no such thing as a reference of "all issues of fact and law." A reference by consent in cases not provided by statute was equivalent to an "arbitration." Wait's Pr., vol. III., 242. And in this case, and where the reference is to a greater or less number of referees than is described by statute, it amounted to a "discontinuance of the action," and the reference became an

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"arbitra*tion" merely. Wait's Pr., vol. III., 254. When a case is on trial before a referee who has been appointed in pursuance of the statute, he has full power to swear witnesses under the penalties of perjury, to force their attendance by rule or attachment, and the master has like power under an order properly made in pursuance of the practice in such cases.

The sections of the code (294, 295 and 296), which gave the power to the courts to refer all issues of fact and law, have been repealed by the master's act, and this latter confers no such power to hear and determine "all issues of fact and law."

The case is, therefore, before me for trial, and, in my view of the reference, I have no facts properly proven on which to base a judgment, even if the court in this case could dispense with a trial by jury. If the reference is a mere arbitration and binding on the parties, another proceeding is necessary to enforce it, as in the view above presented it worked a discontinuance of this action.

I have come to the conclusion, however, from the terms of the order, and the circumstances under which it was made, and by which it is to be interpreted, that the order was not an agreement to refer to arbitration, but only an order of reference made in the

cause and for which there was no warrant of law, even with the consent of counsel.

I am unable, therefore, to render a judgment in the cause upon the merits, and

It is ordered that the proceedings under the reference be set aside, and that the parties have leave to move for a trial in such mode as they may be advised.

From this decree the plaintiff appealed to this court upon the following exceptions:

1. For that his Honor held that the "order of reference" in the above-stated cause, of date November 22d, 1879, was without "warrant of law, even with the consent of counsel."

2. For that his Honor held that the master had no power to hear and determine the issues of fact and law referred to him in said cause.

3. For that his Honor held that there were

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"no facts prop*erly proven on which to base a judgment, even if the court in this case could dispense with a trial by jury."

4. For that his Honor did not hold that the defendant, having set up an equitable defence in his answer, and having consented in writing to the order of reference and proceeded thereunder without objection, is now estopped from raising such objection.

5. For that his Honor did not hold that the defendant, not having excepted to the order of reference or to the master's report upon said grounds, is now estopped from setting up the same.

6. For that his Honor did not hold that the defendant's consent to the order of reference in said cause was "a waiver of trial by the jury," and the master having taken and reported all testimony offered in pursuance of said order, he should proceed to determine for himself the facts at issue upon said pleadings and give judgment in accordance therewith.

7. For that his Honor ordered "that the proceedings under the reference be set aside, and that the parties have leave to move for a trial in such mode as they may be advised."

Messrs. W. H. Lyles and J. T. Barron, for appellants.

Mr. Youmans, Attorney-General, contra.

July 22d, 1881. The opinion of the court was delivered by

McIVER, A. J. This was an action brought by the plaintiff, in the county of Richland, to recover certain articles of personal property or the value thereof. By the consent of parties, an order was made by the Court of Common Pleas for that county:

"That it be referred to Nathaniel B. Barnwell, Esq., master for Richland county, to take testimony and determine all issues of fact and law in the above-stated cause, and that he report his actings and doings in said cause with all convenient speed to this court."

Pursuant to this order the master made his report, to which sundry exceptions were filed by the defendant, and when the case came on for hearing before Judge Hudson, the defendant, for the first time, raised the objection "that the master had not jurisdiction to determine the issues in the cause."

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The judge *thereupon directed the master to file with the clerk the testimony taken before him in the cause, which was subsequently done, and the case was continued. When the case came up for hearing at the next term before Judge Fraser, he sustained the objection to the jurisdiction of the master, declined to hear the case upon its merits, and ordered "that the proceedings under the reference be set aside and that the parties have leave to move for a trial in such mode as they may be advised." From this ruling and order of Judge Fraser this appeal has been taken, by which the fundamental question presented is, whether, since the passage of the act creating the office of master, the issues in an action of this kind can be referred, by consent of parties, to the master, to be heard and determined by him in those counties where that office has been established.

The code was designed to establish a system of civil procedure in the courts of this state, one of the features of which was, that in certain cases there might be three modes of trial—by jury, by the court and by referees; and the real question is, whether the master's act (16 Stat. 608) was designed to abolish the last mode of trial in those counties where the office of master was established. The title of that act, to which we are at liberty to refer with a view to ascertain its object, is as follows: "An act to repeal the 294th, 295th, 296th, 297th and 436th sections of the code of procedure within the counties herein mentioned, so as to abolish the use of referees in the said counties, and to establish in their stead the office of master."

It will be observed that the object of the act, as declared by its title, is not to abolish the third mode of trial provided for in the code, nor was it merely to abolish the use of referees, but rather to substitute in the place of the triers, previously provided for, who might be mere private citizens, under no bond, a public officer who would be under bond; for, the language is, that these sections are to be repealed "so as to abolish the use of referees, and to establish in their stead the office of master." This would seem to indicate that the purpose was not to interfere with the third mode of trial, but simply to put in the place of those before whom such trial could be had, a public officer who would be under bond for the faith-

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ful performance of the duties *of his office; and that the master being put in the place of referees, or "in their stead," as it is expressed in the title, would be invested with

all the powers and charged with all the duties which had been previously conferred and imposed upon referees, together with such other powers and duties as are provided for in the act.

Then, when we turn to the body of the act, we find no expression of an intention to abolish one of the modes of trial provided for by the code, except in so far as such intention may be implied from what is termed the repeal of those sections of the code named in the title of the act. But, in fact, those sections are not repealed; they still stand as part of the general law of the state, and are only declared inoperative in the counties named. Then, too, Sections 276 and 277 of the code are left unaffected by the terms of the master's act, and this affords a strong indication that it was not the design of that act to abolish one of the modes of trial provided for by the code, but simply to substitute in the place of referees chosen by the parties or appointed by the court a public officer before whom such trial should be had. Those sections, 276 and 277, contemplate the reference of issues for trial, and the only effect of the master's act is to require that the issues should be referred to the master instead of to referees, in those counties where that office has been established.

Again, the master's act does not simply confer upon those officers the powers and require of them the performance of the duties which were heretofore conferred and imposed upon masters and commissioners in equity, but it also requires them "to execute and perform the orders of the said court [the Court of Common Pleas] upon references made to them or either of them, conformably to the practice of the said court, or to the practice of the Courts of Equity in this state before the said courts were abolished, and so far as the same is not inconsistent with the code of procedure as amended by this act." Now, if the object had been to confine the masters to the powers previously conferred upon masters and commissioners in equity, it would have been very easy to say so. Instead of that, however, the masters are required to execute and perform the orders of the Court of Common Pleas up-

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on *references made to them, conformably, not merely to the practice of the old Court of Equity, but also to the practice of the Court of Common Pleas, and that practice, under the general law of the state, which, as we have seen, is left unaffected by the master's act, is to refer issues in certain cases to be heard and determined by referees, but as it would be "inconsistent with the code of procedure, as amended by this [the master's] act," to refer such issues to referees in those counties where the office of master has been established, the reference there must be to the master.

We are, therefore, unable to concur in the conclusion reached by the Circuit judge that the master had no jurisdiction to hear this case, and, on the contrary, think that the parties were entitled to have the case heard upon the master's report and the exceptions.

From the view which we have taken of this case, the other questions discussed in the argument do not arise, and need not, therefore, be considered.

The judgment of this court is, that the order of the Circuit Court be reversed, and that the case be remanded to that court to be heard on the master's report and the exceptions thereto.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. 476

(Case No. 1067.)

VERDIER v. PORT ROYAL RAILROAD COMPANY.

(April Term, 1881.)

[1. *Public Lands* ⇐92.]

A railroad company constructed its roadbed over lands acquired by the United States, under the provisions of the direct tax act of 1863, (12 U. S. Stat. 422,) without objection by the government, or claim to a right of notice or demand for the appointment of commissioners to assess compensation; after five years' use by the railroad company the United States sold this land by metes and bounds, without reservation of the road-bed, to V., who had knowledge of its possession and use by the railroad company. V. afterwards brought action

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for the recovery of the strip of this *land used by the railroad company, and for damages, and proved his title-deed from the United States. *Held*, that V. was properly nonsuited.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 281; Dec. Dig. ⇐92.]

[2. *Ejectment* ⇐9.]

A party who has never been in the possession of land, for the recovery of which he brings his action, can recover only upon the strength of his own title.

[Ed. Note.—Cited in Rhodes v. Russell, 38 S. C. 424, 17 S. E. 222.

For other cases, see Ejectment, Cent. Dig. §§ 16–29; Dec. Dig. ⇐9.]

[3. *Public Lands* ⇐63.]

This land, while owned by the United States, was public land, within the meaning of the act of 1866, (U. S. Rev. Stat., § 2477 [U. S. Comp. St. 1913, § 4919]) which provides that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 215; Dec. Dig. ⇐63.]

4. Quere: Did not the United States recognize this statute as operating as a grant, and in the sale of this land did they intend to convey a right to disturb the railroad company in the use of their road-bed?

5. Quere: If the United States were a private owner, and this railroad was constructed without objection, would a subsequent purchaser with notice, have the right to demand compensation from the company for their use of the road-bed?

[6. *Estoppel* ⟸98.]

Under Chapter LXIII., Section 83 of General Statutes, permission to a railroad corporation to enter upon the construction of their highway without previous compensation, may be given by the owner without receiving the notice prescribed in Section 75; and under the circumstances of this case, such permission will be presumed, and the United States and their vendee estopped from afterwards denying it.

[Ed. Note.—Cited in Tompkins v. Augusta & K. R. Co., 21 S. C. 430; Tutt v. Port Royal & A. Ry. Co., 28 S. C. 400, 5 S. E. 831; Tompkins v. Augusta & K. R. Co., 37 S. C. 386, 16 S. E. 149; Leitzsey v. Columbia Water Power Co., 47 S. C. 481, 25 S. E. 744, 24 L. R. A. 215; Rankin v. Sievern & K. R. Co., 58 S. C. 537, 538, 544, 36 S. E. 997; Ingleside Mfg. Co. v. Charleston Light & Water Co., 76 S. C. 98, 56 S. E. 664; Ellison v. Greenville, S. & A. Ry. Co., 94 S. C. 430, 77 S. E. 723, 78 S. E. 231; Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co., 63 S. E. 553.

For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. ⟸98.]

[This case is also cited in Leitzsey v. Columbia Water Power Co., 47 S. C. 484, 25 S. E. 744, 24 L. R. A. 215, without specific application, and in Ingleside Mfg. Co. v. Charleston Light & Water Co., 76 S. C. 95, 56 S. E. 664, and distinguished therefrom, and as to the facts in Sams v. Port Royal & A. Ry. Co., 15 S. C. 485, and distinguished therefrom as to the question of notice.]

Before Thomson, J., Beaufort, November, 1880.

This action was commenced February 5th, 1878, by William J. Verdier, against the defendant corporation, for the recovery of real property, and damages for its detention. The opinion states the case as fully as does the brief. No grounds of appeal are given.

Messrs. W. J. Verdier and J. D. Pope, for appellants.

Mr. William Elliott, contra.

July 27th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This action was brought to recover possession of a strip of land used by defendant corporation as a road-bed in operating their railroad. In 1857 the Port Royal Railroad Company was chartered by the state "for the purpose of establishing a communication by railroad

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from the waters of *Port Royal harbor, in the neighborhood of Beaufort, to some point on the Savannah river." 12 Stat. 564. The charter was afterwards amended, and the time for the completion of the road extended.

It does not appear who owned the strip of land prior to 1863, but it is conceded that it had been previously granted, and had been the private property of some one, and about that time the title became vested in the United States government under the operation of the direct tax acts of congress, passed during the war. 12 U. S. Stat. 422.

While the land was owned by the United States government, sometime in 1870, the defendant corporation entered upon the land and took possession of so much thereof as was necessary and had been authorized by the charter, to lay the track of their railroad. They finished their road over it in 1871, and are still in possession, using it as their tract, and claim that as against the plaintiff, certainly they have acquired the right of way therein.

In 1876, the defendants being in possession and operating their road over said strip, the plaintiff, with knowledge of that fact, received a conveyance from the United States government of the tract of land through which it runs, and claiming that his deed gave him title to all the land within its limits, commenced this action February 5th, 1878, to recover the same from the defendant corporation. The case was tried before Judge Thomson, who, without assigning any reason therefor, granted a non-suit. The plaintiff filed no specific exceptions to the order of non-suit, but appeals generally therefrom to this court.

The only question is whether the non-suit was improperly granted. Being an action for a strip of land, of which the plaintiff never had actual possession, nor was evicted therefrom, he must recover it, if at all, upon the strength of his own title, and not the weakness of that of the defendant. He must show complete chain of title back to the original grantor, or possession long enough to presume a grant or give title, or that plaintiff and defendant claim from a common source, and that his title is better than that of defendant. In proving his case the plaintiff did not go back of the conveyance of the government to himself, and, therefore, he failed to show perfect title in

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*himself either by chain to the original grantee or by possession for a period long enough to give title.

The only question then remaining is whether it appeared that the defendant as well as the plaintiff claimed under the government, and that plaintiff's claim was better than that of defendant. Upon this issue the onus was upon the plaintiff, and, until the necessary proof was made, it was not incumbent upon the company to do more than stand upon their possession. If that were obtained in any other manner than from the government, the principle indicated was not applicable to the case, and in order to recover it was necessary for the plaintiff to prove title in himself. It does not seem to be perfectly clear that the company entered under the government. It is certain that no written connection was shown, and, from all that appears, it is possible that the company claimed in some way other than from the government.

But, as the company built and located their road in 1870, while the government owned

the land, let us assume that this fact created such a relation between them and the government as to authorize the application of the rule in regard to tracing title to a common source, and inquire how the matter stands in that aspect. The plaintiff insists that he purchased land and received a conveyance with certain metes and bounds, which include the strip sued for, and that his title to that is as good as to any other portion of the land; that the right of way in the land was never acquired by the company, which could be done only by condemnation of the land according to law, or by the assent, expressed or implied, of the owner. The plaintiff received conveyance in 1876, from the United States government. There is no copy in "the case," and we are not informed of its precise terms, or whether it makes any reference to the fact of the railroad running through the land conveyed; but we assume that it was a quit-claim deed or grant in the usual form, conveying lands by metes and bounds, which include the slip in controversy, and we take it as clear that the plaintiff can have no higher right than his vendor had at the time of the conveyance.

If the land through which the track runs had not been conveyed to the plaintiff, could

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the government in an action recover *this tract from the company? If not, the plaintiff, holding under the government, cannot. There was no evidence that the land had been condemned in the manner prescribed by law, or that the government had executed a formal release of the right of way, but it does appear that while the government owned the land the public authorities of the government granted to the company the right of way under the operation of the general statutes of congress, passed in 1866, which was operative in 1871, when the track of the railroad was located, and declares that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." U. S. Rev. Stat., p. 456, § 2477.

It is insisted, however, that this land was not "public" in the sense of the act of congress, and that the general grant of the right of way in "public lands" did not include this case. It is true that these lands, having been previously granted and owned as private property, were not original public lands like those unsettled in the new states and territories, but we suppose that after the United States acquired the title they were held for the benefit of all the citizens of the government, and were "public lands" in the sense of the act of congress. If so, as they were sold to the plaintiff, we may safely assume that they were not "reserved for public uses," and fell under the operation of the act of congress. That the government acknowledged the force of the grant as applicable, would seem to be indicated by the fact that no objection was made to the location of the road and the use of the road-bed for years—indeed, up to the time of the sale to the plaintiff, it does not appear that the government ever objected. It seems from the statutes that it is the practice of the United Sates to make grants of land to promote public enterprises, and especially the building of railroads; and it may be that the authorities regarded the right of way in this land as already granted to the company before they sold, and that they did not convey or intend to convey to the plaintiff the right to disturb the company in the enjoyment of it.

If we are mistaken in this, and the government should only be regarded as a private owner of the land, does it follow that the plaintiff should recover possession of this

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road-bed? The ques*tion is not whether the plaintiff, leaving the company in possession of its track, can recover compensation for its use as a right of way, but whether, disregarding all that has been done and the long possession of the company, he may recover the land itself and thus break the track, and to that extent destroy the public usefulness of the road.

The state, by the right of eminent domain, granted to the company the power to take any lands lying in their route, upon only one fundamental condition, viz., that the value of the land so taken should be paid to the owner, if required; for want of an agreement, or where parties would not negotiate, the value to be fixed by commissioners. In any event, however, with or without consent, the company was authorized to take as much as was necessary for a right of way. True, this could be done only in the manner prescribed by law, or with the assent, express or implied, of the owner, and the plaintiff claims that the right of way was not condemned in the manner prescribed, and that the company are as much trespassers as if they never had a charter. If this were true, we suppose that the company would still have the right, under their charter, to re-take the land and have it valued under the act; so that, at last, even upon the view of the plaintiff, the only substantial right really involved is that of compensation for the use of the land; and in such case it has been held, under circumstances somewhat analogous, that that right belongs only to the owner of the land at the time of the construction of the road and cannot be pursued by a subsequent purchaser with notice, whose rights only commence at the date of his deed, and who takes the land in the condition in which he purchased it. Lewis v. R. R. Co., 11 Rich. 91.

The act of 1868 (Gen. Stat. 352), prescribes "the manner of acquiring rights of way" in cases of individual ownership. McCrea v. Port Royal R. R. Co., 3 S. C. 381 [16 Am. Rep. 729]. One of the sections of that act provides that any person or corporation, be-

fore entering upon any lands for the purpose of construction, shall give to the owner thereof (if he be sui juris) notice in writing that the right of way over said lands is required for such purpose; which notice shall be given at least thirty days before entering upon said lands; and if such notice shall be given and

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*the owner shall not, within the period of thirty days, signify in writing his refusal or consent, it shall be presumed that such consent is given. If the owner of said lands shall signify his refusal of consent to entry upon his lands without previous compensation, the person or corporation requiring such right of way shall apply, by petition, for empaneling a jury to ascertain the amount which shall be paid as just compensation for the right of way, &c. And then Section 83 is as follows: "Nothing herein contained shall be construed to prevent entry upon any lands for purposes of survey and location; and if, in any case, the owner of any lands shall permit the person or corporation requiring a right of way over the same to enter upon the construction of the highway without previous compensation, the said owner shall have the right, after the highway shall have been constructed, to demand compensation and to petition for an assessment of the same in the manner hereinbefore described; provided, such petition shall be filed within twelve months after the highway shall have been completed through his or her lands."

It is insisted that under these provisions there could be no "permission" to enter upon the construction of the highway before the owner had received the notice required by a previous section; that such notice must be the first essential step to set up the easement, and, in fact, a condition precedent to securing any rights whatever under the act by permission, possession, consent or otherwise. The requirement as to notice was made manifestly with a view to formal proceedings to assess the value in case of refusal, but surely it was never intended that the owner could not give the "permission" without first receiving formal notice, without which the right to object remained in abeyance indefinitely. The notice was intended for the benefit of the company in cases of objection, to give them a starting point to condemn the lands but was unnecessary in cases of consent. As the owner could give "permission" without receiving previous notice, it might be inferred from facts and circumstances. There was no express proof that the company gave the government "notice in writing" that the right of way was required; but the company are supposed to have known of the act of congress (supra), and there was proof

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that they, as early as 1870, entered *publicly upon the lands, located and built their road, and continued in possession of it as part of their road-bed until 1876, when the land through which it ran was conveyed to plaintiff. During the whole of this time the authorities of the government acquiesced in such entry and use without objection, or claiming that they had no notice in writing, or asking the appointment of commissioners to assess the value.

Whether, as matter of fact, this was enough "to presume" that the notice was given, or that regular release of right of way was executed, it was at least evidence that the government "permitted the corporation to enter upon the construction of the highway without previous compensation." The government, considered merely as an individual proprietor, had the right, with or without written notice, to require compensation. The manner of proceeding was open to the authorities of the government as well as to others, and upon the assumption that such right was not granted or waived, it was their duty to speak and warn the company; but they stood by in silence for six years and allowed the company to incur expense in locating and building this road through these public lands. We think, as matter of law, the government would now be estopped from denying this permission, this executed license, and from recovering the lands, and, as a consequence, the plaintiff, who holds the title of the government, is also estopped. "He who can forbid and does not, is deemed to have assented. * * * If one having title to land looks on and suffers another to purchase and expend money on the land without making known his claim, he will not be permitted, afterwards, to assert his title against an innocent purchaser." Herman's Law of Estoppel, § 409.

In Hand v. R. R. Co., 12 S. C. 351, this court said: "If a party having title to property, or a right in respect thereof, permits another to exercise authority over such property, or deal with such right, the latter shall not be subjected to damages by reason thereof, for volenti non fit injuria. This is a well-known legal principle, and, under its operation, a license to use both real and personal property is recognized as existing at law, both by deed and other writing under seal

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and by parol, and is also *presumed from the conduct and relationship of the parties when not in terms expressed."

This judgment is without prejudice to any right which the plaintiff may be advised that he has to institute proceedings under the act for compensation for the use of the right of way. No opinion is intended to be intimated upon that subject.

The judgment of this court is, that the judgment of the Circuit Court be affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

15 S. C. 484

(Case No. 1068.)

SAMS v. PORT ROYAL AND AUGUSTA RAILWAY COMPANY.

(April Term, 1881.)

[1. *Public Lands* ⟸92.]

A tract of land belonging to S. was acquired by the United States under the provisions of the direct tax act of 1863, (12 U. S. Stat. 422,) but was afterwards restored to S. During its occupancy by the United States a railroad was constructed over this land, and, subsequently, an officer of the government demanded of the railroad company compensation for the right of way used by them, but did not obtain it. After the restoration to S., he commenced an action against the successors by purchase of this railroad for the recovery of their road-bed and for damages. *Held*, that he was properly non-suited.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276–282; Dec. Dig. ⟸92.]

[2. *Public Lands* ⟸92.]

S. received the land back in its then condition, encumbered with all acts of the United States affecting it, done while in their possession.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276–282; Dec. Dig. ⟸92.]

[3. *Public Lands* ⟸92.]

If the notice served upon the railroad company was by authority of the United States government, it was an admission of the right of the company to the use of their road, binding upon S.; and his only remedy is that provided by General Statutes, Chapter LXIII.

[Ed. Note.—Cited in Tutt v. Port Royal & A. Ry. Co., 16 S. C. 365, 371.

For other cases, see Public Lands, Cent. Dig. §§ 276–282; Dec. Dig. ⟸92.]

[4. *Eminent Domain* ⟸267.]

[Cited in Tutt v. Port Royal & A. Ry. Co., 28 S. C. 397, 5 S. E. 831; Leitzsey v. Columbia Water Power Co., 47 S. C. 484, 25 S. E. 744, 24 L. R. A. 215; Rankin v. Sievern & K. R. Co., 58 S. C. 538, 36 S. E. 997; Moore v. Ewbanks, 66 S. C. 376, 44 S. E. 971, to the point that where the Legislature has authorized a public work, and has provided by statute a method for the assessment and payment of damages to individuals, the parties injured are confined to the remedy prescribed by the statute.]

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 718; Dec. Dig. ⟸267.]

Before Thomson, J., Beaufort, November, 1880.

Action by Lewis R. Sams against the defendant corporation. The opinion states the case. It does not appear that the Port Royal Railroad Company took any notice of the letter of W. R. Clautman, set out in the opinion.

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*Messrs. W. J. Verdier and J. D. Pope, for appellants.

Mr. William Elliott, contra.

July 27th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This case was heard in connection with that of William J. Verdier v. Port Royal R. R. Co., just decided, [15 S. C.] ante p. 476. The general questions are the same, only modified by a difference of one or two facts. In this case the plaintiff was the owner of the land prior to 1863, when the United States became seized, under the operation of the direct tax acts of congress, and held the same until 1875, when the authorities of the government released the same to the plaintiff under the act of congress, June 8th, 1872. In 1870, while the land was owned by the government, the Port Royal Railroad Company entered upon and took so much thereof as was necessary for a right of way. They finished their road over it in 1871. On April 30th, 1872, the following notice was served on S. C. Millett, superintendent, and one of the directors of the company:

"United States Internal Revenue Collector's Office, Second District, South Carolina,

"Beaufort, April 30, 1872.

"Gents: You will please take notice that a portion of your road is built upon lands belonging to the United States, without your having procured the right of way. You are hereby requested to make payment or compensation therefor, the same as though it belonged to private parties. By order of the commissioner of internal revenue.

"Respectfully yours,

"W. R. Clautman.

"By S. B. Wright, Deputy.

"To the president and board of directors of the Port Royal Railroad, Beaufort, S. C."

In October, 1878, a new company, under the corporate name of "The Port Royal and Augusta Railway Company," became the owners of the rights, franchises and prop-

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erty of the old com*pany, and continued to operate the road on the same track until September 17th, 1879, when this action was brought against the new company to recover so much of the road-bed as runs through the land. The Circuit judge granted a non-suit also in this case, and the appeal comes to this court.

As the plaintiff originally owned the land, he proved title in himself. The government acquired title from him, and he afterwards received it back, so that there is here no necessity for the application of the principle as to tracing title to a common source. When, however, the plaintiff received back the title and possession of all but the strip on which the track was located, he was not thereby restored to all the rights which he originally possessed when his title was divested, but he received the land in its then condition, affected by all the intermediate acts of the United States authorities touching the same. He acquired such rights only as the government had not, while owner, granted, or in some way lost. Notwithstanding his original ownership, as the last donee, he has no higher title than the last donor could give.

The notice given by the United States authorities in 1872, "requesting the company to make payment or compensation for the right of way," distinguishes this case from the one just decided. If this notice, in disregard of the act of congress granting the right of way "for the construction of highways over public lands," was without proper authority from the government, then it is the same as if no notice was received or given, and being like the case of Verdier v. Port Royal Railroad Company, the principles announced in that case must be conclusive of this. But if such notice was by the authority of the United States government, and by the proper officer, then that notice affords the proof that the government, while owner of the land, did not object to the right of way, nor claim to recover the land, but instead thereof, claimed "payment or compensation for the right of way." This was an admission of the right of the company to take so much as was necessary to locate the road, and a claim for compensation for it, "the same as though it belonged to private parties."

The act of 1868 prescribes the manner of securing compensation by private parties, for lands taken for right of way, and the

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*government, while owner, having claimed it, the plaintiff, the donee of the government, cannot ignore that claim and recover the land itself. No action of any kind, other than that allowed by the statute, can be maintained for damages. The statutory remedy provided for securing compensation to those whose lands are taken by the authority of the state, supersedes and excludes all other remedies. McLauchlin v. C. & S. C. R. R. Co., 5 Rich. 597; Fuller v. Edings, 11 Rich. 245. In the latter case the court said: "Where the legislature authorizes the laying out of a highway or the establishment of other works deemed by them to be of public necessity and convenience, or when in their opinion it is for the public benefit, and in the construction thereof damages are supposed to result to the property of others, and a mode is provided by statute for the assessment and payment of the same, the party so authorized is not a wrong doer, and the remedy for the person injured is confined to the mode provided by the statute, and none exists at common law. 1 Am. Railway Cases, 163; 11 Mass. 364; 12 Mass. 446; 4 Wend. 667."

In the case from Wendell, Judge Marcy says: "The principles settled by the court for correction of errors in the case of Rogers v. Bradshaw, 20 Johns. 735, applied to this case, are fatal to the rights of the plaintiffs to sustain this action. * * * The rule of construction that if a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable at common law, the party is not deprived of this common law remedy, but may elect to take it or that offered by the statute, does not, I apprehend, apply to acts done by the express authority of the legislature for a public purpose. Such, certainly, has not been the doctrine applied to suits against our public agents employed on our works of internal improvement, and such is not the doctrine that I am willing to apply to this case."

This is without prejudice as to any claim for compensation under the act which the plaintiff may be advised to make. Upon that point we express no opinion.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. *488

*(Case No. 1070.)

BROWN v. BUTTZ.

(April Term, 1881.)

[1. *Dismissal and Nonsuit* ⇐73.]

A jury cause, after issue joined, was, by mistake of the clerk, docketed on Calendar 2, and, after the juries were dismissed for the term, was transferred to Calendar 1, when defendant made a motion to dismiss the complaint for not stating facts sufficient to constitute a cause of action. *Held*, that the Circuit judge committed no error in then hearing and deciding the motion.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 167, 168; Dec. Dig. ⇐73.]

[2. *Judgment* ⇐375.]

A trial justice has no power to vacate for fraud a judgment obtained in his court, especially after a transcript has been filed in the Circuit Court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 712; Dec. Dig. ⇐375.]

[3. *Judgment* ⇐354.]

The trial judge properly declined to vacate a judgment for fraud where the action was not shaped to that end, but was for damages for trespass in levying execution upon plaintiff's property.

[Ed. Note.—Cited in State ex rel. People's Bank of Greenville v. Goodwin, County Supervisor, 81 S. C. 424, 62 S. E. 1100; Id., 59 S. E. 37.

For other cases, see Judgment, Cent. Dig. §§ 691, 703, 704; Dec. Dig. ⇐354.]

[4. *Judgment* ⇐291.]

Where the law authorizes a trial justice to appoint a clerk, a transcript of a judgment, which was rendered by such trial justice, is properly signed by his clerk.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 573–577; Dec. Dig. ⇐291.]

[5. *Appeal and Error* ⇐477.]

Upon appeal taken to this court from an order dismissing an action for damages in levying upon property under execution, based upon an alleged invalid judgment, the Circuit judge is not required by Section 360 of the code of procedure to order a stay of proceedings un-

der such judgment, pending the appeal; it is a matter of discretion with the Circuit judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2247–2249; Dec. Dig. ⟸ 477.]

[6. *Dismissal and Nonsuit* ⟸48.]

[A motion to dismiss for insufficiency is always in order when the case is reached on the calendar.]

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 96; Dec. Dig. ⟸48.]

[7. *Dismissal and Nonsuit* ⟸70.]

[Cited in Davis v. McDuffie, 18 S. C. 499, to the point that a motion to dismiss for insufficiency being always in order, when the case is reached on the calendar, no formal notice need be given.]

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 164; Dec. Dig. ⟸70.]

[This case is also cited in Doty & Co. v. Duvall, 19 S. C. 147, as to civil jurisdiction of trial justices, and in Steffens & Sons v. Bulwinkle & Co., 48 S. C. 357, 26 S. E. 666, and distinguished therefrom.]

Before Mackey, J., Charleston, February, 1881.

Action commenced December 18th, 1880, by Judith Brown against D. H. Buttz. The complaint alleged the facts stated in the opinion of this court, and none others, claimed $100 damages, and prayed judgment for such damages, and for the vacation of the transcript. No fraud was alleged. Other facts are stated in the opinion.

Mr. W. M. Thomas, for appellant.

Mr. S. J. Lee, contra.

August 1st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The complaint in this case alleges that one J. W. Polite recovered judgment against the plaintiff (appellant)

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*in the court of a judicial trial justice, in Charleston, for $35 and costs; that this judgment, upon a transcript signed by the clerk of the trial justice, was entered in the Circuit Court; that at the same time the said judgment was assigned by Polite to the defendant (respondent) Buttz; that the trial justice afterwards vacated this judgment for fraud; that Buttz was requested to vacate the transcript, which he declined to do, and proceeded to levy his execution on plaintiff's property. To this complaint the defendant answered, claiming that he purchased the judgment for valuable consideration, and denying the fraud and damages.

The case, as it seems, was to be placed on Calendar 1, to be tried by the jury; the clerk, however, by some mistake, placed it on No. 2. This was not discovered until after the juries had been dismissed, when it was taken from No. 2 and docketed on No. 1. On this calendar the defendant moved to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The presiding judge granted this motion.

The plaintiff has appealed upon the grounds following:

"1. Because it was error for the judge to hear a motion to dismiss the complaint against plaintiff's objections before the trial of the cause and without notice to the plaintiff.

"2. It was error in the judge to hold that the judicial trial justice had no power to set aside a judgment of the judicial trial justice court for fraud.

"3. Because, if the judicial trial justice had no such power, the judge of the Circuit Court should have set it aside.

"4. Because a transcript by the clerk of the judicial trial justice court is not a judgment of the Circuit Court.

"5. Because the judge should have granted a stay of proceedings, as requested by the plaintiff's attorney, until the decision of the Appeal Court."

We do not think that the appellant can take anything by her appeal on any of the grounds stated. The fact that the clerk made a mistake in placing the case, in the first instance, on Calendar No. 2, and afterward removed it to No. 1, when the juries had been dismissed, did not preclude the defendant

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from inter*posing the demurrer upon which the complaint was dismissed. A jury was not necessary to the hearing of this demurrer. It involved legal grounds and could be addressed only to the court. It was a preliminary motion, and necessarily preceded the trial, and could be heard as well in the absence of the jury as if they were present.

A demurrer upon the ground that the facts alleged do not constitute a sufficient cause of action, like that which excepts to the jurisdiction of the court, is not to be deemed waived, because not presented either by answer or by formal demurrer. It is always in order when the case is reached on the calendar, and no formal notice need be given to the other side. A party plaintiff is supposed at all times to be prepared to vindicate the action which he has deliberately instituted against a demurrer of this kind, raising, as it does, only issues of law.

2. Did the trial justice transcend his powers in vacating for fraud the judgment which had been obtained in his court, especially after it had become a judgment of the Circuit Court by the filing of a transcript in that court?

A trial justice court is one of limited jurisdiction. Its boundary is prescribed by the acts which have created it, and which have invested it with its powers. We must look to these acts to ascertain the limit of its jurisdiction. Judicial trial justices, under that name and title, exist only in the city of Charleston; but the jurisdiction of this of-

ficer does not differ materially from the trial justices in the other counties of the state. The act defining the civil jurisdiction of trial justices, which applies to judicial trial justices as well as to others, is found incorporated in the code.

In this act the jurisdiction of these courts is specially defined and limited, without enumerating the different classes of cases in which jurisdiction is conferred. It is enough to say that nowhere in this act, nor in any subsequent act, have trial justices been invested with power to grant relief in cases of fraud, except in the single case of an action for damages, for fraud in the sale, purchase or exchange of personal property, where the damages claimed do not exceed $100. There is no general jurisdiction conferred over the subject of fraud. It is confined to the case

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*mentioned, and the power of the trial justice cannot be extended beyond such a case. It is true, that by the act of 1874 trial justices may grant new trials for reasons for which new trials have usually been granted in the courts of law of the United States, provided the motion is made within five days after the rendition of the judgment; and, provided further, that the new trial shall be had only before the trial justice who first heard the case.

It does not appear in this case that the judgment was vacated on motion for a new trial, made within five days after judgment rendered. From the statements made in the brief, it is inferred that the judgment was attacked for fraud, and that it was vacated permanently by an original proceeding to that end. This, we think, the trial justice had no power to do. Hence, there was no error in the ruling of the Circuit judge as to this exception.

3. It is claimed by appellant that if the trial justice had no power to vacate this judgment the Circuit Court should have set it aside. The Circuit Court, no doubt, has jurisdiction of fraud in all of its phases; and, upon a proper case made, its powers in this respect—which are full and complete—can be successfully invoked. But to accomplish this result the proceeding must be shaped to that end. In this case the action was not to set aside the judgment, but it was brought to recover damages for an alleged trespass by the defendant upon property of the plaintiff. The judgment in question was only incidentally involved, and although in the prayer of the complaint the vacation of this judgment was asked, yet the main issue was as to the trespass, and the main relief sought was damages for this alleged trespass.

4. The fourth exception assails the validity of the transcript filed in the Circuit Court on the ground that it was signed by the clerk of the trial justice instead of the trial justice himself.

Section 90 of the code provides that a trial justice, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where judgment was rendered, and from that time the judgment so filed shall be a judgment of the Circuit Court. Section 12 of the act approved December 14th, 1878, regulating the practice

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and duties *of trial justices' courts in the city of Charleston, authorizes the judicial justices of that city to appoint a clerk. 16 Stat. 685.

Now there is nothing in this act in reference to the transcript which requires that it shall be signed by the trial justice himself. Of course it should be properly authenticated, and with those trial justices who have no clerk, there is no one else to certify the transcript but the trial justice himself, and, in such case, his signature is necessary to authenticate the paper, and to authorize the clerk of the Circuit Court to file it. But with the judicial trial justices who have, by law, a clerk regularly appointed, his authentication of the judgment, rendered and signed by the trial justice, and enrolled as the act requires, would seem to be not only all that is necessary, but, from analogy, the exact legal mode of transmitting the transcript to the higher court. This was the mode adopted in this case, and we think that this was a compliance with the law.

5. On dismissing the complaint the judge refused, without a bond, to stay proceedings until the appeal could be heard in this court, and this is the foundation for the fifth exception.

Section 360 of the code authorizes a party, after giving notice of appeal from a judgment rendered against him, directing the payment of money, to apply to the presiding judge to stay execution; but this section does not require, in mandatory terms, that the application shall be granted. It seems to be a matter of discretion with the judge. In other cases the code provides for the stay of proceedings according to the character of the judgment rendered. There was no error of law, that we can see, in the refusal of the judge to grant plaintiff's motion.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

15 S. C. *493

*(Case No. 1071.)

KEITT v. COUNTS.

(April Term, 1881.)

[1. *Appeal and Error* ⟸1022.]

A finding of fact, concurred in by master and Circuit judge, sustained, it not being clearly against the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⟸1022.]

[2. *Sales* ⟸479.]

Defendants purchased from plaintiff, partly on credit, a chattel, the title to which was to remain in plaintiff until it was paid for. *Held*, that plaintiff was entitled to recover its possession after default of the payment required by the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418–1432, 1434–1438; Dec. Dig. ⟸ 479.]

[3. *Sales* ⟸330, 331.]

The complaint in this case having stated the contract, the payments and the balance due, and the title to the property having been adjudged to be in plaintiff, the defendant cannot object that the judgment ordered a sale instead of a delivery. In such case, however, the debt and interest should be paid out of the proceeds of sale, but nothing additional as damages for the detention.

[Ed. Note.—Cited in Talbott & Sons v. Padgett, 30 S. C. 170, 8 S. E. 845.

For other cases, see Sales, Cent. Dig. §§ 912, 913; Dec. Dig. ⟸330, 331.]

Before Wallace, J., Newberry, May, 1880.

Action commenced August 12th, 1873, by E. S. Keitt against G. B. Counts and E. B. Suber, for the recovery of a steam engine and carriage. The complaint alleged that the defendants purchased this property May 24th, 1870, for $600, of which $200 was cash, and balance, with interest, was payable January 1st, 1871, upon which was paid $100 April 15th, 1871; it also alleged that the title to the property was to remain in the plaintiff until it was paid for; that it was unjustly detained, to plaintiff's damage, &c. The joint answer of defendants admitted the purchase, the amount of the note and credit, but denied that it was to be the property of plaintiff until paid for.

All issues of law and fact in the case were referred to the master; whether by consent or otherwise, does not appear. The report of the master found the facts to be as stated in the complaint, and, as conclusions of law, that the plaintiff was entitled to the possession of the property and $100 damages, besides costs, &c. Defendants filed exceptions, which were overruled by the decree of the Circuit judge, stated in the opinion.

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*Defendants appealed upon grounds which are substantially stated in the opinion.

Mr. T. S. Moorman, for appellants.

Mr. L. J. Jones, contra.

August 31st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This action was brought to recover possession of personal property—a certain steam engine and carriage—bought by defendants from plaintiff, the purchase being partly for cash and partly on credit. The issue between the parties was whether title to the property had been reserved to the plaintiff until payment of the credit portion of the purchase money. The case, embracing the issues both of law and fact, was referred to the master, who found the question of fact for the plaintiff, and also $100 damages for the detention of the property. As conclusions of law he found:

"1. That the title to the engine and carriage is in the plaintiff.

"2. That the plaintiff is entitled to the immediate possession of said property.

"3. That the plaintiff should recover against the defendants for the damages sustained by him by reason of the unlawful detention of the said property by the defendants the sum of one hundred dollars, besides his costs and disbursements in this action."

To the report of the master there were several exceptions by defendants, all of which were overruled by the Circuit judge, who ordered and adjudged "that the findings of fact and conclusions of law of the master be confirmed and be made the judgment of the court." He further ordered that the property be delivered up by the defendants, as the property of the plaintiff, to Silas Johnstone, master, and that said master do sell the same, after fifteen days' notice, for one-half cash and the balance on a credit of twelve months, the net proceeds to be applied first to costs and then to the debt and interest, as set forth in the complaint as due and owing by defendants to the plaintiff, the balance, if any, to be paid to the defendants.

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*From this judgment the defendants have appealed to this court, objecting to the conclusions of law, that the plaintiff is entitled to the immediate possession of the property in question, and to $100 damages for its detention, and also to the order of sale—the defendants contending, as to the latter, that this was converting the action from an action at law for the recovery of personal property into an action in equity for the foreclosure of a mortgage, while this was not the prayer of the complaint, and the defendant had no opportunity to make defense against the debt claimed.

As to the first question—the question of title—that depends upon a question of fact, to wit, whether there was an understanding and agreement between the parties at the purchase by defendants that the title should remain in the plaintiff until the purchase money was fully paid. The master heard testimony on this question and decided that such agreement was made. The Circuit judge concurred in this finding of fact, and

under repeated decisions this is conclusive, unless this finding is patently and clearly against the weight of evidence, which we do not find to be the case here. This agreement then being established, the conclusion objected to followed as a necessary consequence, and must be sustained.

The objection made by appellants to the order of sale in the opinion of this court, is also untenable, especially coming from the defendants in the action. The plaintiff might have demanded a judgment for the recovery of this property and the damages found in his favor, leaving the defendants to such course as they might see proper to adopt to obtain relief on account of the payments which they had made on the purchase; but the plaintiff seems willing to forego his rights in this respect and to allow the property to be sold, and while the parties are all before the court, that justice may be done according to the equities established between them. We cannot see the force of defendants' objection. They claim that they had no opportunity of resisting the debt. The amount claimed by the plaintiff was set out in the complaint, the contract of purchase, the amount paid in cash, the subsequent payment and the credit portion were all alleged and were material averments, and we cannot see but that the defendants had

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*full opportunity to make any questions they might have desired on this subject. Having failed to do so, the court was warranted in assuming that the facts averred in the complaint were true, and that the amount therein stated was due by defendants. The order of sale was in fact an order for the benefit of defendants.

We do not clearly understand whether it was the intention of the Circuit judge, that in addition to the debt and interest which he directed to be paid out of the proceeds of the sale ordered, that plaintiff should also have judgment for the $100 damages found for the detention of the property. No part of the proceeds of sale is directed to be applied to this damage. And if that amount is to be recovered at all, it must be enforced by execution.

This amount of $100 was allowed upon the theory that the judgment would be for the recovery of the specific property. Since that theory has been departed from with the view to adjust the equities between the parties, and the plaintiff has been adjudged his debt and interest to be paid out of the proceeds of the sale, we do not think he should recover, in addition to this, the damages also. The interest upon the amount due is generally sufficient to cover damages, and this he has been allowed.

It is the judgment of this court that the judgment of the Circuit Court be affirmed as to the order of sale and the application of the proceeds thereof; but that so much as allows the plaintiff $100 damages in addition to the interest on the debt be reversed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 496

(Case No. 1072.)

FRASER v. DAVIE.

(April Term, 1881.)

[1. *Appeal and Error* ⇐1194.]

A controversy as to the terms of a contract having been brought before this court for adjudication, and determined in favor of the appellant, and the case having been remanded to the Circuit Court for inquiry whether the contract could be carried out, and for final decree,

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it is too late after*wards for such appellant to attack the validity of the contract, or to contend that it has been forfeited. These questions are res judicata.

[Ed. Note.—Cited in Kennedy v. Williams, 59 S. C. 387, 38 S. E. 8; Holliday v. G. H. Pegram & Co., 94 S. C. 294, 77 S. E. 1014.

For other cases, see Appeal and Error, Cent. Dig. § 4651; Dec. Dig. ⇐1194.]

[2. *Contracts* ⇐193.]

A judgment creditor having acquired title to the lands of her debtor, signed and sealed a deed which was to be delivered when a sum agreed upon as a compromise of the judgment, was paid. *Held*, that moneys of the judgment debtor afterwards applied by the sheriff to such judgment and received by the judgment creditor, should be credited as part payment of the consideration of the deed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 894, 895; Dec. Dig. ⇐193.]

Before Hudson, J., Chester, October, 1880.

Action by Fredrick E. Fraser, trustee, against Mary F. Davie and Churchhill B. Jones, his wife and children. The opinion sufficiently states the case.

The Circuit decree is as follows:

This cause has been heretofore heard on the Circuit, and on appeal in the Supreme Court, and has been there decided except in one particular. The facts affecting the controversy hitherto, are so fully set forth in the report of the case in 11 S. C. 56-70, that it is needless to restate them here.

At the close of the judgment in that case the court says: "The case must be remanded to the Circuit Court for an inquiry whether the situation of the property and of the parties is such that the deed of trust can take effect in substantial compliance with the terms of the contract between the parties as hereby established, and for a final decree upon the principles as hereinbefore stated." Now, what is the meaning of this order, and what are we to infer therefrom?

The chief question involved in the controversy on Circuit and in the Supreme Court, seems to have been whether a certain deed of trust had been delivered or not. The

judge below determined that it had been delivered, and ordered it to be recorded. The Supreme Court drew a different conclusion from the testimony and decided that the deed from Mrs. Davie to the plaintiff, as trustee for Churchhill B. Jones and family, had not been delivered and was only to be delivered and placed upon record when Jones should pay the unpaid balance of $1500 in compromise of a certain judgment held by

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Mrs. Davie against *Jones for a much larger amount, the excess of which was also to be assigned to the same trustee on the final delivery of the deed.

At the date of the execution of the trust deed, Jones paid $500, and gave his obligation to pay the balance, $1000 in a certain time, at a heavy rate of interest. The period fixed for the fulfillment of the contract by payment of the amount aforesaid and interest, had elapsed before the institution of this action, which fact, of course, was known to the Supreme Court when it directed this inquiry as to the practicability of still carrying out the contract in substantial compliance with its terms.

In submitting the case to the Supreme Court, counsel for the plaintiff laid down and used in argument these propositions: 1. That the deed purports to be voluntary, and hence equity will not aid Jones in enforcing a voluntary contract. 2. That the deed, however, is in reality not voluntary, but for a valuable consideration. But that consideration is an agreement to take in full satisfaction of a judgment an amount much less than the principal and interest; such being the consideration, Mrs. Davie cannot, in law or in equity, be compelled to accept it and to assign the excess. 3. The delivery of the deed was never complete, and was only to be so when the whole of the $1500 and interest should be paid in the time agreed upon. This was not done, and it is accordingly too late now after so long a delay to require it to be done.

The judgment of the Supreme Court, we regret to say, does not clearly and expressly determine all these propositions; but we think it does virtually and by implication determine the propositions by recommitting the cause to the Circuit Court for the simple inquiry above stated. It, in terms, or by necessary implication, decided that the deed is not voluntary, but is for a valuable consideration, to wit, the contract and agreement to pay $1500; that the contract is in compromise of a judgment for a large amount; that the contract is past due, it is true, but that time is not of its essence; that it is such an agreement as equity will enforce, and that, although much time has elapsed, yet it must be enforced, provided, the situation of the parties and the property is such that the substantial terms of the

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agreement can *still be carried into effect, to wit, the payment of the money, and the delivery of the deed, and the possession of the land, and assignment of the judgment. It is thus that I interpret the judgment of the Supreme Court, and hence I do not regard any of the above questions of law on the proposition aforesaid as open for argument again on Circuit. We are simply to make the inquiry which that Court has sent to us, and decree according as the fact may be, without regard to any question of the validity or legality of the original agreement.

By previous order of this court it was referred to J. J. Hemphill, Esq., as special referee, to make the inquiry directed by the Supreme Court to be made. He has made the inquiry, and has reported to this court that the situation of the property and of the parties is such that the original agreement and contract between Mrs. Davie and C. B. Jones can still be carried into effect in substantial compliance with its terms and according to the principles announced in the judgment of the Supreme Court. The land has not changed hands, but is in statu quo, and all that remains to be done is that the balance of the purchase money be paid, and the deed delivered to be recorded. This balance he finds to be on October 11th, 1879, $1287, after allowing credits for all payments deemed proper to be allowed.

To this report of the referee both parties except. The counsel for C. B. Jones claims that certain rents of the land should have been allowed as credits, which were refused by the referee. The counsel for Mr. Fraser and Mrs. Davie except to the report, upon several grounds, one of which assails a credit allowed, and the other grounds substantially re-open before this court the positions noticed above, which we have already said are, in our judgment, put at rest by the judgment of the Supreme Court. All the exceptions, by both parties, to the report of the referee, are overruled, and the findings of fact therein, and conclusions of law are sustained.

It is, therefore, adjudged and decreed that Churchhill B. Jones do, on or before the 1st day of January next, pay the balance aforesaid, to wit, $1287, to Mrs. Davie, with interest thereon from October 11th, 1879, and the costs of this action, and that thereupon the said deed be delivered for record accord-

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ing to the *terms of the agreement and the balance of the judgment assigned to said Fraser, as trustee as aforesaid. That upon the failure by the said Jones to make payment as aforesaid, the said deed be returned to Mrs. Davie for cancellation, and the said contract be annulled and all rights of the said Jones and other beneficiaries under said deed and said contract be completely barred and determined, and all parties be remanded to their previous status and rights as it

no contract had ever been made, and that in that event the costs and disbursements of these proceedings be likewise paid by C. B. Jones.

Mrs. Davie appealed upon the following grounds:

1. Because his Honor erred in holding that the former decision of the Supreme Court had precluded inquiry as to the character of the agreement in this case, and had decided that time was not of the essence of the contract, and that the agreement must now be enforced, provided that the payment of the money and delivery of the deed, and the possession of the land and assignment of the judgment, could now be carried into effect.

2. Because his Honor erred in decreeing that upon the payment by the defendant, Jones, of the sum of $1287, with interest and costs, that the deed be delivered for record according to the terms of the agreement.

3. Because the situation of the property and of the parties is not such that the deed of trust can take effect in substantial compliance with the terms of the contract between the parties.

4. Because his Honor erred in not sustaining the defendant, Mary F. Davie's, fourth exception to the master's report, in which the master allowed a credit to Jones of $701.40, November 17th, 1873.

Mr E. McCrady, Jr., for appellant.

Mr. G. J. Patterson, contra.

August 31st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The purpose of this action was to determine whether or not a certain deed, purporting to be a trust deed,

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*executed by appellant, Mary F. Davie, to Fraser, trustee, in favor of Churchhill B. Jones, his wife and children, respondents, had been delivered and should be put upon record as a valid deed for the purposes therein expressed.

The complaint was filed by Fraser, as trustee, against Churchhill B. Jones and his family, and also Mrs. Davie, to have the nature of his interest and duties in regard to the trust properly defined and settled as against the grantor and the cestuis que trust. Mrs. Davie, answering, denied that the deed had been delivered. She contended that C. B. Jones being indebted to her, by judgment, in the sum of $6300, represented that he was unable to pay the debt, and proposed to settle it by paying $1500—$500 in cash and the balance in three equal annual installments, at the rate of eighteen per cent. interest; the credit portion to be secured by bond and mortgage on certain real estate, and upon the payment of this sum she was to assign the judgment for the benefit of Jones' family; that afterwards Jones had titles to this real estate, which he had proposed at first simply to mortgage, executed to her, and had its value, some $2475, credited on her judgment. Upon this being done, she executed the deed of trust conveying the land to Fraser, but with the distinct understanding that it was not to be delivered or become operative until the balance of the $1500, agreed upon as a compromise of her debt, was paid according to the agreement. In other words, she was to retain control of the land as a security for the full payment of the $1500, instead of the mortgage which was to have been given according to the first agreement. And, inasmuch as this sum had not been paid, the deed had not been delivered, and should not be recorded.

Jones contended that the deed had been duly executed and delivered at its date, and that it was a valid instrument; that the agreement in reference to the settlement of the judgment was an independent agreement, having no connection with the deed, and, therefore, the complaint should be dismissed.

The case was heard by Judge Mackey, who, sustaining this view of the controversy, ordered the deed to be forthwith recorded. From this judgment Mrs. Davie appealed. The Supreme Court reversed this judgment

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of Judge Mackey, and sus*taining her construction of the agreement, ordered the case to be remanded to the Circuit Court for an inquiry, "whether the situation of the property and of the parties was such that the deed of trust could take effect in substantial compliance with the terms of the contract between the parties as established, and for a final decree upon the principles therein stated." 11 S. C. 69.

Upon its return to the Circuit Court in December, 1878, Judge Aldrich ordered the case to be referred to J. J. Hemphill to make the inquiry directed in the opinion of the Supreme Court. In October, 1879, the report of the referee came in. In this report it was stated that the parties and the property were in such condition as that the trust deed could take effect in substantial compliance with the contract, and after allowing Mr. Jones credit for the sum of $701.40, derived from the sale of Jones' property under the judgment of Mrs. Davie, since the agreement, he recommended "that Jones be allowed until the first day of December, 1879, to pay up the balance reported by him to be due, to wit, $1287. And upon his paying to Mrs. Davie, or her attorney, this sum, with the interest that might accrue thereon, and to the clerk of the court all costs and disbursements, that the trust deed be delivered and recorded, and the case ended." Mrs. Davie excepted to this report on several grounds, one of which assailed the credit allowed by the referee, and the others contending that the agreement had expired by its own limitation and could not now be enforced.

Judge Hudson overruled these exceptions

and confirmed the report of the referee. Judge Hudson interpreted the judgment of the Supreme Court, above referred to, to have settled the points raised in the exceptions as to the validity of the trust deed, and he held that the questions of law raised by the exceptions as to the consideration and delivery of the deed, and as to the time within which the contract was to be carried out, were not open for argument before him. The sole question, in his judgment, being whether the condition of the property and parties was such as that the contract, as established, could be substantially carried out.

From this judgment Mrs. Davie has appealed to this court; her appeal raising, substantially, the two questions raised before

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*Judge Hudson, to wit, that his Honor erred in holding that the former decision of the Supreme Court precluded inquiry as to the character of the agreement in this case, and that the court had therein decided that time was not of the essence of the agreement, and that the situation of the parties and property was such as could be enforced. Second. That the credit of $701.40, reported by the referee, should not have been allowed.

The history of this case shows that it is a hard case upon Mrs. Davie. Ten years ago she held a judgment upon Jones for over $6000. Jones was her nephew, or rather a nephew of her deceased husband. He had been unfortunate and was much embarrassed —his misfortunes, no doubt, growing out of the result of the late war between the states. Mrs. Davie was kind-hearted and indulgent, and seemed to sympathize deeply with her relative, and with a liberality almost unprecedented, yet, under the circumstances, in the highest degree commendable, she agreed to settle this large debt, secured as it was by judgment, for the small sum of $1500, giving a credit on the greater part of it in one, two and three years, the credit portion to be secured by a lien upon real estate.

The parties disagreed as to the understanding between them. Expensive litigation ensued, and Mrs. Davie is still without payment, even of the small amount agreed upon as a compromise. If the questions as to the binding character of the contract of compromise, and the validity of the deed then before the court had been an open question before Judge Hudson, much might have been urged against both. An agreement to take less than the whole amount for the whole, as a general rule, is a nudum pactum, and especially would this principle apply in a case where the debtor failed to comply promptly with the proposed reduction. And if this position had been taken by Mrs. Davie at the proper time, it may be that she might have invoked the protection of this principle successfully. The time, however, to have claimed its benefit was at the former trial; but this she failed to do. The question which she raised then was not that an invalid agreement had been made, but that the agreement which Jones contended for was not the agreement which had been made. She claimed that the true agreement was

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the one *set up by herself, and she does not seem to have manifested any unwillingness that this should be carried out.

The court sustained her view of the case, and it is not surprising that the court should have declared that contract valid and binding. To this result she not only did not object but contributed. Under these circumstances we are constrained to hold that the former opinion of this court settled these questions, and they are now res adjudicata. Such being our opinion, we are compelled to say that Judge Hudson did not err in confining his jurisdiction of this case to the single inquiry contained in the order remanding the case to the Circuit Court. After it reached the Circuit Court under that order it was properly referred to a referee. He confined his examination to the inquiry submitted in the order, and reported that there was no obstacle in the way of the execution of the contract. This has been confirmed by Judge Hudson, and we think that this is an end of the case.

The last exception contests the credit allowed by the referee and confirmed by the court below. This credit is for $701.40. This amount was received by Mrs. Davie in this way: Jones had a judgment on one Blackburn. Certain property of Blackburn was sold under the judgment, and when the proceeds of the sale reached the sheriff's office Mrs. Davie levied on it, and had it applied to her judgment. We do not see how Mrs. Davie can claim this besides the $1500 which she agreed to take for her judgment. The court has decided that the agreement between them is to be enforced, and this sum must be credited on the agreement; otherwise, Mrs. Davie would receive $701.40 more than she had contracted to receive.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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*(Case No. 1073.)

McCAUGHRIN & CO. v. WILLIAMS.

(April Term, 1881.)

[1. *Mortgages* ⇐50.]

A mortgage of land professing to be given to secure a bond for $8000, was, in reality, intended to secure the payment of notes in bank for $3000, made by the mortgagor and endorsed by the mortgagees, and no bond was, in fact,

executed until a year afterwards. *Held*, that the mortgage was a valid security for the amount of the notes and interest.

[Ed. Note.—Cited in Nichols v. Briggs, 18 S. C. 476, 484; Plyler v. Elliott, 19 S. C. 266; Ballou v. Young, 42 S. C. 177, 20 S. E. 84.

For other cases, see Mortgages, Cent. Dig. § 138; Dec. Dig. ⟸50.]

[2. *Evidence* ⟸419.]

The real consideration, in such case, may be shown by parol.

[Ed. Note.—Cited in Moses v. Hatfield, 27 S. C. 329, 3 S. E. 538; Lindsay v. Garvin, 31 S. C. 261, 9 S. E. 862, 5 L. R. A. 219; McAteer v. McAteer, 31 S. C. 320, 9 S. E. 966.

For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. ⟸419.]

[3. *Mortgages* ⟸120.]

A mortgage given by the maker of a promissory note before maturity to his endorsers, to secure the payment of the note, does not secure a contingent liability.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 235, 236; Dec. Dig. ⟸120.]

[4. *Mortgages* ⟸121.]

A note of mortgagor to mortgagee, not secured by the mortgage and no part of the original consideration agreed upon, cannot be included in such mortgage by subsequent agreement between the parties, to the prejudice of junior encumbrancers.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 238; Dec. Dig. ⟸121.]

[5. *Appeal and Error* ⟸1022.]

Concurrent findings of fact by referee and Circuit judge, affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⟸1022.]

[This case is also cited in Peake v. Young, 40 S. C. 59, 18 S. E. 237, without specific application.]

Before Wallace, J., Laurens, May, 1880.

At the hearing of this appeal the Hon. Thomas B. Fraser, judge of the Third Judicial Circuit, sat in the place of the Chief Justice, who had been of counsel in the court below.

It was an action commenced March 23d, 1877, by A. J. McCaughrin & Co. against J. W. Williams and his mortgage and judgment creditors, praying a foreclosure of a mortgage given by Williams to plaintiffs, and that the other defendants be required to present and prove their liens, &c. The only contest in the case arose upon the mortgage debt of L. L. Young and J. W. Chandler, which was disputed by the other creditors.

All the issues of law and fact were referred to J. F. J. Caldwell, Esq., who made his report, which stated the pleadings, the claims presented, &c.; and also the mortgage of Young and Chandler, its recitals and date, the notes to the bank and the endorsements on the bond, all of which are repeated in the opinion of this court. The report then continues:

It will be observed that this bond was signed just one year *after the date of the mortgage. It is not contended that it is a copy of any bond executed at or before the execution

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of the mortgage. Nor is it asserted, positively, that any bond was executed by Williams to Young and Chandler, or to either of them, at or before the execution of the mortgage. My notes of testimony, which are filed herewith, show the expression of a general belief on the part of Young that a bond of this character was executed on the same day as the mortgage; but he does not undertake to say certainly that there was such a bond, or, if there was, that the one just described is anything else than a substitute for it. And not even Young has undertaken to say that the matters written at the foot of the bond above described were ever embraced in any other bond than this.

Under these circumstances it became necessary for Young and Chandler to prove the consideration moving Williams to the execution of the mortgage. It was, indeed, contended by their counsel, on argument, that the mortgage operated to secure to them the payment of $8000, and that it rested upon Williams or other creditors of his to reduce that sum; but Young and Chandler themselves recognized the necessity of proving the consideration, and undertook so to do at the trial without being required by my order to make such proof. I am, however, free to say that I would not have hesitated to require such proof. Young, Chandler and Williams, and also J. W. Ferguson, Esq., who drew the mortgage, have testified on behalf of Young and Chandler. As my notes accompany this report, I content myself with a brief summary of the testimony of each of these witnesses. Young insists that the mortgage was executed for the avowed purpose of securing himself and Chandler as endorsers on the two bank notes, and also for the purpose of securing the payment of the $2000 note from Williams to himself, above described. Williams does not remember whether he gave a bond at the time the mortgage was executed or not, and says that he gave the mortgage to secure Young and Chandler, as his endorsers, and also to secure all his creditors—among whom he mentions J. N. Martin, specially. He adds, that at the time of executing the mortgage he had given Young a note, but that they "had had a sort of settlement in a general way." He

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states *on his examination in reply, that he "intended first to secure Young and Chandler as my [his] endorsers, and the former as my [his] creditor." "And then," he adds, "I designed to make other debts secure." I confess that this testimony strikes me as a fine specimen of the palpable obscure. Chandler does not think that any bond was executed at the time the mortgage was given. He says the mortgage was given to secure himself and Young as endorsers, and he thinks "it was William's intention to secure Young individually also, on account of the debt he owed him." Col. Ferguson testifies that he

drew the mortgage. Williams, Young and Chandler having come to his law office to have it done; that they "desired a mortgage drawn for four thousand dollars;" that he "put the penalty at eight thousand;" that they then "concluded that they did not know how much money it would be needed to secure," so he "put the consideration in the same sum;" that the mortgage was the only paper he ever drew for them; that there was talk about a bond, but it was never drawn; that they spoke of a debt to the Bank of Newberry, but he does not know whether the mortgage was intended to secure it or not; that the parties spoke of money borrowed, or to be borrowed, from the Bank of Newberry; that he was led to believe that the mortgage was given to secure the payment of money which was to be, or had been, borrowed from that bank; that he does not remember to have heard of the intention to secure any other debts; that it was the debt to that bank which they stated the mortgage was intended to secure.

It is very plain, from all this, that the bond exhibited amounts to nothing more than a statement by Williams in regard to the purpose of his mortgage. As between himself and Young and Chandler, it would constitute an important admission; but as regards other and subsequent lien creditors, it signifies nothing. It is not pretended to be a copy of any former bond, and it is not pretended to contain even the substance of any former bond. I, therefore, hold it to be nothing more than a bare memorandum, which should not affect other creditors in the least.

To further relieve the case of unnecessary discussion, I may state that I am satisfied that no bond was executed at or before the date of the mortgage, or at any other

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time, except this one *which has been exhibited. The mortgage has, therefore, to stand or fall upon its own contents and the parol testimony taken at the trial.

I confess that I have been much troubled by this case. Indeed, of all the causes which have been referred to me since my coming to the bar, no one has exercised me half so much. My own private opinion is, that the mortgage was given for the purpose of securing Young and Chandler as endorsers on the bank notes; for that matter was certainly spoken of as the object of its execution among both the parties to it and the attorney, Colonel Ferguson, who drafted it. Indeed, unless we presume so serious an instrument to have been drawn and executed without any purpose whatever, we can scarcely arrive at any other conclusion. As regards the individual note I feel differently. I do not dispute that Mr. Young expected it to be secured by the mortgage; but there is no proof that Williams so intended. They wanted security drawn for $4000. Now, this could not embrace $3000 payable to the bank, and drawing one per cent. interest per month, and also the $2000 note, with more than a year's interest, at twelve per cent. per annum, already accrued upon it. I, therefore, unhesitating decide against the claim made for this individual note to the benefits of the mortgage. And this decision is based, not so much upon legal grounds as upon the evidence before me.

But to recur to the two bank notes, against which it is claimed the mortgage was intended as an indemnity. There it was not intended that there should be such certainty of description as in the case of individual note, as it is called. The bank held the notes, and it might have been difficult, perhaps impracticable, to obtain copies of them. Besides, it is quite likely that renewals were contemplated, which would, of course vary dates and amounts. And, certainly, a bond of indemnity would have been eminently proper, and this bond might well have been the sole evidence of indebtedness recited in the mortgage. If there had been such a bond executed contemporaneously with the mortgage, or before it, its proper setting forth in the mortgage would have furnished the means of ascertaining the objects of the

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*mortgage, and it would, therefore, have been sufficiently certain for the purposes of the claim.

But one's private opinion should never be allowed to upset legal rules or contravene established legal principles. And it is upon the strength of such rules and principles that this matter must be determined.

Judge Wardlaw has well spoken, in Mitchell v. Bogan, 11 Rich. 686 of mortgages of real estate as anomalies in the laws of this state. In England they are conveyances, subject to defeasance. Here chattel mortgages operate to transfer the title of the mortgaged property. But, as he says, a mortgage of real estate, with us, is not a conveyance of property, for the mortgagor remains completely the owner of the land; but it is rather a lien conferred upon the property, under which the mortgagee acquires the right to have the property sold for the satisfaction of the debt intended to be secured, or for the providing for compensation for the breaking of covenants, as the case may be. A mortgage of real estate should therefore be defined to be, not a conveyance of real property from the mortgagor to the mortgagee, with a mere equity of redemption or right left in the mortgagor to recover title to the land upon paying the debt or performing the duty acknowledged in the mortgage, but it should be defined as a mere right given by the mortgagor to the mortgagee, by an instrument in due form, to make the land pay the debt or compensate for the failure to perform the covenants recited in the mortgage. Hence it comes that

the mortgage is not the principal thing, but the debt of money or other obligation intended to be secured is the principal thing, and the mortgage only its incident. Hence, also, it is held throughout the United States that where a note or bond is secured by a mortgage of land, the transfer of the note or bond carries with it, whether expressly so stipulated or not, the mortgage, whereas the transfer of the mortgage does not carry with it a transferal of the note or bond. Hence, also, the release of the mortgage by the mortgagee, after his transfer of the note or bond, whether the mortgagor or others have notice of the transfer of the note or not, will not operate as a release. Muller v. Wadlington, 5 S. C. 342.

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*It is true, that there need not be a separate statement of the debt to be secured expressed in any other writing than the mortgage itself; and in this case the mortgage will occupy the place both of evidence of the debt and the lien which is intended to be given it on the land. But it seems to follow, from the principles just announced, that where the mortgage does not undertake within itself to specify and reasonably ascertain the debt, that debt must be fixed elsewhere, because the mortgage is executed for the sole purpose of securing the debt, and, therefore, when there is nothing fixing the debt, the mortgage is a nullity. I do not mean to say that every inaccuracy or uncertainty in regard to the debt will invalidate the mortgage, for anything is certain in law which may be made certain. And parol evidence would be freely admitted in any court to establish the identity of the real note with that attempted to be described in the mortgage—ut res magis valeat quam pereat. But I apprehend that no mortgage would be held valid to secure the payment of a bond when the obligation intended to be secured is described in it as a promissory note or as an open account, or vice versa. It has been held in this state that a mortgage may be valid, although the note which it professes to have been executed to secure is shown to be invalid; as in Gillett v. Powell, Speers Eq. 142, where the note was adjudged nugatory, on account of material alterations, yet the debt held to be enforceable under the mortgage. This decision followed from the holding by the court that the note was no obligation, and, therefore, the mortgage itself expressed the debt. And it is probable that the court was influenced by the fact that it was a chattel mortgage which was sought to be enforced. It has frequently been held that a mortgage conditioned for the payment of future loans or advances, or for the indemnification of sureties or endorsers of contemplated obligations, is valid, without any specifications of the amount or dates of such loans, advances or written obligations in the mortgage, whether there be a bond executed to cover such future indebtedness or not; but whether a mortgage professing to be executed to secure a certain note or bond, and for that purpose alone, is valid without such a bond or note ever being executed, is quite another question. If the bond in such a case is con-

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ceded to be the *principal and substantial thing, and the mortgage only an incident to it, how can it be said that the mortgage has any real legal existence or any available quality about it when there is no note or bond to sustain it? For the mortgage, in such case, does not constitute a debt, but is only a security for a debt. And if there is no debt there can be no mortgage. It is not sufficient to uphold the mortgage that there is some sort of liability from the mortgagor to the mortgagee; the mortgage must be construed according to its own language, and it must be held to apply only to those to which it professes to apply. I am not speaking of mere uncertainty in the language of the mortgage in its description of the debt, but of the debt itself. If the mortgage professes to secure an existing debt which is proved not to exist, it is available for nothing—it is nudum pactum. As before stated, I am satisfied that no such bond was ever executed as is described in the mortgage. There is, therefore, no bond secured by the mortgage. There is, therefore, no such debt in existence as this mortgage undertakes to secure. The mortgage is, consequently, a nude pact.

It appears to me useless to say that Young and Chandler had, and have, a contingent claim against Williams, arising out of their endorsement of his notes, in the bank, and that Williams has for six years owed Young a note. Williams gave them no bond; he owes them no bond except that executed a year after the mortgage. He, therefore, did not owe them the debt which the mortgage undertakes to secure as already owing them, so I cannot see that the mortgage secures any debt at all.

[The referee here cited and commented upon the cases of Parker v. Parker, 17 Mass. 370; Pettibone v. Griswold, 4 Conn. 158; Bramhall v. Flood, 41 Conn. 68; Belknap v. Wendell, 11 Foster 92; 2 Hilliard on Mort. 369.]

Young, however, although having no valid mortgage on Williams' land, is entitled to a judgment against Williams for thousand dollars; and as this proceeding is in the nature of a creditor's bill, it might not be improper to allow Young and Chandler a judgment, to be entered at the foot of whatever decree may be pronounced in this cause, for any sum of money they may hereafter pay for Williams on account of the two bank

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*notes. But this latter matter I must leave entirely to the discretion of the Circuit judge,

as it is without precedent, so far as I know.

I find as matters of fact: * * *

13. That the defendant, L. L. Young, holds a valid sealed note against the said J. W. Williams for the sum of $2000, with annual interest thereon from November 4th, 1873, at twelve per cent. per annum.

14. That the National Bank of Newberry holds a promissory note against the said J. W. Williams, maker, and the said J. W. Chandler and L. L. Young, accommodation endorsers, (which is a renewal of two notes for $1500 each, made by the said maker and endorsers on December 8th, 1874,) on which there is now due the sum of $3522.02.

15. That the said J. W. Williams executed a mortgage of the lands described in the complaint to the said J. W. Chandler and L. L Young on December 21st, 1874, professing to secure the payment to the said mortgagees of a bond from him to them in the penalty and condition of $8000, which mortgage was duly recorded in the said county of Laurens on January 4th, 1875.

16. That no such bond as is recited in the said mortgage was ever executed.

17. That a bond of such description was executed by the said J. W. Williams on December 21st, 1875.

19. That J. W. Williams is indebted to the said L. L. Young by a sealed note, now amounting to $3695.62.

I find as conclusions of law:

3. That the mortgage from J. W. Williams to L. L. Young and J. W. Chandler is void.

I therefore recommend that the real estate of the said J. W. Williams, described in the complaint, &c., be sold, &c., and that the said L. L. Young have his judgment against the said J. W. Williams for the sum of $3695.62.

This report came before the Circuit Court on exceptions. The decree is as follows:

This action having been brought to a trial before me at Newberry court-house, by spe-

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cial consent of all the counsel concerned, *on the report of James F. J. Caldwell, Esq., as referee herein, filed on November 17th, 1879, and the exceptions thereto exhibited by the defendants, L. L. Young and J. W. Chandler, jointly, and by L. L. Young as an individual.

The exceptions demand at my hands but a statement by me of their purport. Especially is this the case, as the referee, in his report, is full and explicit.

1. Can a mortgage of land which recites its execution to secure a bond, be held as a valid security against the rights of third persons, if the bond referred to in the mortgage to be secured by it was not executed contemporaneously with or prior to it?

2. If such a mortgage, so executed in the absence of the bond recited in it, should be held valid, can it be made to protect a contingent liability of the grantor of the mortgage to the grantees of the mortgage, arising from their endorsement of his two promissory notes for $3000?

I am satisfied that a mortgage answering to the description named by me in the first proposition of this opinion should be sustained, but the controlling difficulty, to my mind, is embraced in the second proposition, viz., the contingent liability of the grantor, Williams, to the grantees, Chandler and Young, arising from their endorsement of his two promissory notes for $3000.

I am of the opinion that the mortgage in this case, purporting on its face to secure a debt evidenced by a bond, when no such bond was executed until a year after the mortgage, cannot be made available by the mortgagees to secure a contingent liability, not mentioned in the mortgage, of mortgagor to mortgagees.

It is, therefore, ordered, adjudged and decreed that the exceptions be overruled and the report of the referee be confirmed and made the judgment of this court. It is further ordered, adjudged and decreed that the mortgages proved herein be foreclosed, &c.

To which decree the following notice and grounds of appeal were presented:

Please take notice that the defendants, J. Williams, L. L. Young and J. W. Chandler, appeal from the decree of Judge Wallace, and will move the Supreme Court, at its next session hereafter, to reverse said decree upon the following grounds:

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*1. Because the said Circuit judge erred in adjudging that the defendants, L. L. Young and J. W. Chandler, were not entitled to have the mortgage executed by J. W. Williams to them, set up as a subsisting lien upon the lands therein described.

2. Because the said Circuit judge erred in adjudging that the defendant, Young, was not entitled to have the mortgage executed by Williams to Young and Chandler to secure a bond in the penalty and conditions for $8000, set up as a subsisting lien in favor of the said Young, to the extent of the sealed note for $2000, made by Williams to the said Young.

3. Because the said Circuit judge erred in adjudging that the mortgage made by J. W. Williams to L. L. Young and J. W. Chandler was not available to the said Young and Chandler to secure a contingent liability not mentioned in the mortgage of mortgagor to mortgagees; while it is respectfully submitted that his Honor should have held that the mortgage made to secure a bond for $8000 by Williams to Young and Chandler created a lien capable of being enforced for the benefit of the said Young and Chandler, to protect them as the endorsers of the said Williams on his two notes for $3000 to the National Bank of Newberry, South Carolina.

Messrs. Y. J. Pope and B. W. Ball, for appellants, cited Herm. on Mort. 360; 32 N. Y. 293; 7 Cranch 34; 6 Watts 57; 5 Conn. 442; 4 Id. 158; 7 Johns. Ch. 14; 6 N. Y. 147; 12 N. J. Eq. 13; 57 Ill. 327; 24 Me. 185; 44 Id. 286; 13 Gray 168; 1 Jones on Mort. 351, 353; 1 Strob. Eq. 356; 1 McM. Eq. 1.

Messrs. G. S. Mower and C. H. Suber, contra, cited 10 Rich. Eq. 484; 2 McC. Ch. 16; 27 Me. 400; 15 Wis. 601; Herm. on Mort. 125.

September 9th, 1881. The opinion of the court was delivered by

FRASER, A. A. J. The case is so fully and clearly stated in the report of the referee, which was confirmed and made the judgment of the Circuit Court, that only so much will be stated here as is necessary to explain the judgment of this court. The

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*finding of fact by the referee having been concurred in by the Circuit judge, and upon such testimony as has been introduced in this case, will not be overruled in this court.

On December 21st, 1874, J. Wash. Williams, one of the defendants, executed in the usual form a mortgage to J. W. Chandler and L. L. Young, of a tract of land. The mortgage recites that "whereas I, the said J. Wash. Williams, &c., in and by certain bond or obligation, bearing date December 8th, 1874, stand firmly held and bound unto L. L. Young and J. W. Chandler in the penal sum of $8000, as in and by the said bond and condition thereof, reference being thereunto had, will more fully appear."

The condition is for the "payment" of the said debt or sum of money aforesaid, "with interest." The referee finds, as a fact, that no such bond as here described had been executed at or before the execution of the mortgage.

A bond was, however, executed December 21st, 1875, one year after the mortgage, by Williams to Young and Chandler, in the penal sum of $8000, conditioned to pay $8000. This bond is without a witness and has no time fixed for the payment.

On this bond is a written declaration of the same date as the bond signed by Williams; that it was "executed in the place of the bond mentioned in the mortgage, * * * it being for the same amount and for the same purposes, and intended to occupy its place under the mortgage, not in payment thereof, but in lieu thereof." On the other side of the sheet is a further declaration, in writing, signed by Williams, without date, that this bond and mortgage were given by him "to secure the payment and thereby to save harmless the said Young and Chandler as endorsers thereon of two notes for $1500 each," &c., * * * and "to secure the payment of such renewals thereof as may be made," &c., and "to secure the payment of ——— to L. L. Young," with interest, "the amount of individual indebtedness" to said Young. The notes bore date December 8th, 1874. The referee finds, as a fact, that the mortgage was intended, or, to use the words of the referee, "given for the purpose of securing Young and Chandler as endorsers

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on the bank notes." The referee finds *that there was no proof that Williams intended to secure the individual note of $2000 to Young.

His conclusion, therefore, may be stated to be this: that the mortgage was given at its execution to secure the endorsers on the bank notes, but the feature in the transaction, in reference to the individual note of Young, was an attempt to engraft it upon a mortgage with which it had no original connection.

The questions raised by the appeal in this case are—

1. Is a mortgage of land a valid security, which recites a bond to be secured by it, which bond in fact was not executed before the mortgage or at the same time with it?

2. Can such a mortgage be held a valid security for the contingent liability of the mortgagor to the mortgagees, arising from an endorsement by the mortgagees on promissory notes of the mortgagor?

3. Can a mortgage, which is a valid security only for contingent liability, or for any other debt, be extended afterwards to secure other debts not included in the original agreement between the parties, and after its execution and delivery?

The first question has been decided by the Circuit judge affirmatively, and, we hold, correctly. The case of Bramhall v. Flood, 41 Conn. 58, was a case in which the debt was described as a note for $1000. No such note had been given, but the mortgagor was indebted to the mortgagee for $756 for goods sold, and there was an agreement to furnish the balance to the amount of $1000. The mortgage was held to be void. This is said in Jones on Mort., § 70, to be "an extreme case and not to be relied on."

In Jones on Mort., § 353, we find the doctrine laid down in these words: "A deed of trust or mortgage is valid without any note or bond, although it purports to secure a note or bond and substantially describes it. The mortgage debt exists independently of the note. The inquiry is: Does the debt exist? If it does, it is not essential that there should be any evidence of it beyond what is furnished by the recital of the deed. The validity of a mortgage does not depend upon the description of the debt contained in the deed, nor upon the form of the indebtedness, whether it be by note

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or bond or otherwise; it depends *rather upon the existence of the debt it is given to secure. Although there be no note or bond, and no time is specified for the payment of the mortgaged debt, the mortgage, if given to secure the payment of the debt that actually exists, is valid, and may be enforced immediately."

As soon as this mortgage was executed it enured to the benefit of the bank to secure an existing debt, the notes endorsed by Young and Chandler. The renewals of the original notes do not affect the security. Jones on Mort., § 355. If the mortgage was valid to secure the debt which really existed, and that debt was a note or notes payable in bank, it is not correct to say that this was a mortgage to secure a contingent liability. If the agreement between these parties had been that the mortgage should secure a note thereafter to be made and endorsed, or an account for goods thereafter to be contracted, it might very well be held that as no such debt existed at the time the mortgage was executed, no such future and uncertain liability could be secured by it; but such is not the case here. The mortgage describes an obligation absolute on the face of it, and parties are estopped from denying its existence. A deed, absolute on its face and reciting full consideration, can be shown by parol evidence to be only a mortgage, and there seems to be no good reason why a mortgage reciting a bond, which in reality has no more existence than the recited considerations of a deed, can be shown to be in reality security for the payment of a debt for which the mortgagor and mortgagees are liable at the time of its execution.

The only question which remains is as to the individual note to L. L. Young. The referee holds that it was no part of the original agreement that this mortgage should secure this note. "A mortgage given to secure a certain debt is valid for that purpose only." Jones on Mort., § 357. The security remains good so long as the debt can be traced, but it cannot cover a new debt by any subsequent agreement of the parties.

It is, therefore, the judgment of this court that the mortgage of J. Wash. Williams is a valid security for the two notes in bank, endorsed by L. L. Young and J. W. Chandler, with their renewals and interest, but that it is not a security for the note of J. Wash. Williams to L. L. Young, individually, for $2000.

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*It is, therefore, ordered and adjudged that the judgment of the Circuit Court, as herein modified, be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

15 S. C. 518

(Case No. 1074.)

Ex parte BROWN AND WIFE et al. GIBBES v. GREENVILLE AND COLUMBIA RAILROAD COMPANY. STATE, Ex relatione ATTORNEY-GENERAL, v. SAME.

(November Term, 1880.)

[1. *Railroads* ⇐206; *Receivers* ⇐49.]

Pending action to subject a railroad to sale for the payment of its mortgage debts, the president and directors of the company were ordered to continue in the possession and management of its property of all kinds under the order of and subject to the court; and such officers were in like manner to continue to conduct and carry on the business of the company and to make report to the court, when required, of the condition of the property of the company, of its earnings and expenditures, to the end that such orders might be moved for as were necessary for the protection of the property of the company and the interests of all parties concerned. *Held*, that by this order the president and directors, and their successors in office, were constituted receivers of the court. Fifty-four Bonds Case, ante p. 304.

[Ed. Note.—Cited in Hand v. Savannah & C. R. Co., 17 S. C. 269; Ex parte Benson & Co., 18 S. C. 45, 44 Am. Rep. 564; Ex parte Carolina Nat. Bank, 18 S. C. 295, 296; Roberts v. Johns, 24 S. C. 585, 586.

For other cases, see Railroads, Cent. Dig. § 678; Dec. Dig. ⇐206; Receivers, Cent. Dig. § 82; Dec. Dig. ⇐49.]

[2. *Receivers* ⇐108.]

A change of incumbent in the office of railroad receiver does not affect the status of claims against the property arising during the receivership.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 158; Dec. Dig. ⇐108.]

[3. *Railroads* ⇐265.]

Passengers over a railroad and an employee of the company, when entitled to damages for injuries received while the railroad is operated by a receiver, should be paid out of the fund in court realized from the earnings of the road during the receivership, in preference to mortgage or other debts existing at the time of action brought.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 841; Dec. Dig. ⇐265.]

[4. *Carriers* ⇐4.]

[Cited in Huguelet v. Warfield, 84 S. C. 90, 65 S. E. 985, to the point that receivers operating a railroad are common carriers and liable as such.]

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462–478; Dec. Dig. ⇐4.]

[This case is also cited in Fraser & Dill v. City Council of Charleston, 23 S. C. 373, and distinguished therefrom, and cited and followed in Ex parte Carolina Nat. Bank, 18 S. C. 289.]

Before Hudson, J., Richland, July, 1880.

In this case, Hon. A. P. ALDRICH, of the Second Judicial Circuit, and Hon. T. B. FRASER, of the Third Circuit, sat in the places of Chief Justice SIMPSON and Associate Justice McGOWAN, who had been of counsel in the original causes.

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*These were four petitions to be paid out of the fund in court, which was realized from

the earnings of the Greenville and Columbia Railroad Company, while in the hands of the receiver, who was appointed under the actions of James S. Gibbes and others, creditors, against the Greenville and Columbia Railroad Company, and the State, ex relatione the Attorney-General, against the same corporation. Ex parte E. M. Brown and Emily Brown, his wife; Ex parte William Cummings; Ex parte William H. Redwood, were petitions for the payment of judgments obtained by them against the railroad company in May, 1878, for injuries received by them while passengers over the road on June 1st, 1874, resulting from the breaking of a trestle. Ex parte Elizabeth J. Layne, administratrix of the estate of John Y. Layne, deceased, was for the payment of balance of $1140 and interest due on judgment for $2000, taken by her against the company by consent, in September, 1877, damages for the death of her husband and intestate, an engineer on the road, his death being caused by the bursting of a defective boiler, on January 23d, 1874. Other facts are stated in the opinion of this court.

The petitions were filed by leave of court and referred to N. B. Barnwell, Esq., master, who made an unfavorable report. Exceptions were taken thereto by the petitioners, and the cases were heard by Judge Hudson, whose decree, after a statement of facts, was as follows:

The view I entertain of the law of the cases renders the payment or not of earnings to the interest on the mortgage debt, in preference of these judgments, not decisive of the issues; and although it may be that the interest was in fact not paid from earnings, but from funds otherwise raised, as the counsel for creditors claim they can show, yet, for the purposes of this contention, I am willing that it be conceded by the court that between the years 1874 and 1878, a portion of the earnings of the road was applied to payment of interest on the mortgage debt, sufficient to have paid all the claims of these petitioners. If the petitioners have a superior claim upon the fund of such payment was a diversion; otherwise, not.

With this statement of facts we proceed to

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examine the issues *raised by the exceptions to the master's report. The whole matter may be resolved into a single question, viz., has a passenger or an employee who holds a judgment for damages to the person against an insolvent railroad company, which has been placed in the hands of a receiver, a right to be paid out of the net earnings of the road in preference of senior mortgage creditors? Is the legal or equitable right to this fund set up by such a judgment creditor superior to the legal and equitable right of a prior mortgage creditor?

The petitioners rest their claims upon a supposed prior and superior equity to this particular fund, contending that whilst the mortgagees have a superior lien upon the property, they have a superior equitable lien upon the net earnings; that they do not stand upon the footing of ordinary and general judgment creditors, but of creditors whose claims are so peculiarly meritorious that a Court of Equity will, in the exercise of extraordinary power, displace existing liens and subordinate superior legal rights to these judgment claimants.

That they ought to be paid no one can deny, and that they will be paid is a fact, provided the assets of the corporation, in a due course of administration by the court, are sufficient. But if the assets of the company in the possession of the court, at the end of a legal and equitable administration, should fail to pay these debts, the petitioners are in no worse condition than the multitude of creditors who will have to go without pay. The question is not one of liability. It cannot be denied that a company, while managed by its own direction, is liable to demands of this kind, and where managed by a receiver as an officer of the court, it is equally liable out of its property to respond to unpaid claims of this kind, whether the cause of action arose before or after the judgment of insolvency and appointment of a receiver; whether the court may be solvent or insolvent, whether under its own directorship or the control of the court, does not affect the question of liability, but affects only the mode of establishing the debt and enforcing its payment.

So that whether a receiver can be sued in a court of law upon a demand of this kind, what is the effect upon the parties if they elect to sue the company, instead of going

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against the property *of the company in the hands of the court; what is the effect upon their rights, whether the cause of action arose prior or subsequent to the appointment of a receiver, all such questions, in the discussion of some of which much learning has been displayed by our judges and text writers, do not, in my opinion, greatly affect the fundamental issues in these cases. The main question is one of priority and not of liability. The petitioners have a right to be paid, they ought to be and will be paid, if the property be sufficient; but they claim a right prior to that of mortgage creditors, to be paid out of the income in the hands of the receiver; and that claim of priority we will proceed to examine. When a railroad corporation becomes insolvent, its property may be taken out of its hands by the court and managed by an officer of the court. This step is taken at the instance of creditors, in order to have the property controlled, protected and managed for the benefit of existing creditors, whose rank and priority, as then existing under the law, remain and must remain unchanged. No court

has the right or power to displace existing liens, to divest vested rights, or to derange that order in which creditors, by their own contracts, have classed themselves under the law. It would be alarming to creditors, if not a monstrous doctrine, if a court, having forcibly taken possession of the property of a railroad, should have the power to upset the status of things and unhinge the vested rights of creditors by a rule of discretion resting on caprice.

Equity follows the law, and will not and cannot violate its mandates and behests. The harshness of the rules of law it will moderate, but then only to protect rights and prevent wrongs, which the rigid rules of law fail to do. Estates of decedents, and property of all kinds, coming into the control of a Court of Equity, will be administered by fixed and established principles, and not by caprice or fancy.

The property of the Greenville and Columbia Railroad Company is now being administered by this court. It has been brought here by creditors who ask this court to administer it, not for the benefit of the company, out of whose hands it has been taken, but for the benefit of the creditors. This the court has undertaken to do, and must do, and must, in

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so doing, *have a sacred regard for the rights of creditors as fixed at the date of the forcible sequestration of the property by the court. But a material part of this administration consists in the management of the road as a highway for traffic and travel, and whatever is essential to this proper management, the creditors have asked the court to carry out. This also the court will do, and to all the necessary incidents of good management, the creditors have, by coming here, agreed and contracted to submit, and are bound to acquiesce therein, even though their liens and rights may be affected thereby.

The necessary expenses incurred in the management and preservation of the property, it is evident must be defrayed by the court. This must be done out of the earnings, and earnings alone, if sufficient; and if not sufficient, then out of the property, and this before any creditor can receive a cent of his debt. Wages of employees of every class, and all kinds of material and labor furnished in order to keep up the road, constitute the leading items of necessary expense. To produce income for the creditors these expenses are absolutely necessary, and upon every principle of equity, as well as from the implied agreement of creditors, who have forced the road into court; these expenses must be paid in preference of all outstanding debts. Beyond this the court will not go, nor allow its officers to go, in incurring new liabilities.

This is the doctrine of fairness, equity and good faith, and is established by the uniform current of the decisions of our courts and the doctrines of our text writers. High on Rec., §§ 390–398; Jones on Rail. Sec., ch. XIX., §§ 557–566, and authorities there cited. Numerous decisions of the Circuit and Supreme Courts of the United States and the states might be referred to, all concurring in this leading doctrine as to the powers and duties of courts in running and managing insolvent railroads. The duty of the court is not to teach railroad officials how a railroad can and ought to be managed, but itself so to manage it as best to subserve the interest, real not imaginary, of existing creditors, whose servant and agent the court has undertaken to be. Economical management and prompt sale, if sale must be had, should, therefore, be the sole end and aim of the

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*court. Whatever, therefore, pertains to and is necessarily incident to the good management and preservation of the property, the court should do, and the creditors must submit to; but beyond this the court must not be led by caprice, taste, fancy or supposed kindness and mercy.

Therefore the petitioners, to succeed in their prayer for precedence, must show that the payment of their claims out of the income falls within this rule, and that such payment is necessary to the management of the road, and is to the interest of the mortgage bondholders.

The petitioners contend that their causes of action arose and their judgments were recovered while the road was in the hands of a receiver, and hence their equity to be paid out of the income. They say that the road was sequestered by the court in 1872, by the order of Judge Melton, and that the officers of the company were, by that order, made receivers; that the appointment of James Conner, in 1878, as receiver, did not change the status of the road, but only made definite and complete the status which before was anomalous. The counsel for the bondholders, resisting these petitioners, contend that no receiver, properly so called, existed until the appointment of James Conner.

I deem the settlement of this dispute not necessary to their judgments, and will consider the question as if the position of the petitioners in regard to it is correct, and I hold that the claims of the petitioners, admitting that they arose subsequent to the receivership, are no more entitled to priority over the liens of mortgage bondholders, as far as the earnings are concerned, than if they arose prior to the insolvency of the road and the appointment of a receiver.

Jones on Rail Sec., § 571, lays down the following doctrine: * * *

In the further discussion of this point the author cites the case of Davenport v. Alabama and Chattanooga R. R. Co., 2 Woods 519, which was for damages to a passenger on that road while in the hands of a receiver,

In none of the authorities cited by counsel for the petitioners do we find anything to sustain their claim. All are in harmony with the above case, and the doctrine of the

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text of Mr. Jones. *The case of Fosdick v. Schall, 9 Otto [99 U. S.] 235 [25 L. Ed. 339] which is most relied upon by claimants' counsel, is not at all at variance with the above, and the law as laid down in Davenport v. Alabama and Chattanooga Railroad Company is sound doctrine and well established.

It follows that the payment of income heretofore, if any has been paid, to interest on the mortgage debt, was not a diversion of funds, which of right, or in equity, belonged to the petitioners, nor have they any equity to any part of the present income or future earnings, prior to the right of the mortgagees, to whom it belongs primarily after payment of expenses.

It is, therefore, adjudged that the judgment of the petitioners do rank with the other judgments according to date and lien in the distribution of the assets of the Greenville and Columbia Railroad Company, in the possession of the court, and that, as such, they are not entitled to be paid out of the income or property in preference of superior liens.

The exceptions to the master's report are overruled, and the same is confirmed.

The petitioners appeal to this court upon the following exceptions to this decree:

1. Because his Honor erred in ruling that the payment of income heretofore, if any has been paid, to interest on the mortgage debt, was not a diversion of funds which of right, or in equity, belonged to the petitioners.

2. Because his Honor erred in ruling that the petitioners have not any equity to any part of the present income or future earnings prior to the right of mortgagees.

3. Because his Honor erred in adjudging that the judgments of the petitioners do rank with the other judgments according to date and lien in the distribution of the assets of the Greenville and Columbia Railroad Company, and that they are not entitled to be paid out of the income or property in preference of superior liens.

[For subsequent opinions, see Ex parte Williams, 17 S. C. 396; Ex parte Brown, 18 S. C. 87.]

Mr. W. C. Benet for Brown and wife; Cummings and Redwood, appellants.

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*The orders of court prevented us from enforcing our executions against the property of the company. 2 Redf. on Railw. 510; 6 Rep. 331; High on Rec., § 163; 5 Wait Act. & Def. 354; 16 Wall. 218. Though we might have petitioned the court for payment. High on Rec., § 2. Under the order of Judge Melton, of July 2d, 1872, the president and directors of the company became receivers of the court. 4 Gratt. 187; High on Rec., § 5.

Our suits were brought against the corporation, but the directory, who were also the receivers, were served, and appeared and litigated, without objection. Objection has, therefore, been waived. 85 Ill. 558; 17 Alb. L. J. 209; High on Rec., § 396; 23 Ind. 553; 29 Vt. 421; 2 E. D. Smith, 519; Wait Ann. Code, § 134, f; 17 Wall. 451. There has been here a continuing receivership since 1872, and our claims extend to the fund in court, and not to the earnings, only, which were in existence at the time the liabilities arose. 9 Otto 235; 6 South. Law Rev. 548, 549; 107 Mass. 1; 18 Amer. Railw. Rep. 565.

The whole doctrine of receivers of railways is comparatively new, and is progressive and expansive. 6 South. Law Rev. 536; 16 Wall. 203; 18 Amer. Railw. Rep. 291; High on Rec., §§ 365, 390–392; 1 Wood 336; 9 Otto 389. Wages of laborers and other employés, materials, supplies and repairs are payable out of the receiver's fund. Cases supra, and 3 Cent. Law J. 578. Also, attorney's fees. 8 Rep. 579; 58 N. Y. 368; 3 Otto 352. Also, damages for goods lost. Jones on Rail. Secur., §§ 498, 512. Also, for injuries to employés. 20 Ohio St. 137. Also, for injuries received by others besides employés or passengers. 18 Wis. 74. Also, for injuries sustained by passengers. 4 Hun 373; 26 N. J. Eq. 474; 17 Wall. 445; 20 Ohio St. 150; High on Rec., §§ 392, 395; Wood on Mast. & Serv., § 412. The effect of the appointment of a receiver is to take the property into the custody of the court, whose hand the receiver is; but his duties require him to operate the road, which is a common carrier. 5 Wait Act. & Def. 353, 354; High on Rec., § 1, et seq.; 2 Story Eq. Jur., §§ 829–833; 4 Gratt. 208; 4 Md. 85; 80 Ill. 467. The fund in the receiver's hands must be applied under the direction of the court. Neither

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the suing creditors *nor mortgagees have any superior right to them. 11 Paige 436; 10 Paige 43; 1 Jones on Mort., § 160; 18 Amer. Railw. Rep. 234–237. The doctrine is given definite shape in Fosdick v. Schall, 9 Otto 235. See Bispham's comments in 6 South. Law Rev. 543. Having taken possession of the road, the court should do exact justice; should enforce the legal remedies of parties enjoined. 5 Wait Act. & Def. 353; 2 Story Eq. Jur., § 798; 4 Rich. Eq. 201; and should do what the corporation could be compelled to do. Authorities, supra. The liabilities of a receiver are identical with the liabilities of the corporation. Authorities, supra; 38 Vt. 402; 6 Bosw. 627; High on Rec., §§ 395–398; 5 Wait Act. & Def. 379–385; 2 Van S. Eq. Pl. 427. Receiver, is therefore, liable for damages, injuries, expenses, claims, &c., if the corporation in charge of the road would be. So is he liable for injuries to passengers and employés, because this liability attaches to his duties. 1 Smith Lead. Cas. 101. Unless paid, business of road and value of its

property is impaired. 1 Van S. Eq. Pl. 380; and because such damages are part of the expenses. Necessary expense is that which insures income. Employés are necessary to running the road, and passenger traffic produces income. Davenport v. Railroad Company, 2 Wood 519, stands alone, and is opposed by all the authorities, supra. Mr. Jones (Railw. Sec., § 571,) cites this case with approval, but finds no other authority for the doctrine quoted in the Circuit decree; but see Sections 498, 512.

Mr. J. E. Bacon, for Layne, appellant.

Messrs. Simonton and Barker for the receiver.

Judge Melton's order did not make the officers of the road receivers. High on Rec. § 1; 17 How. 331. Judge Pressley's order cannot make them receivers. If they were receivers, they should have been sued eo nomine. High on Rec., § 258. But petitioners cannot be paid out of the funds in the hands of the receiver, for after appointment of receiver, the income belongs to the mortgagees. 94 U. S. 800; 9 Otto 245, 389. Earnings were not appropriated by the receiver to the bonded debt. There is no superior equity with these petitioners; the precise

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point has *been adjudicated. 2 Wood 519; Jones on Rail. Sec. § 571. The dictum of Chief Justice Waite in Fosdick v. Schall was a surprise to the profession.

Mr. S. W. Melton, same side.

September 10th, 1881. The opinion of the court was delivered by

FRASER, A. A. J. The action in the above case in which James S. Gibbes and others are plaintiffs, was commenced May 6th, 1872. On May 25th, 1872, an order was made by his Honor, Judge Melton, "that until further order of this court the said Greenville and Columbia Railroad [Company] be enjoined and restrained from paying out or in anywise transferring and delivering to any person any of the moneys, property or effects of the said company, except so far as the same may be necessary to the keeping up and to the operating of the road of said company."

On June 11th, 1872, the action in the name of the attorney-general was commenced. A motion was made for a receiver and other relief and Judge Melton, by consent of counsel for the company and certain creditors, on July 2d, 1872, ordered "that any and all judgment creditors of the said company be restrained and enjoined from enforcing their said judgments against the property of the said company." The same order contained this further provision: "As the state cannot be required to give security as other plaintiffs, it is ordered that the president and directors of the Greenville and Columbia Railroad Company, under the order of and subject to this court, continue in the possession and management of the property of all kinds of said company, and in like manner continue to conduct and carry on the business of said company; that they make report to this court at such time as this court may require, of the property of all kinds of said company, of its earnings and profits and expenditures, to the end that such orders may, from time to time, be moved for as may be necessary and proper for the protection of the property of said company and of the interest of all parties concerned, pending litigation."

Affairs continued in this situation until November 23d, 1878, when Judge Pressley made an order in which it is said: "I con-

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*sider that the said order of Judge Melton did make the officers of the Greenville and Columbia Railroad company officers of this court, and responsible to it in the character of receivers; but they have not executed the proper bond nor have they filed their accounts or performed the other duties required by that order. It is, therefore, imperative on me to put an end to that condition of the property and to place it more substantially in the hands and under the custody and order of this court. It is, therefore, ordered that James Conner, Esq., be, and he is hereby, appointed receiver of all and singular the property and assets, rights, credits and franchises of the corporation defendants, the Greenville and Columbia Railroad Company; that he do forthwith demand and receive possession thereof, * * * and the same safely keep and preserve, subject to the control, order and direction of the court, with power and authority to manage and operate said railroad, to receive the income and earnings thereof, and of the same to disburse whatever may be necessary for the expenses of running said road, and with all the other and further power and authority as may be conferred by the decree of this court hereafter to be filed. It is further ordered that all and singular the creditors of the said the Greenville and Columbia Railroad Company be, and they are hereby, enjoined and restrained * * * from enforcing judgments against said company."

After this order was made, James Conner, as receiver, took charge of the road and all the property of the company and for some time conducted the operations of the road very successfully, and, after meeting all current expenses of his administration and investing a considerable sum out of the income in necessary rolling stock, &c., had on hand and has turned over to the master of this court a considerable sum arising from income.

By the order of the court the road and all its outfit and all the property of the company have been sold by the master. The sum realized was sufficient to pay all the first

mortgage bonds and the guaranteed bonds.

The second mortgage bonds constituted a third lien on the property, and after exhausting the proceeds of the sale and all the surplus of income, there would still be a large deficiency in the amount necessary to pay these bonds.

The petitioners in the case before the court

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are not lien cred*itors. They claim, however, that they have a right to be paid out of the income: that their claims were expenses incurred during the period in which the railroad was in the hands of a receiver, or if not a receiver eo nomine, in the hands of persons appointed by, responsible to, and acting under the orders of the court which had enjoined the enforcement of judgments against the property of the company.

The petitioners have unnecessarily complicated their cases by suing them to judgment in the Court of Common Pleas, in which they are severally parties plaintiffs and "The Greenville and Columbia Railroad Company" defendants.

The first three cases were claims for injuries done to passengers, June 1st, 1874. The amount of the judgments are for Brown and wife, $8137.15; Redwood, $2636.85; and Cummings, $2650.90. The last case was for injury resulting in the death of John T. Layne, an engineer in the employ of the company, or rather of those who, under the order of the court, had charge of the road and directed its operations. The injury resulted from a defective boiler. In this case there was a judgment by consent of the counsel of the administratrix and the counsel of the managers of the road. "The president and directors" had the company represented by counsel in these cases and, so far as appears, raised no objection to the appearance on the part of the company. It is not clear that there could have been any valid objection raised to a suit against the company, as only the enforcement of judgments was enjoined.

These claims are all pressed in this case not on account of their rank as judgments, but on account of the cause of action on which those judgments are based. It would have been more regular to have based the claim in this court at once on these several causes of action. This, however, would have opened the cases anew and led to a very long and expensive investigation. It is as well, therefore, and perhaps the duty of this court to disregard the mere form and treat the judgments as they seem to have been regarded by all parties as sufficient evidence of the nature of the claims and the amounts due on them severally. These claims were referred to the master, were reported on unfavorably and the report confirmed by the

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Circuit judge, and this *appeal is from his ruling. Claims for cotton lost and also counsel fees for professional services rendered after the commencement of the proceedings by the creditors against the Greenville and Columbia Railroad Company, have been paid out of the income made by the receiver, James Conner, but it does not follow that these claims, which are contested by the lien creditors, should also be paid out of the fund; they must stand on their own merits.

These claims arose during the management of the road by "the president and directors," under the order of the court and before the appointment of "Receiver Conner." The president and directors did not turn over to Receiver Conner any surplus of income and it was claimed by the petitioners and conceded for the purposes of these cases that a considerable amount of the income during the administration of the president and directors was paid out as interest on the bonds held by the lien creditors. The fact was not settled by the presiding judge, but it seems not to have been seriously questioned in the argument, and in the view taken by this court of these cases it is not material what the fact is. The question of a diversion of the income to interest becomes important when claims which ought to be paid out have not been paid and such income has been diverted to the payment of interest, and the question is whether such income so diverted should not be restored out of the sale of the property. In this case there is no such question. There is a considerable sum turned over by the receiver to the master and now under the control of this court.

If the order of the court of July 2d, 1872, created a receivership in fact, then the mere transfer of that office to Receiver Conner certainly cannot have the effect of invalidating claims which were good under the first administration. The management of the court is one even if it becomes necessary to change the receiver once, twice or oftener. Claims against receivers would stand on a very unstable basis if they could be defeated by a change which could so easily be made. The questions, therefore, are these:

1. Was the order directing "the president and directors of the Greenville and Columbia Railroad Company" to continue in the possession and management of the property of

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all kinds of the *company" and "to conduct and carry on its business under the order of and subject to this court," and "to make report," that orders * * * "may from time to time be moved" for "pending litigation," the appointment of a receiver? If not in name was it so in substance?

2. What are the relations of such a receivership to third parties with whom it may have transactions in reference to the property and business of the corporation shippers, passengers, employees, &c.?

It is true, that this order of July 2d, 1872, was somewhat anomalous. It was without bond that the president and directors of the

Greenville and Columbia Railroad Company were intrusted with valuable property, but they were not the owners of the property, and it was competent for the Circuit judge to dispense with the security, and if, in his judgment, they were proper persons for the appointment, it was in his discretion to make it. It is true that it was no individual by name that was appointed, but it was an organized board whose identity was provided for and secured by the rules laid down for preserving the vitality of the corporation whose exponent it was. It is, perhaps, a peculiar appointment, but it was competent for the court to make it. See High on Rec. 66, 67, 68, 81, as to persons to be appointed.

All the essential powers of a receiver were conferred by this order. It is the business of the receiver "to receive and preserve the property" pendente lite—"the court itself having the care of the property by its receiver." The receiver has no powers other than those conferred on him by the order of his appointment, or such as may be derived from the established practice of Courts of Equity. High on Rec. 1.

These officers, "the president and directors," were ordered to continue in the possession and management of the property and "conduct and carry on the business of the company," and "make reports," that further "orders" may be made. In the order of Judge Pressley, of November 23d, 1878, James Conner was appointed receiver eo nomine and he was required "to demand and receive possession of all the property of the company, to keep and preserve the same, sub-

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ject to the control, order and *direction of the court, with power and authority to manage and operate the said railroad, to receive and disburse the income, the disbursements to be confined to the expense of running the road." In the first case the sweeping power is given "to conduct and carry on the business of the company," and in the latter the power is somewhat limited in the matter of expenditures of income. Every essential feature of a receivership was created by the order of July 2d, 1872, and the office ought to have been so called, and to be treated so now after the property has been, at the instance of the creditors, held for eight years in the same way as if it had been in name as it was in substance, a receivership. Fifty-four Bonds case [15 S. C.] ante 304.

Having come to the conclusion that the property of the Greenville and Columbia Railroad Company has been in the hands of receivers since the order of July 2d, 1872, and the road operated by the receivers, it remains to determine what are the liabilities of the receivers.

The railroad company was a common carrier, and, as if in anticipation of events which have come to pass, the charter of the company, (A. A. Stat. 1845, p. 328, § 13,) provided for the right to let or farm out to others, the right of transportation of person, produce, &c., and that the company, in the exercise of this right, and the persons to whom this right of conveyance and transportation should be let, shall, in so far as they act on the same, be regarded as "common carriers." It would be an easy way to defeat the wise purposes of the legislature if, on the application of a mortgage creditor, the railroad and all the important and valuable franchises of the company could be put, by an order in chancery, in the hands of a receiver, who could, for years, as in the case before the court, conduct the operations of the railroad, and enjoy the franchises of the company, entrusted to it on considerations of an enlightened public policy and escape the responsibilities of the common carrier. The convenience of transportation of persons and property, secured by this responsibility constituted in large measure the inducement to the legislature to exercise the right of eminent domain, and transfer to railroad companies valuable franchises, and in some cases against their will, the property of private

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citizens. The current of opinion *seems to be very decidedly in favor of the view that receivers are common carriers. It is said in High on Rec., § 398: "Receivers in possession of, and operating a railroad under appointment of a Court of Equity, may be held liable as common carriers for negligence in the performance of their duties." In Jones on Rail. Sec., § 511, we find these words: "But considerations of public policy may likely lead to the adoption of the rule that a receiver shall not be allowed to exercise the rights and powers of a common carrier without being also held subject to a common carrier's duties and liabilities." And this we hold to be the better doctrine.

The case of Davenport v. Railroad Company, 2 Wood 519 [Fed. Cas. No. 3,588], was one for the recovery of damages for a personal injury, and in it Judge Wood says: "It was regarded as too clear for argument that if the road had been run by the president and directors when the injury was sustained, such a claim could not possibly have priority; but the receivers act merely in place of the president and directors, except so far only as the court may otherwise direct." In one sense the receiver does so act, but in another sense, especially in that sense which is important in these issues, he does not so act. The receivership is the transfer of the property to a new owner, who begins his work cut off from the past, with new duties and new obligations. The court could order a sale at once and let new and absolute owners take the property and assume their proper liabilities to third parties. If, instead of doing this, a receiver is appointed, he represents, technically, the interests of an insolvent corporation, but technically and sub-

stantially the interests of creditors, who ought not to be allowed to enjoy the franchises and property of the corporation without its responsibilities.

The intimation is given by Chief Justice Waite, in Fosdick v. Schall, 9 Otto [99 U. S.] 254 [25 L. Ed. 339] that cases may arise in which it would be proper to apply a part of the proceeds of the sale of the mortgaged property to the payment of expenses incurred during the receivership. While the opinion in that case throws a flood of light on the subject of the payment of the expenses of a receivership and the mode of these payments, as well as the general relations of all creditors to the income, there is nothing in the

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*case specially applicable here, as in the view taken by this court, there is a fund arising from the income during the time the property has been under the control of the court, in the hands of its appointees, out of which can be paid the claims of petitioners.

Under the order of July 2d, 1872, the president and directors were instructed "to conduct and carry on the business of the company." This is language certainly broad enough to authorize the payment for losses and damages usually paid for by a railroad company, if any order on the subject was necessary. If there has been a receivership of this railroad since July 2d, 1872, and receivers are common carriers, there can be no doubt of the liability of the receiver in all these cases.

In Kinney v. Crocker, 18 Wis. 74, it was held that a state court could entertain jurisdiction of an action against a receiver appointed by the United States court for injury to the plaintiff in that case, from negligence of the employees. In Meara's Adm'rs v. Holbrook, 20 Ohio St. 137, it was held that a receiver was liable for injury to an employee. These doctrines are, of themselves, in accord with the best reason and public policy, and sufficiently sustained by authority in cases where the whole field is new and comparatively unexplored.

If the receiver is liable, and there is nothing to show and no intimation that there was any personal fault so as to make him personally liable, the claims ought to be paid out of the fund in court. No question of jurisdiction between two courts has arisen here as in most of the cases on this subject.

It is, therefore, adjudged and decreed that the decree of the Circuit judge be reversed, and that the case be remanded to the Circuit Court, that proper orders may be made for the payment of the claims of these petitioners, in accordance with the views herein expressed.

McIVER, A. J., and ALDRICH, A. A. J., concurred.

15 S. C. *535

*(Case No. 1077.)

KERCHNER v. SINGLETARY.

(April Term, 1881.)

[1. *Courts* ⇐99.]

An order of a Circuit judge unappealed from is binding in subsequent stages of the same cause. There can be no appeal from one Circuit judge to another.

[Ed. Note.—Cited in Long v. Hunter, Pearce & Batley, 58 S. C. 162, 36 S. E. 579.

For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. ⇐99.]

[2. *Homestead* ⇐51.]

The return of appraisers to lay off a homestead was handed to the sheriff, who retained it in his possession for sixteen days, until he received the surveyor's plat, without which the return was imperfect, when he filed both papers with the clerk of court for record, and within thirty days thereafter the creditors served exceptions. *Held*, that the exceptions were taken within the time allowed by law.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 75; Dec. Dig. ⇐51.]

[3. *Homestead* ⇐51.]

Where an assignment of four hundred acres of land as a homestead had been, after trial, set aside as excessive, and new appraisers appointed, who assigned the same land and fifty-four acres additional, without affixing any valuation to such homestead tract, the Circuit judge determined that there was good cause shown against this second return, and ordered a new assignment. *Held*, that this court could not disturb this conclusion of the Circuit judge.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 74; Dec. Dig. ⇐51.]

[4. *Homestead* ⇐51.]

An order of the Circuit Court setting aside a return of homestead appraisers and directing a new appraisement, does not exhaust the power given to the court by the statute; this power may properly be exercised more than once when necessary to correct erroneous assignments.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 66–69, 74, 75; Dec. Dig. ⇐51.]

Before Hudson, J., Marion, April, 1880.

Francis W. Kerchner and Asa K. Walker, execution creditors, and Robert L. Singletary, execution debtor and claimant of homestead, are the parties to this appeal. To the full statement of the case, made in the opinion of this court, it will be necessary to add nothing, except this—that the return of the appraisers of February 7th, 1880, required a survey to determine the precise boundaries indicated and the number of acres contained.

Mr. W. W. Harllee, for appellant.

Messrs. Johnson & Johnson, contra.

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*September 12th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. The plaintiffs had judgments and executions for large sums against the defendant. The plaintiff, Francis W. Kerchner, levied on the land of the defendant, who claimed homestead. Three appraisers were appointed to lay off homestead, and, in December, 1877, two of them made return,

assigning as homestead four hundred acres, including the dwellinghouse. The other appraiser dissented. The judgment creditors objected to the returns, both by complaint and exceptions, alleging:

"1. That the return was only signed by two of the appraisers, the third being present and dissenting in writing on the return.

"2. That the appraisers did not take the oath prescribed by law.

"3. Because the assignment was excessive, the lands set apart exceeding in value the sum of one thousand dollars."

The defendant demurred, denying the jurisdiction of the court to determine the matter by action, and also answered. At October Term, 1879, Judge Kershaw referred the facts to a jury, reserving the question of law until the question of fact should be determined. The jury found, as matter of fact, that the value of the land assigned as homestead exceeded $1000. Judge Kershaw thereupon ordered "a new assignment," appointing different appraisers thereof. On February 7th, 1880, the new appraisers made return, setting off by metes and bounds four hundred and fifty-four acres as homestead, including the four hundred before assigned, and adding fifty-four acres. The return, without a plat, was handed to the sheriff on the day it was signed, and he retained it until the plat was handed him, February 23d, when he filed both in the clerk's office, "for record in court." On March 18th, 1880, plaintiffs again excepted, and March 21st, 1880, filed regular complaint, setting out at length the grounds of objection. The defendant again demurred on the ground that a regular action was not the proper remedy, and also made motion to dismiss the exceptions on the grounds that they were not taken in time, and the return of the appraisers appointed by Judge Kershaw was conclusive on the par-

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ties, the *act making no provision for any further proceedings. Judge Hudson sustained the demurrer to the action and dismissed the complaint, but sustained the exceptions of plaintiffs, set aside the return and appointed new appraisers. From this order the plaintiffs appeal because the judge dismissed the complaint, and the defendant also appeals on the following grounds:

"1. Because his Honor erred in holding that the exceptions to the return of the appraisers, dated February 7th, 1880, returned to the sheriff on that day were filed in proper time, and that the same was not filed until February 23d, 1880, when so marked by the clerk.

"2. Because his Honor erred in his decision that the first return, signed by but two of the appraisers, the third being present, participating and dissenting, was null and void, not being signed by the three appraisers.

"3. Because his Honor erred in holding that the failure to insert the value of the lands laid off as the homestead vitiated it, when each of the appraisers was served with a copy of the order of Judge Kershaw, instructing them to admeasure the homestead, not exceeding $1000 in value, and their return in obedience thereto, returning the said order with their return, was a sufficient compliance with the law.

"4. Because his Honor erred in holding that after the second return of appraisers, appointed by the court in November, 1879, the law authorized any further proceedings to set aside the homestead laid off by them, on the ground of its being excessive or otherwise, when, as it is submitted, the homestead act of 1873 makes no provision for any further proceedings, and it is insisted that such second return is final, unless attacked for fraud or misconduct in the appraisers.

"5. Because his Honor erred in holding that the appraisers appointed by the court were bound by the verdict of the jury and the judgment of the court in November, 1879, as to their assignment and valuation of the premises; and it is submitted that it was error in his Honor, Judge Hudson, to set aside the second return without inquiry or evidence touching the same."

From the view the court takes it will not be necessary to consider the respondent's

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ground of appeal to so much of Judge *Hudson's order as sustained the demurrer and held that a regular action was not the proper way by which to make "complaint" to a return assigning homestead.

The appellant has very properly abandoned his exceptions to the first order of Judge Kershaw. That order was not before Judge Hudson for approval or disapproval, and nothing that he said about it is properly in the case. There is no appeal from one Circuit judge to another. The order was binding upon him. It was not appealed from at the time it was made or until it had been executed by a second return, and cannot now be considered by this court. Judge Hudson could only deal with the second return, and our inquiry upon appeal from his order is limited to that. Besides, Judge Kershaw did not rule the law complained of; he set aside the first return simply on a question of fact found by the jury, viz., that the assignment was excessive.

The first exception of appellant to the order of Judge Hudson makes the point that "complaint" as to the homestead assigned was not made in time. The homestead act of 1868, (14 Stat. 19), provides that "the appraisers shall be sworn by a justice of the peace to impartially appraise and set off by metes and bounds a homestead of the estate of the debtor, such as he may select, not to exceed the value of $1000; and the said appraisers shall proceed accordingly to set out the homestead, and the set-off and the assignment so made by the appraisers shall be returned by the officer along with said pro-

cess for record in court, and if no complaint shall be made by either party no further proceedings shall be had against the homestead, but the residue of the lands and tenements of the head of the family, if any more or other he shall have, shall be liable to attachment, levy and sale; provided, that upon good cause shown the court out of which the process issued, may order a re-appraisement and re-assignment of the homestead either by the same appraisers or others appointed by the court," &c.

The act of 1872 (15 Stat. 229) changed the above only in allowing for "complaint" thirty days after return for a record in court. The return was handed to the sheriff on February 7th, but without the plat. He held it until the plat was completed, February 23d, when

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he filed both in the "clerk's office for *record." Up to that time the return was incomplete. The creditors could not know that it was made so as to object. It was filed for record on February 23d, and on March 18th the plaintiffs made "complaint," both by exceptions and regular action, so that they were within the "thirty days" allowed by law.

The defendant further objects that it was error in Judge Hudson to hold that the failure to insert in the return the value of the lands laid off as homestead vitiated said return. It does not appear that the judge placed his order upon that ground alone. The words of the act are "upon good cause shown" the court out of which the process issued may order a "re-appraisement and re-assignment," &c. This charges the Circuit judge with the responsibility of determining upon the facts whether "good cause" has been shown. Who else could know whether, in his judgment, there was "good cause?" That was a matter for the exercise of his judgment, and if he made a mistake as to what was "good cause," we do not see how it could be corrected on appeal as error of law. Various considerations affected his judgment. He says: "Ordinarily where, by exceptions, a question is raised as to the value of the homestead assigned, a question of fact is presented which must be determined judicially by the court, either with or without the aid of a jury, and upon legal evidence. But in this case it has already been adjudged by the court, after a tedious hearing, that the same land now assigned (less fifty-four acres) is worth more than a thousand dollars. * * * Besides, it is a noticeable fact that the three appraisers do not fix any value whatever to the large tract allowed to the debtor; they do not say whether the same is worth a thousand dollars, or more or less. In this the return is fatally defective." It is manifest that the judge considered the assignment as excessive, and that, in connection with the fact that the appraisers, whose duty it was to make a re-appraisement, made no mention whatever of the value of the land assigned as homestead, convinced him that there was "good cause" for a new assignment? The very gist of the matter was that the land assigned should not exceed the value of $1000, and we cannot say that the judge erred in ruling that there was "good cause" for a new assignment.

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*The defendant further objects that Judge Kershaw having set aside one return and ordered a new assignment, Judge Hudson had no authority to order another assignment; that the power given by the act was exhausted by the first order.

The act does not declare that the power given shall be limited to one exercise of it. If it had done so, it would have been unusual and extraordinary. We do not think that is the meaning of the act—such construction would limit the power of the court over its own process and subject it to the absolute control of its appointees. The power of the judge under the act to order a new assignment for "good cause," is somewhat analogous to the right to grant a new trial. In the case of Means v. Means, 6 Rich. 1, the old Appeal Court of this state granted three new trials in regard to the validity of a will. In granting the last new trial the court says: "Where a valid will is set aside in consequence of the misapprehension of the jury, or from any other cause, it is the duty of the court to re-establish it. If the court does not constantly and firmly perform this duty, the property of the citizen may be wrested from him under the forms of law. The verdict is so wholly unsupported by the evidence that the court is constrained to grant the motion for a new trial." So here, the same duty rests upon this court.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 540

(Case No. 1078.)

STATE v. WORKMAN.

(April Term, 1881.)

[1. *Jury* ⇐136.]

A person indicted under Chapter CXXIX, Section 4, of the General Statutes, for burning a frame prepared for building, is entitled to only five peremptory challenges.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 607–618; Dec. Dig. ⇐136.]

[2. *Criminal Law* ⇐736.]

Whether a confession has been free and voluntary depends in large measure upon the circumstances of the case, and is a question for the Circuit judge in his discretion to decide.

[Ed. Note.—Cited in State v. Middleton, 69 S. C. 74, 48 S. E. 35; State v. Rogers, 99 S. C. 490, 83 S. E. 971.

For other cases, see Criminal Law, Cent. Dig. § 1219; Dec. Dig. ⇐736.]

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[3. *Criminal Law* ⟸518.]

*To render a confession admissible in evidence, it is not necessary that the prisoner should be forewarned of the effect his confession may have.

[Ed. Note.—Cited in State v. Baker, 58 S. C. 112, 36 S. E. 501.

For other cases, see Criminal Law, Cent. Dig. § 1157; Dec. Dig. ⟸518.]

[4. *Criminal Law* ⟸528, 673.]

The confession of one of the defendants implicated himself and his co-defendant; while this confession was not evidence as against the other party, there was no error in permitting the full statement of the prisoner to be proved, without suppression of the name of the co-defendant, the jury having been properly instructed that it was evidence only against the party who made it.

[Ed. Note.—Cited in State v. Dodson, 16 S. C. 460; State v. Anderson, 24 S. C. 114; State v. Carson, 36 S. C. 531, 15 S. E. 588; State v. Green, 48 S. C. 142, 26 S. E. 234; State v. Milam & McCoy, 65 S. C. 323, 43 S. E. 677.

For other cases, see Criminal Law, Cent. Dig. §§ 1005, 1873; Dec. Dig. ⟸528, 673.]

[5. *Witnesses* ⟸106.]

Two men being jointly tried for the same crime, the wife of one of them is not a competent witness for her husband, nor as to any common ground of defence, for the other defendant.

[Ed. Note.—Cited in State v. Dodson, 16 S. C. 460; State v. Reynolds, 48 S. C. 387, 26 S. E. 679.

For other cases, see Witnesses, Cent. Dig. § 421; Dec. Dig. ⟸106.]

[6. *Criminal Law* ⟸958.]

On motion for new trial upon the ground of after-discovered evidence, the affidavits did not show that such evidence could not by due diligence have been discovered before the trial. The motion was properly refused by the Circuit judge.

[Ed. Note.—Cited in Sams v. Hoover, 33 S. C. 403, 12 S. E. 8; Turner's Motion, 39 S. C 416, 17 S. E. 888.

For other cases, see Criminal Law, Cent. Dig. § 2399; Dec. Dig. ⟸958.]

[7. *Criminal Law* ⟸1159.]

This court cannot look into the evidence to determine whether the verdict is sustained by the facts proved, but must assume that the charge made in the indictment was sufficiently established.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3074; Dec. Dig. ⟸1159.]

[8. *Criminal Law* ⟸911, 1156.]

[Cited in State v. Don Carlos, 38 S. C. 227, 16 S. E. 832; State v. Jones, 49 S. C. 331, 26 S. E. 652; Halk v. Stoddard, 62 S. C. 571, 40 S. E. 957; Mills v. Atlantic Coast Line R. R., 87 S. C. 157, 69 S. E. 97, 99; Id., 87 S. C. 158, 69 S. E. 96; State v. Bradford, 87 S. C. 549, 70 S. E. 308; State v. Jones, 89 S. C. 50, 52, 53, 71 S. E. 291, Ann. Cas. 1912D, 1298; State v. Bethune, 93 S. C. 202, 75 S. E. 281; Miller v. Atlantic Coast Line R. Co., 95 S. C. 475, 79 S. E. 645; State v. Bradford, 87 S. C. 549, 70 S. E. 309; Mills v. Atlantic Coast Line R. Co., 69 S. E. 96, to the point that a motion for a new trial is addressed to the discretion of the court, and a refusal of such motion will be reviewed only where there was an abuse of discretion, or the refusal based on an error of law.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2134, 3067–3071; Dec. Dig. ⟸911, 1156.]

[This case is also cited in State v. Petsch, 43 S. C. 148, 20 S. E. 993, without specific application, and in State v. Green, 48 S. C. 136, 26 S. E. 234, and distinguished therefrom, and cited and approved in State v. Dodson, 16 S. C. 453.]

Before Hudson, J., Newberry, February 1881.

This was an indictment against Isom Workman and John P. Satterwhite. The report of the presiding judge is as follows:

The defendants were jointly indicted under Chapter CXXIX., Section 4, page 714, General Statutes. Upon their arraignment they claimed the right of twenty peremptory challenges each to the jurors. This I refused, and held them each entitled only to five peremptory challenges. The law clearly defines in what felonies the accused shall have the incidents of arraignments and the right to twenty peremptory challenges, and expressly declares that in all other cases the accused shall have but five peremptory challenges. The present offence is not one of those in which the right to twenty peremptory challenges is given. I allowed the state to give in evidence the confession of Isom Workman because it appeared that the same was made freely and voluntarily, and upon his own solicitation; but I held the confession to be admissible only against Workman, and carefully charged the jury that they must not regard the confession as evidence against Satterwhite; that even if made in Satterwhite's

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presence the con*fession would not be evidence against him, but his conduct and words in response thereto would be.

The wife of Satterwhite was offered as a witness in his behalf. I held her an incompetent witness for or against either of the defendants.

To these rulings exceptions were taken by defendants; that to the confession being that it was made under duress, and should have been entirely excluded. The defendants were found guilty, and a motion in arrest of judgment and for a new trial was made upon the exceptions aforesaid, and upon the ground that the verdict of the jury is against the law and evidence, and also upon the ground of newly-discovered testimony. I refused the motion, because I can see no error in my aforesaid rulings, because there was evidence to sustain the verdict, and because I do not regard the showing as to newly-discovered testimony sufficient in form or in substance to justify me in setting aside the verdict.

The defendants moved for a new trial upon the following grounds.

1. Because his Honor erred in not allowing the prisoners the right and benefit of twenty

peremptory challenges each, but restricted them to five each.

2. Because his Honor erred in permitting the confessions of the defendant, Isom Workman, to go to the jury, when it clearly appeared that they were made under duress and threats of bodily injury.

3. Because the arresting officers did not state to the defendant, Isom Workman, before he made his confession, that what he had to say would or could do him no good, and might or could be used as evidence against him.

4. Because his Honor erred in refusing to allow the wife of the defendant, John F. Satterwhite, to give testimony either in the behalf of her husband or in behalf of the defendant, Isom Workman, in the above-stated case.

5. Because the verdict of the jury was in all respects contrary to the law and the evidence, and that there was no proof what-

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*ever of conspiracy between the above-named defendants to commit the offence charged in the indictment.

6. That the newly discovered evidence, as shown by affidavit, shows facts calculated to change the testimony and lead to a conclusion of innocence.

The affidavit referred to in the last ground was as follows:

Personally came O. L. Schumpert, one of the defendants' attorneys, who, being duly sworn, says that since the rendition of the verdict in the case of State v. Workman and Satterwhite, to wit, on Sunday, February 13th, instant, certain evidence was brought to his attention as said attorney for the first time, which goes far to show that the alleged confession of Isom Workman was extorted under duress; that two of the state's witnesses were paid five dollars each to testify against said defendants, and that the prosecutor in said cause and Detective Alley prevented the arresting party from lynching said defendants on the night of their arrest.

Defendants appealed upon the grounds taken for a new trial in the court below.

Messrs. G. S. Mower, J. Y. Culbreath and O. L. Schumpert, for appellants.

Mr. Solicitor Duncan and Mr. Geo. Johnstone, contra.

September 12th, 1881. The opinion of the court was delivered by

McIVER, A. J. In this case the defendants were indicted and tried jointly for burning a frame of timber prepared for making a house, which is made a felony by Section 4, Chapter CXXIX., General Statutes, page 714. Upon their arraignment they each claimed the right to challenge, peremptorily, twenty of the jurors presented, but the Circuit judge held that they were each only entitled to five peremptory challenges, and this presents the first question raised by this appeal.

It is very clear that the prisoners were

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properly restricted to *five peremptory challenges each. The statute designates specifically the cases in which twenty peremptory challenges are allowed, and declares that in other cases the right of peremptory challenge on the part of the accused shall be limited to five. General Statutes 747, 748. The offence for which these defendants were indicted does not fall within any of the classes in which twenty peremptory challenges are allowed. If there could be any doubt upon this point that doubt would be removed by the decision of this court in the recent case of State v. Pope, 9 S. C. 273, which is, in principle, identical with this case.

The next question is as to the admissibility of the confessions of one of the defendants—Isom Workman. Three objections seem to be made. 1. That the confessions were not free and voluntary. 2. That no previous warning had been given to the defendant as to the effect his confessions might have. 3. That even if the confessions were admissible as against the party who made them, they were not competent evidence against the other defendant, and the witnesses in proving them should have been required to omit the name of Satterwhite wherever it was used by Workman in making his confession.

As to the first objection the rule is that the evidence upon the point whether the confessions are free and voluntary or have been extracted by fear or induced by hope excited in the prisoner's breast by some outside influence, is addressed to the presiding judge, and it as a matter for him in his discretion to decide; but as it is difficult to lay down any particular rule by which the proper exercise of this discretion is to be tested, each case must, in large measure, depend upon its own circumstances. 1 Greenl. on Ev., § 219. In this case the Circuit judge reports that the confession of Workman was admitted in evidence "because it appeared that the same was made freely and voluntarily, and upon his own solicitation," and we think the testimony set out in the "case" fully sustains this statement of the Circuit judge, and that there was no error in admitting the confessions.

The next objection to the confessions cannot be sustained. No previous warning was necessary. In 1 Greenl. on Ev., § 229, it is said: "Neither is it necessary to the admissibility of any confession to whomsoever it

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may have been made, that it should ap*pear that the prisoner was warned that what he said would be used against him. On the contrary, if the confession was voluntary it is sufficient though it should appear that he was not warned."

The remaining objection to the confessions

is, not only that they were not admissible against the co-defendant, but that the witnesses in detailing the confessions should not have been allowed to use the name of Satterwhite where it had been used by Workman in making the confessions. The first branch of this objection rests upon a misapprehension of the ruling of the Circuit judge, for he not only did not hold the confessions of Workman to be admissible as evidence against Satterwhite, but, on the contrary, he seems to have carefully instructed the jury that the confessions were evidence against Workman only, and that they must not regard them as any evidence against Satterwhite.

The only remaining inquiry on this branch of the case is whether the witnesses who were put upon the stand to prove the confessions of Workman should, in detailing such confessions, have been required to omit the name of Satterwhite where it was used by Workman in making his confession. The rule seems to be that the name should not be omitted. Rex v. Fletcher et al., 19 Eng. Com. Law 369; Rex v. Hearne et al., 19 Eng. Com. Law 350; Rex v. Clewes, 19 Eng. Com. Law 356. In Hearne's Case, supra, where it was insisted on behalf of Cox, one of the defendants, whose name had been mentioned as one of the parties engaged in stealing the horse, in proving the confessions of Cotton, another of the defendants, that the witness, in proving the confession, ought to be required to omit his name and merely say "another person," Littledale, J., said: "The witness must mention the name. He is to tell what Cotton said, and if he left out the name he would not do so. Cotton did not say 'another person,' and the witness must give the conversation just as it occurred, but I shall tell the jury that it is not evidence against Cox;"—just as the Circuit judge seems to have done in this case. The doctrine established by these cases appears to be recognized by these eminent text-writers. Phillips, ch. V., § 5; Starkie, part 4, p. 54, and 1 Greenl., § 218.

The next point raised by the appeal is as

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to the competency *of Satterwhite's wife as a witness. The appellants insist, first, that she was a competent witness for both of the defendants, and next, that if she is held to be incompetent as a witness for her husband, she was, nevertheless, a competent witness for the other defendant. It is conceded that at common law the wife would not be a competent witness for her husband in a case of this kind, and we are not aware of any statute which renders her competent. The act of 1866, incorporated in Gen. Stat., Chap. CX., p. 514, § 17, and in Chap. CXL., p. 748, §§ 5, 6, is relied upon by the appellants as rendering the wife a competent witness for her husband in a criminal case. We do not think that such is the effect of that act. The manifest object of that statute was to remove objections to the competency of witnesses upon the ground that they were parties to the action or interested in the event of it; and as Dunkin, C. J., in Moseley v. Eakin, 15 Rich. 338, says, the other provisions of the act of 1866, contained in the third section, were simply intended to preserve the then existing rules of law by which persons could not be required to criminate themselves, and by which confidential communications between persons standing towards each other in the relation of husband and wife were protected. But the rule which renders the wife an incompetent witness for or against her husband did not rest alone upon the ground of identity of interest, but also upon "principles of public policy which lie at the basis of civil society." 1 Greenl. on Ev., § 334.

The passage, therefore, of this act, removing all grounds of objection to the competency of witnesses on the score of interest, does not remove the other ground of objection to the competency of a wife to testify for or against her husband based upon considerations of public policy. Lucas v. Brooks, 18 Wall. 453 [21 L. Ed. 779]; Gee v. Scott, 48 Tex. 510; Same case, 26 Am. R. 331; Steen v. State, 20 Ohio St. 333; Gibson v. Commonwealth, 87 Penna. St. 253. It is insisted, however, that even though the wife of Satterwhite may not be a competent witness for him, yet she was a competent witness for his co-defendant, Workman. These parties were indicted and tried jointly, and there was no motion to sever, upon the ground that one of them desired to use a witness who would not be competent for the other; nor was it proposed to prove by Mrs. Satterwhite a distinct and independent de-

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fence *in behalf of Workman, which would not affect the defence set up by her husband, and when this is the case it is well settled that the wife of one defendant is not a competent witness for any of the other defendants. State v. McGrew, 13 Rich. 316; Commonwealth v. Eastland, 1 Mass. 15; Commonwealth v. Robinson, 1 Gray 555; State v. Smith, 2 Ired. 402.

The next question is whether the judge erred in refusing the motion for a new trial based upon the ground of newly-discovered evidence. This motion was addressed to the discretion of the Circuit judge, and unless his discretion was abused or some rule of law was violated we have no authority to interfere. In this case, so far from there having been any abuse of discretion, or any violation of any of the rules of law, we agree entirely with the Circuit judge that the showing upon which the motion was based was altogether insufficient, both in form and substance. Without undertaking to specify all the objections to it, there was one which was absolutely fatal, and that was the absence of

any showing to the effect that the alleged newly-discovered evidence could not, by due diligence, have been discovered in time for it to be offered at the trial. Indeed, there is nothing whatever to show that the so-called newly-discovered evidence was not known to the defendants at the time of the trial, for the motion is based solely upon the affidavit of one of the counsel for the prisoners, and while it may have been, and no doubt was, entirely true, that this evidence was only brought to the attention of the counsel after the trial, it does not by any means follow from this that such evidence was not known to the defendants.

The last ground relied upon by the appellants is that "the evidence discloses no offence against the statute under which this indictment is framed. The testimony shows that it was a dwelling-house nearly completed." The real point upon which this ground rests, as we gather from the argument here, is, that the thing burned was not a frame of timber prepared for making a house, which is the offence denounced by the statute under which this indictment was framed, but that it was a dwelling-house partially completed.

We do not see how the appellants can raise

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this point here *under the statements contained in the "case" as prepared for argument here, for it presents a mere question of fact, and one, therefore, beyond our jurisdiction. No exception seems to have been taken to the indictment, and hence we are bound to assume that it was sufficient in form, and that it properly charged the offence created by the statute; nor does it appear that the Circuit judge was requested to make any ruling upon the subject. All that does appear is that the defendants were charged with burning a frame of timber prepared for making a house, and that of this charge the jury have found the defendants guilty. We must, therefore, conclude that the charge was sustained by the evidence submitted, for we have no authority to look into the evidence for the purpose of ascertaining whether the verdict of the jury is in accordance with the evidence.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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15 S. C. 548

(Case No. 1079.)

KENNEDY v. REAMES.

(April Term, 1881.)

[1. *Agriculture* ⇐11.]

Quere: Can a laborer who contracts for a share of the crop as payment for his services, execute a valid agricultural lien upon the crop which is to be made by his labor?

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15–30; Dec. Dig. ⇐11.]

[2. *Landlord and Tenant* ⇐246.]

Where the relation of landlord and tenant of a farm exists, the former has a preferred statutory lien upon the crops made thereon by the latter, to the extent of one-third of such crops. 16 Stat. 411, § 5.

[Ed. Note.—Cited in Carter v. Du Pre, 18 S. C. 182; Whaley v. Jacobson & Son, 21 S. C. 53.

For other cases, see Landlord and Tenant, Cent Dig. § 993; Dec. Dig. ⇐246.]

[3. *Agriculture* ⇐11.]

This agricultural lien act being a new law, the courts cannot, for its violation, go beyond the remedy afforded by it, or enforce any other remedy.

[Ed. Note.—Cited in Carpenter v. Strickland, 20 S. C. 6; Gibbes v. Town Council of Beaufort, 20 S. C. 216; Sullivan v. Ellison, Id., 484; Godfrey v. Fielding, 21 S. C. 316; Jennings v. Abbeville County, 24 S. C. 549; Miller v. White, 25 S. C. 238; Whilden & Co. v. Pearce, 27 S. C. 48, 2 S. E. 709; Murphy v. Valk, 30 S. C. 267, 9 S. E. 101; Cope v. Hampton County, 42 S. C. 21, 19 S. E. 1018; Michalson v. All, 43 S. C. 460, 21 S. E. 323, 49 Am. St. Rep. 857; Newton v. Odom, 67 S. C. 10, 45 S. E. 105; Tenney v. Anderson Water, Light & Power Co., 67 S. C. 16, 45 S. E. 111; Creech v. Long, 72 S. C. 31, 51 S. E. 614; Bethea v. Allen, 101 S. C. 357, 85 S. E. 905.

For other cases, see Agriculture, Cent. Dig. §§ 15–30; Dec. Dig. ⇐11.]

[4. *Agriculture* ⇐15.]

A creditor of one who had given a lien upon his crop, received in good faith a part of such crop and applied it to payment of his demand. *Held*, that the creditor was not liable to the lienee for conversion of this crop, or for its value in money.

[Ed. Note.—Cited in Whaley v. Jacobson & Son, 21 S. C. 54; Bingham v. Harby & Co., 91 S. C. 123, 74 S. E. 369.

For other cases, see Agriculture, Cent. Dig. § 44; Dec. Dig. ⇐15.]

[This case is also cited in Link v. Barksdale, 70 S. C. 487, 50 S. E. 189, and distinguished therefrom.]

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*Before Thomson, J., Sumter, February, 1881.

Action commenced in the Court of Common Pleas, January 2d, 1879, by William G. Kennedy against Frederick L. Reames and Washington Miller. Miller was living upon the land on which the crop in dispute was made. Reames owned the land, but did not reside upon it. The opinion states the case.

Mr. Joseph H. Earle, for appellant.

Messrs. Haynsworth & Cooper, contra.

September 14th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. About January 1st, 1878, Washington Miller agreed with his co-defendant, Frederick L. Reames, to cultivate a certain farm belonging to the said Reames, (who was also to furnish the stock), and to receive for his labor one-third of the crop to be produced upon the place, subject, however,

to the payment of any claim Reames might have against Miller for money or supplies which might be advanced to him during the year. This agreement was verbal, but under it Miller went into possession of the farm. He got some supplies from Reames, and, desiring more, April 9th, 1878, gave to the plaintiff, Kennedy, a lien under the act of March 4th, 1878, (16 Stat. 411), purporting to be on all the crop to be made on the farm that year, and also a mortgage of "four shoats," to secure an advance for agricultural purposes to be made by the said plaintiff. The "shoats" were stolen and do not enter into the case. The instrument given to the plaintiff was registered, and an advance to the extent of $40 made.

There was made upon the place that year five bales of cotton and a small amount of corn. The cotton, at different times in the autumn of the year, was received by Reames and the proceeds retained, but did not satisfy his share of two-thirds and advances. The corn was divided, and one-third, forty or fifty bushels, was left in the hands of Miller, who afterwards disposed of it. In December the plaintiff took out under the act an agri-

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*cultural warrant against Miller. When the sheriff, with the warrant, went on the place the cotton was not there, and the defendant, Reames, claimed the corn also to satisfy the balance of his claim for advances. The sheriff did not seize the corn, saying "he had no instruction to take it." He did seize some small articles of inconsiderable value, from which nothing was realized. The plaintiff then brought this action in the Court of Common Pleas against both Reames and Miller, praying that the five bales of cotton which Reames got be produced to satisfy his debt, or that the money arising from the sale should be paid into court. The case was heard by Judge Thomson, who ordered the complaint to be so amended as to be a simple action for money, and that being done, he gave judgment for $40 and interest for the plaintiff, against the defendant, Reames, who appeals to this court upon the following exceptions:

"1. Because Washington Miller was an employee of the defendant, Reames, and not a 'cultivator of the soil' in the sense of the act of 1878.

"2. Because, under the agreement between the defendant, Reames, and Miller, he (Miller) had no title to any part of the produce or crop until the same had been divided and his portion delivered to him by Reames.

"3. Because Miller did not own such an interest in the crop as was subject to an agricultural lien.

"4. Because the defendant, Reames, had no actual notice of the plaintiff's lien, and having sold the cotton before notice was given him of such lien, and before any demand was made upon him for said cotton, he is not liable for conversion.

"5. Because the remedy of the plaintiff, if any, was an action in rem.

"6. Because the plaintiff was bound to exhaust the crop which he found in defendant, Miller's, possession before proceeding against defendant, Reames."

In the view which the court takes it will not be necessary to consider exceptions first, second, third and sixth, as to the character of the relation which Miller bore to Reames in the cultivation of his farm, whether as tenant or mere employee. We incline to think that he was a mere hireling, to be paid

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in kind *and had no right to give a lien upon the crop which belonged to Reames until the third part was delivered to Miller in payment for his labor. Upon this subject see Huff v. Watkins [15 S. C.] ante 82 [40 Am. Rep. 680].

But for the purposes of the case let us assume that Miller was a "cultivator of the soil" in the sense of the act of 1878, and had such an interest in the crop to be produced by his labor, assisted by the stock and lands of Reames, as to enable him in advance to subject it to a legal lien: and it does not follow, even in this view, that the plaintiff had the right to recover from Reames the $40 in money which he advanced to Miller, and for which he had only his agricultural lien. Upon this assumption what were the relative rights of the parties? If Miller was an independent cultivator of the soil, so as to be able to make the lien, it must have been as tenant, and, if so, Reames was his landlord. The soil, of which Miller was the cultivator, and the stock used in the cultivation, belonged to Reames, and in reason and justice the amount due for such use and occupation was as much an advance for agricultural purposes as any supplies that could be furnished him.

Section 5 of the act of 1878, supra, under which plaintiff took his lien, provides as follows: "That the above section shall be subject to the provisions of the following sections of the act. That each landlord leasing lands for agricultural purposes shall have a prior and preferred lien for rent to the extent of one-third of all crops raised on his lands, and enforceable in the same manner as liens for advances, which said lien shall be valid without recording or filing." So that in this view, Reames having leased the land to Miller, had a preferred statutory lien to the extent at least of one-third of the crop.

As to the remainder of his share of the crop and advances, he had no lien, as he had not filed an agreement in the office of the register or clerk, but that was still a debt which Miller owed Reames and which he chose to pay by transferring to him the whole of the cotton made on his place.

Did Reames, by receiving and selling the cotton and applying the proceeds to the balance of his debt, not secured by registered lien, make himself legally responsible to pay

plaintiff's claim? We think not. He was
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certainly not liable under the proceed*ing provided by the agricultural lien law. He was not a party either to the agreement or the process issued under it. The statute declared the lien and furnished the machinery to enforce it, viz., affidavit and warrant in the hands of the sheriff to seize the crop itself, wherever found, but not the proceeds received from the sale of the crop. The warrant was issued and failed to secure any part of the crop, and this proceeding was instituted to have efficacy given to that statutory lien by an ordinary action based upon it.

The view, as we understand it, is that the lien given was a right, which the defective machinery of the statute failed to give the means of enforcing, and the Court of Common Pleas will supply the deficiency by way of supplement to the statute—that the lien declared will be considered in the nature of a chattel mortgage to secure an ordinary debt, and, upon the principle that there should be a remedy for every right, the court should give the remedy to enforce it applicable to such a mortgage. As the right of the plaintiff did not exist at common law, but was entirely the creature of statute, the court cannot supply the remedy and go beyond that afforded by the statute. "It is the general rule that if an affirmative statute, which is introductive of a new law, direct a thing to be done in a particular manner, that thing shall not, even although there are no negative words, be done in any other manner." 9 Bac. Ab., tit. "Stat.," letter G, and authorities; McLauchlin v. R. R. Co., 5 Rich. 598; Sternberger v. McSween, 14 S. C. 35.

The last case cited was very much like this, and it is not necessary to do more than refer to it. The action was to recover the value of a bale of cotton sold to the defendant by one Morris, upon which plaintiff claimed to have an agricultural lien. Judge McIver, in delivering the opinion of the court, said: "One who attempts to enforce his rights under a lien, which is the creature of a statute, must confine himself to the remedy furnished by the statute. The right derived is solely from the statute, and the remedy resorted to must be that furnished by the statute. The attempt to invest an agricultural lien with the qualities of a chattel mortgage, is an attempt to interpolate into the statute provisions which the legislature
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has not seen fit to adopt, for, *certainly, if that body had designed to give an agricultural lien the qualities of a chattel mortgage, it would have been very easy to have said so. On the contrary, however, the agreement provided for by the statute, which creates the lien, lacks one of the qualities of a chattel mortgage, which has been held (Green v. Jacobs, 5 S. C. 283,) to be essential to invest the mortgagee with the right to the possession of the property, in that it does not contemplate any provision whatever for the transfer of title; and, as we have seen, the remedy provided by the statute manifestly contemplates no change in the title, but, on the other hand, pre-supposes the continuance of the title in the lienor, subject, however, to the lien, until it is transferred by the execution of the process of the law; just as in the case of property covered by the lien of a judgment or execution, the title of the property remains in the judgment debtor until it is transferred by a sale under process of law, and one who purchases from the judgment debtor takes subject to the lien, which follows the property into whosoever hands it may go; but the purchaser, after he has disposed of it, cannot be made liable for the value of the property or for the proceeds of its sale. Paysinger v. Shumpard, 1 Bail. 237."

Besides, if the civil remedy were not limited to that given by the act, and the lien were enforceable according to the terms in which it is declared, we do not see that Reames—a bona fide creditor of Miller—in receiving the cotton from his debtor and applying the proceeds to his debt, committed such a conversion of plaintiff's property as would support either an action of trover, or, waiving the tort, for money had and received as upon an assumpsit, express or implied. "To sustain trover the plaintiff must show a legal title; he must have property, general or special, or actual possession, or the right to immediate possession at the time of the conversion." Cooley on Torts 443, and cases there cited.

The judgment of this court is that the judgment of the Circuit Court be reversed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. *554

*(Case No. 1080.)

WIESENFELD, STERN & CO. v. STEVENS & CURETON.

(April Term, 1881.)

[1. *Appeal and Error* ⇐842.]

Whether an assignment for the benefit of creditors was executed with intent to defeat, hinder or delay, is a question of fact. The finding by the Circuit judge that there was no such intention in this case, approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. ⇐ 842.]

[2. *Assignments for Benefit of Creditors* ⇐ 104.]

A and B, partners in trade, conveyed each to the other, by exchange, their interest respectively in two lots of land held by the partnership, and on the next day made an assignment for the benefit of their creditors of all the rest of their partnership property, preferring some, and authorizing the trustees to defer sale if to the interest of the creditors, the rents and profits meantime to pass under the assignment. No mention was made of B's lot, but A's lot, which contained two acres, was specially reserved as a

homestead to him. Afterwards A became a bankrupt, and one and two-thirds acres of this lot were assigned to him as a homestead; and he then obtained his discharge in bankruptcy. *Held*, that the assignment was [not] rendered fraudulent and void, by the preference to some of the creditors.

[Ed. Note.—Cited in Trumbo, Hinson & Co. v. Hamel & Co., 29 S. C. 526, 8 S. E. 83.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 354, 355; Dec. Dig. ⟸104.]

[3. *Assignments for Benefit of Creditors* ⟸97.]

Nor by the reservation of A's lot as a homestead.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 320; Dec. Dig. ⟸97.]

[4. *Fraudulent Conveyances* ⟸110.]

Nor by the authority to postpone the sale.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 352–359; Dec. Dig. ⟸110.]

[5. *Fraudulent Conveyances* ⟸237.]

And the deed from B to A for this lot could not be canceled in an action brought to set aside the assignment; nor could its validity be questioned by creditors who, by notice, were made parties to the bankrupt proceedings.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 684; Dec. Dig. ⟸237.]

Before Hudson, J., Lancaster, September, 1880.

This was an action commenced on November 18th, 1879, by the plaintiffs, against James H. W. Stevens and Thomas J. Cureton, who had been merchants and copartners, under the firm name of Stevens & Cureton, and against R. M. Miller and T. G. Cureton, trustees, under an assignment made by Stevens & Cureton, for the benefit of their creditors. The object of the action was to set aside this assignment as fraudulent, and also a deed from Cureton to Stevens, for the appointment of a receiver, account by the trustees, injunction, &c. The debt to plaintiff was a partnership debt, contracted prior to February 12th, 1878, when the deeds stated in the opinion were exchanged between Stevens and T. J. Cureton. In October, 1879,

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this debt was *put in judgment. On February 13th, 1878, the deed of assignment was executed. In this assignment no mention is made of the lot conveyed to Cureton, but all of the personal property of the firm, and several tracts of land are transferred, including "another tract containing fifty acres, situate in the town of Lancaster, * * * excepting the lot or portion of said tract on which is situate the residence of the said J. H. W. Stevens, containing about two acres, bounded * * * which said lot is hereby excepted and reserved as a homestead for said J. H. W. Stevens." The assignment continues:

To have and to hold the real and personal property aforesaid, with all the rights, privileges and appurtenances thereto belonging, unto the said R. M. Miller and T. G. Cureton, their heirs and assigns, in special trust and confidence nevertheless, as follows, that is to say, the said trustees shall proceed to take immediate possession of the said property, and after having given notice to the creditors herein provided for, as the law directs, shall proceed to collect the debts and sell said property, for cash, as speedily as practicable, by public or private sale, as in their judgment may best tend to promote the interest of the said creditors; should the said trustees find it impracticable to sell the real estate aforesaid at what they consider fair and adequate prices, they are hereby specially empowered to defer the sale thereof for a period not exceeding two years from the date hereof, and in the meantime to rent or operate the said farms as in their judgment may be best for the interests of the said creditors, and in the event that the said trustees shall determine to rent or operate the said farms, or any of them, they shall have the right to retain in their possession the mules, wagons, farming implements, corn and forage, and such other articles of personal property as may be necessary in operating the said farms, and out of any money that may come into their hands, to purchase such provisions and supplies as may be necessary for the purpose, and to replenish and keep up the stock of goods in store, if deemed best to enable the assignee to run the farm and collect the debts of the firm. The proceeds arising from the sale of said property and any profits that may be realized from operating the said farms the said trustees shall apply as follows, after retaining their commissions, to wit:

First. To defraying the expenses incident to the execution of this trust, including attorney's fees.

Second. To the payment of the following claims, to wit: S. C. Witherspoon, $200; M.

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B. Massey, $75; John Sinclair, $50; *Merchants' and Farmers' Bank (Charlotte) overdraft, $200.26; also any balance that may be due any of the laborers on the Miller plantation.

Third. To the payment of all the other debts, equally and ratably; and,

Fourth. Any surplus that may remain in the hands of the said trustees after paying the debts and expenses and charges aforesaid, they shall apply to the payment of all other debts that the said firm may owe, equally and ratably.

The trustees carried on the business of the firm and the farms, defraying the expenses thereof, until the first Monday in February, 1879, when sale was made of the assigned lands, goods and other personalty. Other facts are stated in the opinion. The Circuit decree is as follows:

The object of this action is to set aside, as fraudulent and void, a deed of assignment, executed and delivered to R. M. Miller and T. G. Cureton, by J. H. W. Stevens and T. J. Cureton, co-partners in trade, under the firm name of Stevens & Cureton. The assignment was executed and delivered on February 13th, A. D. 1878, and was for the benefit of the creditors of the said failing firm. In the assignment the order of payment of creditors is prescribed and certain preferences are made, all of which will fully appear by reference to the deed.

The deed is assailed by the plaintiffs principally on two grounds, viz.:

1. Because, in the deed is reserved to J. H. W. Stevens, as a homestead, his residence in the town of Lancaster and the two acres of ground around it.

2. Because power is given the trustees to defer the sale of a part of the estate as long as two years, if, in their judgment, it should be deemed advisable.

Other objections are urged, but these two are chiefly relied upon.

It appears from the testimony submitted, that shortly before the deed of assignment was executed, T. J. Cureton conveyed to J. H. W. Stevens all his right, title and interest in the said lot and dwelling, so that, at the date of the assignment, this was the separate property of J. H. W. Stevens, and not copartnership property. The conveyance

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by Cureton was for valuable consid*eration. After the assignment to the aforesaid trustees and their acceptance of the trust, to wit, in 1879, J. H. W. Stevens was adjudged a bankrupt by the United States District Court and received his discharge as such. To him was allotted by that court a homestead in the said family dwelling and one and one-third acres of the lot appurtenant. To these proceedings in bankruptcy the present plaintiffs were parties, and are, of course, estopped from now agitating in this court any question which either was or should have been made there. It must also be borne in mind that it is not sought here, nor indeed could it be, to set aside the conveyance of Cureton to Stevens. We deem further recital of the testimony or facts unnecessary at this point.

The counsel for plaintiffs has, with commendable zeal and ability, urged his positions upon this court; and whilst we have been more than usually entertained and instructed by his learned argument, we are constrained to differ as to the views of the law as applicable to this case. It is not denied that it has for a long time been well established in this state that a debtor may lawfully prefer one creditor to another. The only qualification is that the preference must not be undue and inherently calculated to hinder, delay and defeat others. We see nothing in the deed before us so calculated, nor is anything revealed by the testimony going to show that such was the purpose and intent of the assignors.

It is also well established that a deed of a failing debtor, which is made for the apparent benefit of creditors, but which, in its terms and provisions, secures to the debtor a benefit and advantage at the expense of the creditors, is void. But we do not regard the reservation of the homestead of Stevens in this deed as rendering it obnoxious to this objection. It was the sole property of Stevens and need not have been mentioned in the deed. The law allows him a homestead, and, at the end of final process, this family homestead could not have been reached by the plaintiffs or any other creditor. It was a benefit accruing to him, not by virtue of the reservation in the deed, but by virtue of the constitution. But it is said that Cureton's deed to Stevens was made in fraud of the rights of creditors and is null, and that this homestead should be pronounced partnership assets; that in

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*partnership property the right of homestead does not exist. But this remedy against Cureton's deed must be sought by different proceedings than the present action, which assails the assignment, not for matter dehors but apparent on the face of the deed. There is no evidence of fraud on the part of Cureton, and the house and lot is, in fact, the separate property of Stevens. This proposition of the plaintiffs is not maintainable. Besides, they were parties to this assignment to Stevens of this homestead by the Court of Bankruptcy, and were at the time aware of the deed to R. M. Miller and T. G. Cureton, and we regard them estopped now to make a question as to the nonexistence of the right of homestead in copartnership property. As against the plaintiffs, this property has been allotted to Stevens by a court of competent jurisdiction, so that the reservation in the deed is not of property to which the creditors were entitled, and the insolvent did not thereby reserve a benefit to himself at the expense of the creditors and to their injury.

Nor do we think the deed of assignment obnoxious to the second objection of the plaintiffs, viz., that it defers the sale of the property and thus hinders and delays creditors. The main purpose of such a deed should be to devote at once all the insolvent's property to the benefit of creditors; and if, instead of this, the property is, by the deed, placed for an unreasonable time beyond their reach, it is regarded in the eye of the law as mala fides, and will be declared void; but this deed does not seek to do this, nor is such its inevitable effect. On the contrary, it declares on its face that the trustees shall, as soon as practicable, proceed to sell the property, and to pay the debts from the proceeds thereof. But if, in

their judgment, having the interests of creditors in view, they should find it unwise to sell the property promptly, they are empowered to retain a part thereof as long as two years, and manage the same for the benefit of the creditors. A perusal of the deed clearly reveals the fact that the trustees are required to act, not for the benefit of the assignors, but for the good of the creditors. The discretion to be exercised by them is intended to be for the advantage of creditors, and hence they are allowed only such time and such discretion as may enable them to save the property from sacrifice.

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The postpone*ment of the sale of any part of the property is not enjoined upon them, and it is dependent on circumstances.

We see no cause of complaint because of this reasonable request and power conferred. The action of the trustees is a matter subject to the control of the creditors. There is nothing in the deed to prevent them from urging and effecting an early sale. The other objections raised are of minor force and importance, and the plaintiffs are overruled on all the grounds presented to this court.

It is therefore ordered, adjudged and decreed that the complaint be dismissed, with costs.

The plaintiffs appealed upon the following exceptions:

1. Because the said court, it is respectfully submitted, erred in said decree in refusing to set aside the assignment executed by the said defendants, "Stevens & Cureton," to the defendants, Robert M. Miller and Taylor G. Cureton, on February 13th, 1878.

2. Because the said assignment was made with the intent to hinder, delay and defraud the plaintiffs and others, the creditors of the said "Stevens & Cureton," and should have been declared to be void and of no effect as against these plaintiffs.

3. Because, it is respectfully submitted, the Circuit Court erred in said decree in holding that the reservation to the said Stevens of the two-acre lot in the town of Lancaster, in and by said assignment, did not render the same fraudulent and void as to these plaintiffs.

4. Because, it is respectfully submitted, the Circuit Court erred in said decree in holding that the provision made in said deed of assignment, allowing the trustees thereunder to defer the sale of the property thereby assigned for the space of two years, did not render the same fraudulent and void as to these plaintiffs.

5. Because the Circuit Court erred in said decree in holding that the provision made in said deed of assignment allowing the trustees to carry on the business of merchandising and to rent and operate the farms upon the lands thereby conveyed, for the space of two years, did not render said deed fraudulent, and void as to these plaintiffs.

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*6. Because, it is respectfully submitted, the Circuit Court erred in said decree in finding, as matter of fact, that the conveyance made by Thomas J. Cureton to James H. W. Stevens, on February 12th, 1878, of his interest as a joint owner in fee of the two acre lot in the town of Lancaster, was, as against these plaintiffs, for a valuable consideration and made in good faith.

7. Because, it is respectfully submitted, the Circuit Court erred in said decree in holding that these plaintiffs were estopped by reason of proceedings had in the Court of Bankruptcy (upon the petition of James H. W. Stevens, as an individual, to be adjudged a bankrupt,) from contesting the validity of the reservation of the house and lot in the town of Lancaster, contained in said deed of assignment.

8. Because, it is respectfully submitted, the said decree of the Circuit Court is, in other respects, erroneous.

Mr. Ernest Moore, for appellants.

Neither Stevens & Cureton nor the trustees were parties to the bankrupt proceedings, and therefore the matter is not res adjudicata, for estoppels must be mutual. Freem. on Judg., §§ 159, 161, 252, 253; 9 Rich. 452; 1 Greenl. on Ev., § 524; 1 Stark. on Ev. 195; 1 Bail. Eq. 291; 4 McC. 217; 1 Phil. on Ev. 249; 2 Smith's Lead. Cas. 683; 2 Hill's Ch. 345. There is clearly no estoppel as to two-thirds of an acre. The deed of exchange as to partnership creditors, was without consideration; and the assignees are chargeable with notice of this. 1 Curt. 157; 5 Jones' Eq. 75; Bump on Fraud. Conv. 355. A partner cannot claim homestead in partnership property. Thomp. on Homes., § 196, et seq.; 2 Coll. on Part., ch. I., § 1; Story on Part., §§ 92–97. The reservation of the lot makes the assignment fraudulent. 2 Kent 535; 11 Wend. 187; 4 Paige 23; McM. Eq. 31; 1 Hill 22; 9 Rich. Eq. 252; Cheves' Eq. 71; 1 Rich. Eq. 219; Burr. on Assign., 188; 12 Rich. Eq. 407; Bump on Fraud. Conv. 384; 3 S. C. 266; 5 Abb. Pr. (N. S.) 39; 20 Johns. 448. The authority to defer sale invalidated the assignment. 5 Ad. & El. 28; 3 Barb. Ch. 644; 7 How. 276; 3 Md. 11; 22 Tex. 704; 11 Wend. 187; Bump on

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Fraud. *Conv. 405. If the effect is to delay, &c., the actual intent is unimportant. Bump on Fraud. Conv. 23, 57; Cheves' Eq. 71; Cowp. 435; 3 Strob. Eq. 55.

Messrs. Wylie & Hough, contra.

This assignment is not fraudulent. 2 Hill's Ch. 414, 636; Rice's Eq. 310. There is no reservation in any of the assigned property; the reservation of a homestead in property formerly of the partnership is permissible. Thomp. on Homes., §§ 181, 211, 214, 215; 41 Iowa, 35; 5 S. C. 499; 15 Johns. 571; 9 Rich. Eq. 267. The bankrupt proceedings es-

top plaintiffs. 1 McC. Ch. 156; Bail. Eq. 110; 1 Johns. Cas. 436.

September 20th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. In this case the defendants, (respondents,) Stevens and Cureton, who had been partners, doing business at Lancaster Court House, in this state, under the name and style of Stevens & Cureton, on February 13th, 1878, made an assignment by deed of indenture to defendants, Miller and Cureton, of their entire partnership property, real and personal, for the benefit of their creditors, the property assigned being estimated at about $10,000.

In this assignment creditors to the amount of some $550 were preferred. No release was exacted of the creditors who might accept. Besides the property assigned, the partners had owned a small lot containing two acres in the village of Lancaster, upon which Stevens resided; also, a tract of land —quantity not mentioned—in York county. The day before the execution of the assignment these parties each transferred to the other his interest in said lot and tract, so that Stevens became the sole owner of the lot in Lancaster, and Cureton of the tract of land in York, the consideration of the transfer in each case being the acquisition of the interest of the other in the lands which each, by the exchange, became entitled to in severalty.

In the deed the lot in Lancaster was reserved as the homestead of Stevens. There was nothing said as to the tract in York, acquired by Cureton. The remainder of the

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partnership *property seems to have been embraced in the assignment. This property was conveyed to Miller and T. G. Cureton, as trustees, for the benefit of the creditors, with directions to take immediate possession, and, after due notice, to collect the debts, and to sell the property for cash as speedily as possible, either at public or private sale, as in their judgment might be deemed best for the creditors. But, should the trustees find it impracticable to sell the real estate at fair prices, they were empowered to defer the sale for a period not exceeding two years, and in the meantime, in that event, to rent out the lands or farm them, as they thought best; all, however, to be conducted for the benefit of the creditors.

Shortly after the execution of this deed, defendant, Stevens, petitioned the United States District Court to become a bankrupt under the bankrupt laws of the United States, and was discharged on September 12th, 1879. To this proceeding his creditors, the appellants among the others, were made parties, by notice. Under the orders of the bankrupt court the lot in question, or a portion of it, which he had reserved in the deed, was set apart to him as a homestead. From this there was no appeal.

Under this state of facts this action was instituted in the Circuit Court by the appellants, judgment creditors of Stevens, for themselves and such other judgment creditors as might elect to come in and share the expenses, to set aside the general assignment, and also the conveyance of Cureton to Stevens of the small Lancaster lot as fraudulent and void as to them, and for other relief. The case was heard by Judge Hudson, who dismissed the complaint with costs.

From this order the plaintiffs have appealed, claiming that the Circuit judge should have held the assignment void—1st. Because it was made with the intent to hinder, delay and defraud the plaintiffs and other creditors. 2d. Because Stevens reserved the two-acre lot in the town of Lancaster as a homestead; and, 3d. Because the trustees were empowered to carry on the business for the space of two years. And, also, that he erred in not vacating the conveyance of the two-acre lot in the village of Lancaster by Cureton to Stevens, because, as they alleged, it

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was *without consideration, and therefore void; and, also, that he erred in holding that the plaintiffs were estopped from contesting the validity of the reservation of the two-acre lot by Stevens, on the ground that they were parties to the bankrupt proceedings when the lot was set apart to him as a homestead.

The first ground of attack upon the assignment involves a question of fact. Did the respondents, Cureton & Stevens, execute the assignment with the intent to hinder, delay and defraud the plaintiffs? If so, this would certainly mark the assignment as fraudulent, and the Circuit judge, no doubt, would have decreed it void; but upon this point Judge Hudson said: "We see nothing in the deed before us so calculated, nor is there anything revealed in the testimony going to show that such was the purpose and intent of the assignors."

We have carefully examined the deed of assignment and the facts agreed upon by counsel, contained in the "case," and we concur with Judge Hudson, that there is nothing on the face of the deed, or in the facts submitted, which evinces any intention on the part of respondents to hinder, delay and defraud the plaintiffs, or any other of their creditors.

A failing debtor has no right to stipulate for terms in any assignment which he may make for creditors, securing benefit or advantage to himself at the expense of his creditors; but this the respondents have not done. They seem to have surrendered their entire partnership property. It is true that the lot in Lancaster was not embraced in this surrender. This was reserved as a homestead for Stevens, and, as was said by Judge Hudson, need not have been mentioned in the deed, as it was the private property

of Stevens. There seems to be no ground, therefore, to assail the deed on account of this reservation, certainly not in the absence of all proof showing a fraudulent intent on the part of these parties in the exchange which they made, and by which Stevens became the sole owner of this lot.

There is nothing on the face of the deed except a preference to some creditors over others. In the face of the decisions in this state it cannot be contended that this in itself is an evidence of a fraudulent intent. On the contrary, whatever may be thought of the morality of permitting a debtor to

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give prefer*ences about which, if it was an open question, much might be said, yet his legal right to do so is well established in this state; and the decisions have even gone further, holding that this preference may be accompanied with a condition that the creditors shall release the debtor, the only qualification being that the preference shall be free from an intent to delay, hinder and defraud other creditors. It is needless to discuss the wisdom or soundness of this principle at this late day. The doctrine has been long since established in this state, as well as elsewhere, and is now a well-settled principle in our jurisprudence. Niolon v. Douglass, 2 Hill's Eq. 443 [30 Am. Dec. 368]; Maples v. Maples, Rice's Eq., 300.

Is the deed vulnerable in the feature which authorizes the trustees to defer the sale for a period not exceeding two years? We think not. There was no advantage to the assignors in this; on the contrary, it appears to have been intended for the benefit of the creditors. It was intended to prevent a sacrifice of the property, and, besides, it was not a peremptory injunction. It was more in the nature of advice, and was left entirely to the discretion of the trustees. It does not appear to us that there was a single element of fraud in this.

Should the judge have decreed the conveyance of Cureton to Stevens of the Lancaster lot void because without consideration? He declined to do so, for two reasons. 1st. He said "the remedy against Cureton's deed must be sought by different proceedings than the present action, which assails the assignment, not for matters dehors, but apparent on the face of the deed." He further says that "there was no evidence of fraud on the part of Cureton, and the house and lot is, in fact, the separate property of Stevens." 2d. He held that the plaintiffs were estopped by the bankrupt proceedings whereby this lot was set apart to Stevens as a homestead, without objection by the plaintiffs. For these two reasons he declined to interfere. In our opinion he was not in error. The deed of Cureton to Stevens does not appear to have been before the court. There was no evidence that it was without consideration, or that its purpose was to defraud creditors.

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These facts the judge could *not be expected to assume, and without these there was certainly no ground to set the deed aside.

And besides, the plaintiffs had full opportunity to raise the question as to the validity of this deed, and to claim that the lot was partnership property before the bankrupt court. They were parties to the proceeding in that court, and having failed to avail themselves there of the opportunity to assail this deed, we think, with the Circuit judge, that they have waived their rights in this respect, and that they are now estopped.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 565

(Case No. 1081.)

MAULDIN v. GOSSETT.

(April Term, 1881.)

[1. *Judgment* ⇦688.]

A rule was issued requiring a sheriff to show cause why he did not apply moneys in his hands derived from a sale of the lands of one deceased to a judgment obtained against the deceased in his lifetime. Upon return made, the rule was referred to a referee, who reported a certain amount still due. To this report the administrator of the deceased filed exceptions, which, in substance, alleged that the judgment was paid. The report was confirmed. *Held*, that this proceeding was not res judicata as to creditors and distributees of the deceased not parties to the rule.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig. ⇦688.]

[2. *Judgment* ⇦688.]

The proceeding by rule was proper, and the report, when confirmed, became a judgment binding upon parties and privies; but even if the administrator was a party and became thereby bound, his appearance would not bind his privies, unless he had a right to appear as a necessary and proper party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig. ⇦688.]

[3. *Executors and Administrators* ⇦75.]

The creditors are privies of the administrator and bound by his legitimate acts, but not where his act related to the disposition of moneys arising from a sheriff's sale of the intestate's land after his death, under judgment obtained against him in his lifetime.

[Ed. Note.—Cited in Fraser & Dill v. City Council of Charleston, 19 S. C. 400.

For other cases, see Executors and Administrators, Cent. Dig. § 324; Dec. Dig. ⇦75.]

[4. *Executors and Administrators* ⇦129.]

[Cited in Wilson v. Kelly, 19 S. C. 166; Fraser & Dill v. City of Council of Charleston, Id., 405; Pendergrass v. Pendergrass, 26 S. C. 32, 1 S. E. 45, to the point that the administra-

tor as such has no control over the land or its proceeds.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 533-536; Dec. Dig. ⟸129.]

[This case is also cited in Hyatt v. McBurney, 18 S. C. 209; Kennedy v. Badgett, 19 S. C. 595; Whaley v. Stevens, 24 S. C. 482; Willoughby v. Northeastern R. Co., 52 S. C. 175, 29 S. E. 629, as to the principles governing the plea of res judicata.]

Before Pressley, J., Pickens, October, 1879.

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*This was an action by Hannah E. Mauldin against John R. Gossett, administrator of John A. Easley, Sr., Mary H. Cleveland, administratrix of B. F. Cleveland, J. H. Cleveland, William Choice, Emily Choice and Harriet D. Evins, commenced in 1878.

The questions involved are clearly stated in the referee's report, and also in the opinion. Omitting so much of the report as finds as matter of fact and law, that the judgment of William Choice against John A. Easley, Jr., (based upon the same debt as the judgment against John A. Easley, Sr.,) was paid, the report of J. J. Norton, Esq., the referee, was as follows:

The issues of law and fact in this case having been referred to the referee for decision, he begs leave to report that on March 15th, 1879, reference was opened herein.

The plaintiff is the owner of a judgment in favor of John W. Brooks for $1799.30 and interest, with $19.40 costs, against John A. Easley, Sr., and John A. Easley, Jr.

The defendants, Mary H. Cleveland and J. H. Cleveland, are owners of the judgments against John A. Easley, Sr., as set forth in plaintiff's complaint, and not contested by any of the other defendants. William Choice, Emily Choice and Harriet D. Evins are the owners of a judgment in favor of William Choice, the elder, for $5613.48 and interest, and $9.95 costs, against John A. Easley, Sr., these four judgments being of the same date, to wit, March 20th, 1858. The last is based on notes, which are included in a previous separate judgment for $7167.60, besides interest and costs, in favor of William Choice, the elder, against John A. Easley, Jr.

The issue in this action is, whether the last-mentioned judgment has been paid in fact—and, if so, whether the plaintiff is concluded from setting up such payment in the present action by the proceedings in this court under a rule by William Choice, the elder, in his lifetime, against J. Riley Ferguson, sheriff of this county, for failing to pay on his judgment moneys collected by sale of the property of the defendant, John A. Easley, Sr. * * *

The proceedings set up in bar are, briefly —First, A notice of a rule upon J. Riley

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Ferguson, sheriff of Pickens county, to *show cause why he should not be attached for contempt in not paying over the money in his hands to the plaintiffs in the cases of William Choice v. John A. Easley, Sr.; Mrs. B. F. Cleveland v. John A. Easley, Sr., and J. H. Cleveland v. John A. Easley, Sr. Second. An order thereunder referring it to William H. Perry, Esq., to ascertain and report what amounts, if any, have been paid on the various judgments against J. A. Easley, Sr., now standing on the sheriff's books, dated June 10th, 1874, by Judge Cooke, and by consent of plaintiff's and defendants' attorneys. Third. The report of the referee, filed March 5th, 1875, that he has held references, heard testimony and examined the records in the sheriff's office, and that he found that the judgment of William Choice v. John A. Easley, Sr., was obtained upon a note upon which the said J. A. Easley, Sr., was surety for his son, J. A. Easley, Jr. "Previous to that time the plaintiff, Choice, had obtained judgment against the said J. A. Easley, Jr., for $7167.60, which included the note just mentioned. The lands of J. A. Easley, Jr., were sold by the sheriff of Pickens county. At various times W. K. Easley, who was the administrator of J. A. Easley, Jr., and purchaser of one of the tracts of land sold by the sheriff as aforesaid, made payment to the said William Choice and took receipts. These receipts are in evidence. On March 19th, 1860, L. C. Craig, then sheriff of Pickens county, entered upon his books on the case of William Choice v. J. A. Easley, Jr., that he had received from the sale of defendant's land $3508.21.

"On the same day the said W. K. Easley, as attorney for William Choice (as the receipt purports), entered upon the same case a receipt for the various amounts which he had paid the plaintiff, Choice, and for which he had taken said Choice's receipts as before mentioned. He receipts for these amounts as if paid to him by the sheriff. This receipt of William K. Easley, attorney for William Choice, the referee thinks was an application of the $3508.21 received by the sheriff on the same day. Taking these receipts together, with one for $600, which was subsequently given by Choice, as a basis of calculation, the referee finds that there was due upon

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said judgment of William Choice *v. J. A. Easley, Jr., on February 1st, 1861, the date of the last receipt, the sum of $2211.88.

"The judgment of William Choice v. J. A. Easley, Sr., being upon a note which was included in the previous judgment of William Choice v. John A. Easley, Jr., the referee thinks and reports that there is now due upon the judgment of William Choice v. J. A. Easley, Sr., $2211.88, with interest on the same from February 1st, 1861. And that no payments have been made on the judgments of Mrs. B. F. Cleveland v. J. A. Easley, Sr., and of J. H. Cleveland v. J. A. Easley, Sr."

Fourth. The administrator of John A. Easley, Sr., by Earle & Wells, his attorneys, excepted to the referee's report, so far as it re-

ported a balance due on Choice's judgment—1. Because the referee adjudged the sheriff's books to be an application of the proceeds of the sale of J. A. Easley, Jr.'s, lands, insisting that the records and receipts showed the contrary, one being for contra claim of J. A. Easley, Jr., two for payments made by J. A. Easley, Sr., amounting to $1123.13, and that the receipts for $1050, for $1750 and for $600, and the administrator's returns showed that they were paid from the personal estate of J. A. Easley, Jr. 2. Because the payments from the estate of J. A. Easley, Jr., should have been applied pro rata to the notes composing the judgment, and the payments of J. A. Easley, Sr., applied exclusively to the note upon which he was surety. 3. Because the real estate of J. A. Easley, Jr., sold for over $6000 more than the sheriff applied, and that surplus should be applied to the extinguishment of William Choice's judgment in full or pro tanto; and, 4. Because the report was otherwise contrary to the law and the evidence.

Fifth. An order, July 23d, 1877, confirming report of referee.

To the proceedings just set forth, neither the plaintiff nor her assignor were parties, and the plaintiff insists that they are not a bar to her present action. First. Because the court has no power to adjudicate such questions under a rule against the sheriff. Second. Because no judgment had been rendered. Third. Because the exceptions by the administrator are a nullity, as he was no party. Fourth, Because if, by litigating, he became a party, a judgment against him is

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not binding on the plaintiff; *and, Fifth. Because the subject matter is not the same as in the present action.

A judgment is "the final determination of the rights of the parties in the action." Rev. Stat. 630, § 268. The order confirming the report of the referee in this proceeding was binding on the sheriff and all the other parties to the proceeding, if the court possessed the power to adjudicate the questions involved under that form of proceeding. Emory v. Davis, 4 S. C. 36. It is conceded that it is not usual to decide such questions under a rule against the sheriff. When there is a contest for the recovery of money by different bona fide contending parties, the sheriff should be regarded as a stakeholder. "A rule will always go where the legal rights of the parties can be made to appear from a conceded state of facts. But where the facts are disputed, and the law depends on their development, the parties should be kept to their action at law, or should enter into a consent rule to make up an issue to ascertain their rights. The court think that the motion should be granted, and issue is directed to be made up to try the question whether the money in the hands of the sheriff should not be applied to the payment of the judgment of Cooper v. Scott." Cooper v. Scott, 2 McM. 156. The questions involved in the rule were properly tried by the referee by consent.

The administrator of J. A. Easley, Sr., having come in under the rule and litigated, is as much bound by the decision under it as if he had been originally a party. Tate v. Hunter, 3 Strob. Eq. 145; Freem. on Judg., § 174.

In Freem. on Judg., § 163, it is said that "A judgment against an administrator is binding on the creditors of the estate," citing Stone v. Wood, 16 Ill. 177; Pickens v. Yarborough, 30 Ala. 408.

In McDowall v. McDowall, Bail. Eq. 330, the plaintiffs were residuary legatees under the will of John McDowall, deceased, and the defendants were his executor and executrix, the latter of whom was also the widow of testator. The executrix had sued her co-executor at law and recovered dower, to which the Court of Equity thought her not entitled, as she had long previously accepted the legacies under her husband's will, which he

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*considered a full compensation for any right of dower she had in his estate, but as the court of law had decided the question under a suit, though so irregular in form that it might have been abated, the Court of Equity held the matter res adjudicata not only as to the executor, who had been a party, but also as to the residuary legatees, who were not parties.

Under these authorities I conclude that the plaintiff is bound by the judgment in the rule above mentioned against the administrator of J. A. Easley, Jr. It is plain from an inspection of the complaint herein and the exceptions to the rule above mentioned, that the main question in each case was whether the judgment of William Choice against J. A. Easley, Sr., was satisfied, either in fact or by operation of law, and that the same evidence was relied on to establish satisfaction, but it was argued that the object of the rule was to obtain from the sheriff moneys then in his hands from the sales of the real estate of John A. Easley, Sr., deceased, on the judgment of William Choice and other judgments, according to their apparent status on his books, and that the object of this action is to have the assets in the administrator's hands applied to the judgments according to their legal priorities as they appear in the sheriff's office, excluding the judgment in favor of William Choice, which plaintiff prays may "be marked satisfied." Whether the purpose be the same or not, is, in the referee's opinion, immaterial, one of the precise issues, both in the rule and in the present action, being whether the judgment recovered by William Choice against J. A. Easley, Sr., was paid—and, if not, how much was due thereon. See Freem. on Judg., §§ 256, 257, and also Jones v. Weathersbee, 4 Strob. 50 [51

Am. Dec. 653], in which the object of the suits was to recover different sums of money on account of the same nuisance, and the defendant was ready to prove title in the second suit, which he had attempted to do in the first and failed. The first judgment was held to be a bar on the question of title. Also in McDowall v. McDowall, above cited, the object of one suit was to recover dower, and of the other to recover legacies. We have many cases to the same effect which need not be here cited.

No evidence was offered as to the pecuniary irresponsibility of the administrator, John R. Gossett, nor of any unfitness on his

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*part to manage the estate of the intestate, nor of any misconduct on his part in reference thereto. The law therefore assumes him to be a fit and proper person to exercise the trusts reposed in him, and that he has faithfully performed the duties of his office.

It is therefore adjudged that John R. Gossett do pay out all moneys in his hands, and all which may come into his hands as such administrator—First, To the expenses of administration, including a proper counsel fee to his attorney in this action, and that he be allowed also a reasonable counsel fee in the case of the rule against J. Riley Ferguson, sheriff, in the cases of William Choice v. J. A. Easley, Sr., B. F. Cleveland v. Same, and J. H. Cleveland v. Same. Second. To any demands against the estate of his intestate having priority under the statute to the judgments owned by the parties to this action, if there be any such. And, Third. Pro rata to the four judgments owned by the parties to this action, as hereinbefore stated estimating the one obtained by William Choice at $2211.88, on February 1st, 1861, and the other three judgments at their face, taking into account in the distribution any payments made by himself or the sheriff upon any one or more of them since July 23d, 1877, if any such have been made, so as to secure equality in such distribution according to this decision.

It is further adjudged that the plaintiff pay the costs of this action.

Both parties excepted to this report. The Circuit decree was as follows:

Judge Hudson referred this case to J. J. Norton, to hear the same and decide the issues of law and fact involved. Both parties have argued before me their exceptions to the referee's report without claiming that his judgment be entered as that of the court, and even without bringing to my attention the terms of the order.

The report shows that the plaintiff and three of the defendants, J. H. Cleveland, B. F. Cleveland, and the assignees of W. Choice, represent four judgments against J. A. Easley, Sr., all of same date, March 20th, 1858. Plaintiff avers that the Choice judgment has been fully satisfied, and the referee so finds,

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as *matter of fact, in which finding I concur. But the assignees of Choice claim that this issue has been formerly settled in their favor by a judgment of this court, binding upon the administrator of Easley, and therefore binding on the plaintiff and all other creditors of Easley.

The facts on that point are these: The sheriff of Pickens had funds of the estate of Easley, and the parties representing the Choice and the Cleveland judgments served him with a rule to show cause why he should not be required to pay said money to their judgments. It was referred to W. H. Perry "to ascertain and report what amounts, if any, had been paid on the various judgments against J. A. Easley, now standing open on the sheriff's books." He reported a balance unpaid on the Choice judgment, and that nothing had been paid on those of the Clevelands, but does not report on or mention that of the plaintiff, who was not a party to the rule, but whose judgment was manifestly included in the said order, it being then open on "the sheriff's" books. The administrator of Easley filed exceptions to that part of the report which allowed a balance on the Choice judgment, but made no exceptions to the Cleveland judgments. It does not appear how the said administrator was admitted to take part in the proceedings under the said rule, or even whether he was allowed to do so. His exceptions to the report are not expressly overruled or even in any respect referred to in Judge Cooke's order, which confirmed said report, and made the rule absolute against the sheriff.

Nor does it in any manner appear whether the said administrator was allowed a hearing on his exceptions or was disregarded as not a necessary or proper party in that proceeding. The source from which the sheriff derived the money then in his hands, is not proved or reported on in this case. Whether it came from real estate or personal, or whether the said administrator would, in any event, have been entitled to receive and administer it, does not appear; except that it is clear that he does not dispute the right of the Clevelands to have it applied to their judgments by the sheriff.

The order of Judge Cooke in making the rule absolute against the sheriff contains nothing about the application by the admin-

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*istrator of any funds in his hands, nor does it at all settle that the money then in question was any part of that which he was entitled to administer.

I therefore do not concur in the report of the referee, that the said order of Judge Cooke was any final adjudication of the respective rights of the creditors of J. A. Easley, Sr., or that it fixed as against them the status of the Choice judgment. They who represent it were bound to prove their plea

in this case. The burden is on them to prove that the fund then in question arose from personal estate, which the administrator was entitled to receive and apply in due course of administration, and therefore as to that fund that he was entitled to litigate in that case, for the rights of all the creditors of his intestate.

That not being proved in this case, I hold that the said administrator was neither a necessary nor a proper party in the said proceedings against the sheriff, and that his voluntary interference therein could not so make the plaintiff a party to that case as to bar her claim to try the merits of her case in this action. It is therefore adjudged that so much of the referee's report as decides that the said judgment of William Choice has been paid is hereby confirmed, and that the remainder of said report is overruled.

Further ordered and adjudged that J. R. Gossett, administrator of J. A. Easley, Sr., apply the assets of said estate to the expenses of administration, including the costs of this case and a reasonable counsel fee to his attorney, and the remainder in due course of administration, according to the legal priorities and liens of the various creditors, excepting the said judgment of William Choice v. J. A. Easley, Sr.

From this decree William Choice, Emily Choice and Harriet D. Evins appealed upon the grounds considered in the opinion. The second proposition approved but not stated, was as follows, (omitting authorities): "That the question here was properly determined by rule, is fully sustained by the argument of the referee. A reference now is equal to order of issue. The final order upon the report of a referee in such case is a final judg-

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*ment. Being a judgment, it cannot be attacked collaterally, and is binding on parties and privies."

Mr. R. W. Shand, for appellant.

Messrs. G. G. Wells and M. F. Ansell, contra.

September 20th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. In this case the plaintiff, (respondent), a judgment creditor of one Easley, deceased, brought this action against Gossett, administrator of Easley, and the other defendants, (appellants), who claimed to be judgment creditors also of Easley, to have the judgment claimed by Evins, William and Emily Choice, appellants, known as the William Choice, Sr., judgment, declared paid, and to require the administrator to pay out the moneys in his hands to the unsatisfied judgments, her own among others.

The appellants, who had become the owners of the William Choice, Sr., judgment, resisted this action, or so much of it as alleged that their judgment had been paid. They claim that this question had been settled in their favor in a previous action, to which the administrator of Easley was a party; that the administrator represented all the creditors in this action; that the plaintiff, being one of the creditors, was bound thereby, and that the question now raised by her was res judicata.

The case was referred to J. J. Norton, Esq., as special referee. Mr. Norton seems to have been of the opinion that the William Choice judgment had been legally satisfied by the receipt of certain moneys by the sheriff, in 1861, which should have been applied to this judgment; but, believing this question to be settled the other way in the previous case, he sustained the plea of res judicata and reported the judgment still open and entitled to its share of the moneys in the hands of the administrator. And he recommended that the assets in the hands of the administrator, Gossett, after first being applied to certain expenses connected with the litigation, be paid out pro rata, on four judgments established before him, including

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the Choice judgment, *upon which last judgment he held that the previous proceedings, out of which the plea of res judicata had sprung, had established that the sum of $2211.88 was due on February 1st, 1861. Judge Pressley overruled this report, holding upon the facts of the previous case that the plea of res judicata could not be legally interposed by the appellants; and he adjudged that the Choice judgment had been paid. He, therefore, ordered the administrator, Gossett, to apply the assets in his hands, after expenses of administration, &c., in the due course of administration, according to the legal priorities and liens of the several creditors, excepting the Choice judgment.

This appeal is from this decree of Judge Pressley, and it involves the single question whether Judge Pressley was in error in overruling the plea of res judicata relied on by the appellants and sustained by the referee. To determine this question we must now examine the previous proceedings.

During the lifetime of William Choice, Sr., the precise date not given, but some time in 1874, he instituted a proceeding by rule upon the then sheriff of Pickens county, the county in which his judgment had been entered, to show cause why he should not be attached for contempt in not paying over the money in his hands to his judgment, the one now in controversy, and also to the Cleveland judgment. This rule was referred to William H. Perry, to ascertain and report what amounts, if any, had been paid on the various judgments against Easley, then standing on the sheriff's books. Mr. Perry reported that, among other judgments, he found the Choice judgment, after deducting all payments, open to the extent of $2211.88.

The administrator of Easley, by attorneys, excepted to the referee's report, as far as he reported a balance due on the Choice judgment, on the ground that the sheriff had received, in the sale of the real estate of J. A. Easley, Jr., also covered by this judgment, over $6000 more than he had applied, which surplus it was his duty to apply, and, if applied, the judgment would be paid.

How the administrator of Easley became a party to this rule—whether by service of process or by his own voluntary act—does not appear, nor does it appear whether his exceptions were heard and considered by

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the court. He is not mentioned *in the proceeding, and at no stage appears, except in the filing of these exceptions. This is the first and last that we hear of him in the rule. In the order of Judge Cooke, confirming the report of Mr. Perry, and making the rule absolute against the sheriff, these exceptions are not overruled or referred to in any way whatever.

It is expressly admitted in the argument of Mr. Shand, appellant's attorney, that the object of the rule was to have applied to the Choice judgment the proceeds of the sale of the land sold by the sheriff, and which were in his hands. Now, the position taken by the appellants is, that Gossett, the administrator of Easley, having been a party to this rule, either voluntarily or otherwise, and one of the issues arising under the rule being whether their judgment was still open, which issue had been determined in their favor without appeal, that this question is now res judicata, estopping the administrator and all creditors, as his privies, from denying its existence, and that the Circuit judge should have so held.

It cannot be denied that a direct and final judgment or decree of a court of competent jurisdiction is forever conclusive and binding as to the subject matter embraced between the same parties and all privies in law or estate. Manigault v. Deas, Bail. Eq. 284.

If, then, the decision rendered on this rule was a decision by a competent court, on the same subject matter and between the same parties, the principle announced above would apply and the plea of res judicata would be conclusive. This plea, however, to be effective, requires the concurrence of four conditions: 1st. Identity in the thing sued for. 2d. Identity in the cause of action. 3d. Identity in the persons or parties. 4th. Identity in the quality of the persons for or against whom the claim is made. Bouvier L. Dic. 465. As an example of the last condition, a final judgment against a party in his own right would be no bar to an action by him as administrator.

If any one of these unities is wanting, and especially the unity of parties, the plea cannot be made out, because, while it is just and proper that litigation between the same parties, after they have once had their rights

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adjudicated by a competent tribunal *without appeal, should end, yet a thing done between others ought not to injure another. A transaction between two parties ought not to operate to the disadvantage of a third. The maxim res inter alios acta nocere non debet is as strong for the protection of those not before the court as that of res adjudicata for those who are present.

There is no question here as to the competency of the court. The rule was in the nature of a special proceeding, not unusual in cases of this kind, and it was heard by a competent tribunal. The thing demanded by the rule was the money supposed to be in the hands of the sheriff, derived from the sale of the real estate of the judgment debtor. The cause of action involved the right of Choice to have the money applied to his judgment.

The parties were the judgment creditor, the sheriff, and, the respondent contends, Gossett, the administrator of the deceased debtor: the quality of the judgment creditor being in his own right, that of the sheriff in his official capacity, and that of Gossett as administrator of the debtor.

Now, how does the case before the court stand as to these matters? The thing demanded here is the money in the hands of the administrator derived from the personal estate of the debtor. The cause of action involves the right of the Choice judgment to a portion of this money. The parties are the plaintiff, a judgment creditor, the administrator of the deceased debtor and the present owners of the Choice judgment. The thing demanded in both cases is money belonging to the deceased debtor: in the first case being proceeds of his real estate, and in the latter that of his personalty. The object of the suit in each case is to determine the proper application of the assets of the deceased debtor, and especially whether the Choice judgment should receive any portion; the main question is the same, and the parties are the same, with the addition of the plaintiff. The conditions, then, may be regarded as the same in each case, with the exception that the plaintiff, who is a party in the present proceedings, was not a party, at least nominally, in the first.

This exception is fatal to the plea, unless it can be made to appear that the plaintiff, although not nominally before the court in the former proceeding, was yet present by

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her repre*sentative in such way as to bind her. And this is the real question in the case. Now, waiving the point whether the administrator was a party to the former proceeding or not, the question arises, was he a necessary party? and in such sense as that, his being a party, the judgment of the court, unappealed from, bound him as well as the creditors and distributees of the estate which he represented.

It will not be denied that the acts of the administrator are binding as to all matters over which he has legitimate control as such administrator. The power delegated to the administrator is to administer the goods and chattels, rights and credits which were of his intestate at the time of his death, and the condition of his bond is to perform this duty. His power goes to this extent, and no further. Within the range of this power his acts not only bind himself, but also all those of whom he is in law the representative; creditors and distributees are his privies in law, and his acts, when free from collusion, bind them. As to all matters, therefore, connected with the goods and chattels, rights and credits of the deceased, undergoing litigation, he is not only a proper, but a necessary party.

But the administrator does not represent the real estate of his intestate. The real estate, it is true, may be made subject to the debts of the intestate, but not by the action of the administrator—that is, by virtue of his administration. The creditors may reach the real estate without his aid, and he is not responsible on his bond if it be lost. He can commit no devastavit in connection therewith.

In the case of Garlick v. Patterson, Cheves' Eq. 27, referred to in the argument, it was held that where a balance is found in the hands of a sheriff, after the sale of the real estate of an intestate in satisfaction of executions, the administrator is not entitled to this surplus, either in law or equity, as assets for the payment of debts, though the creditors themselves may claim it. Nor would his bondsmen be liable even if it passed into his hands. In the case of Bank v. Inglesby, Speers' Eq. 399, the same doctrine is held as to a surplus in the hands of the master upon sale in foreclose of a mortgage of real estate. The master was ruled by the

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administrator. Chancellor Dunkin *dismissed the rule, and, upon appeal, Chancellor Johnson said: "That the defendant is not, in his character as administrator, entitled to receive the money is directly decided in Ex parte Foster, Rice's Eq. 19." "It is plain, therefore," says the Chancellor, "that the sureties on his bond would not be liable for money arising from the sales of real estate."

The attorney of appellant has placed upon the record an admission that the money in controversy in the rule was derived from the sale of real estate of the deceased debtor. Under the decisions referred to, the administrator had no legal interest in this money. He was not entitled to demand or receive it from the sheriff by virtue of his powers as administrator, and if he had received and wasted it his bondsmen would not have been liable. If this be so it was no interest of his, nor was it any part of his duty, to see that the sheriff applied this money properly. That was a matter for the sheriff, the heirs-at-law and the creditors. Such being the fact, we cannot see how the administrator was a necessary or even a proper party to the rule. If he was not a necessary or proper party, then his appearing in the case, either voluntarily or otherwise, would be an act outside of his duty and beyond his power as administrator, and would not bind those of whom administrators are the representatives, to wit, distributees and creditors. It is urged, however, that the main question in controversy under the rule, was whether the Choice judgment had been paid, and that this was a question in which the administrator was interested as administrator, and that this interest rendered it necessary and proper that he should have been made a party to that proceeding.

If the effort in the rule had been to establish the judgment of Choice against any funds under the control of the administrator, and a judgment or decree sought to be enforced therein against him as administrator, or if the funds in the hands of the sheriff had been derived from the sale of personal property, and were a subject of controversy between himself and Choice and the rule had been resorted to to settle the rights of the parties, he should have been a party. But neither of these cases existed; no redress was prayed against the administrator, nor was he entitled to any relief. No act of his

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had given rise to the rule, nor was *any interest of his imperiled by its issue. Was it not time enough for him to attack the judgment when an effort was made to set it up against the personal estate in his hands? Was he bound, or was it in any sense his duty, to intervene in a proceeding between others, simply because a question was incidentally raised there which might possibly thereafter be raised against him? If he had been in possession of any facts showing payment of this judgment, why could he not have been a witness, instead of a party? We cannot see that he was either a necessary or proper party, and we find no error in the order of the Circuit judge overruling the plea of the appellants.

The appellants contend that where money arising from the sale of lands of an intestate is in the hands of the sheriff, whether a judgment claiming this money has been paid or not, is an issue to which the administrator of the deceased is a proper party, and to support this position the following authorities have been referred to in the argument, to wit: Story's Eq. Pl., §§ 176, 169; Rae v. Stead, 2 Cr. 407; Fretwell v. Neal, 11 Rich. Eq. 559; Rogers v. Huggins, 6 S. C. 356; Pomeroy 315. We do not think that the authorities referred to fully sustain the position claimed. It is stated both in Story and Pomeroy that the administrator or executor is a necessary party to an action against the

heirs on a debt of the ancestor, on account of real estate descended or devised to them; but in this case the debt in question had been reduced to judgment against the intestate in his lifetime, and the rule was not intended to obtain a judgment against the heirs, but to have the judgment already obtained paid out of moneys in which they were interested. Whether the judgment was satisfied came up incidentally as one of the facts in the case upon which the main issue depended, but it was not in itself the main issue.

The second proposition of appellants is no doubt correct.

The third, that where an administrator appears in a proceeding, whether personally a party or not, he is bound and estopped, may be true, and yet his appearance in such case would not bind his privies, unless the administrator had a right to appear as a necessary and proper party.

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*The fourth, that where the administrator is estopped, having been a party, the creditors, who are privies, are also estopped, is true as to all matters where the administrator legitimately acted as administrator; but in this case, as we have seen, this doctrine does not apply.

Besides, the proceeding under the rule was had in 1875, some three years before this action commenced. The rule was made absolute against the sheriff. It does not appear but that the sheriff paid this money on the Choice judgment, since the order making the rule absolute. The plea of res adjudicata should not shut off an inquiry of this sort.

If it could avail at all, it should only avail as to the matters involved in the rule. We think there was no error in the Circuit judge overruling the plea, but we think, under all the circumstances, the Circuit judge should not have held that the Choice judgment was satisfied. This is a matter which should undergo a full investigation, unencumbered with the former proceeding.

The judgment of this court is that the judgment of the Circuit Court be modified so that so much of it as overrules the plea of res judicata be sustained, and so much as holds the Choice judgment satisfied be reversed, subject to further investigation, and that the case be remanded for such further proceeding as may be necessary.

McIVER and McGOWAN, A. J.'s, concurred.

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15 S. C. 581

(Case No. 1110.)

PELZER, RODGERS & CO. v. CAMPBELL & CO.

(November Term, 1880.)

[1. *Bills and Notes* ⇐194; *Evidence* ⇐461.]
A creditor agreed to give his debtor, a partnership firm, further indulgence, if notes were given him for the amount due, signed by the firm and by C., the mother of one of the partners. The notes were signed in the partnership name, with a seal added, and were then taken to C. by her son, and afterwards delivered to the creditor with her signature and seal.

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Held, *that the notes were supported by a sufficient consideration and binding upon C., and that parol evidence was inadmissible to show the understanding and intention of C. at the time of execution, or that she was ignorant of the indulgence given.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166–173, 175–181, 185–189, 192, 193, 196–198, 200, 202–207, 212; Dec. Dig. ⇐94; Evidence, Cent. Dig. §§ 2129–2133; Dec. Dig. ⇐461.]

[2. *Principal and Surety* ⇐7.]
Even if the seal of the partnership was affixed to the notes, which were given for an existing partnership debt, without the authority of one of the partners, C. would not thereby be released from her obligation.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 12; Dec. Dig. ⇐7.]

[3. *Husband and Wife* ⇐87.]
A married woman signed the notes of her son as surety, without any advantage to herself or her estate. *Held*, that she had legal capacity to bind herself, and was liable for the payment of the debt.

[Ed. Note.—Cited in Witte v. Wolfe, 16 S. C. 268; Aultman & Taylor Co. v. Rush, 26 S. C. 528, 2 S. E. 402.

For other cases, see Husband and Wife, Cent. Dig. §§ 346–353, 798; Dec. Dig. ⇐87.]

[4. *Constitutional Law* ⇐48.]
An act of the legislature may not be lightly declared unconstitutional; every part of the state constitution should, if possible, be so construed as to allow full force to Section 1, Article III, which vests plenary legislative power in the general assembly.

[Ed. Note.—Cited in Columbia & G. R. Co. v. Gibbes, 24 S. C. 68; Utsey v. Charleston, etc., R. R. Co., 38 S. C. 406, 17 S. E. 141; Mauldin v. City Council of Greenville, 42 S. C. 298, 20 S. E. 842, 27 L. R. A. 284, 46 Am. St. Rep. 723; Germania Savings Bank v. Town of Darlington, 50 S. C. 363, 27 S. E. 846; State v. Parler, 52 S. C. 218, 29 S. E. 651.

For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⇐48.]

[5. *Constitutional Law* ⇐½, New, vol. 4 Key-No. Series.]
The general objects of a written constitution are to lay down fundamental principles and to limit the powers of government, but not to legislate on mere details.

[6. *Constitutional Law* ⇐26.]
While power to legislate upon a subject may be prohibited by a constitutional provision simply affirmative, as where such provision would be frustrated by legislation, yet the doctrine of exhaustive grant is not favored; and as to matters upon which the legislature had before been accustomed to act, its right to legislate further will not be taken away by implication, unless such implication is necessary.

[Ed. Note.—Cited in Herndon v. Moore, 18 S. C. 350; Utsey v. Charleston, &c. R. R. Co., 38 S. C. 408, 409, 17 S. E. 141.

For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. ⇐26.]

7. This case distinguished from Duncan v. Barnett, 11 S. C. 333 [32 Am. Rep. 476.]

[8. *Husband and Wife* ⟸112, 134.]

There is nothing in the constitution of 1868 which prevents the legislature from giving to married women rights and powers in addition to those conferred by that instrument; and, therefore, the provision in the act of 1870 (Gen. Stat., ch. C., § 3,) authorizing a married woman to contract and be contracted with, in the same manner as if she were unmarried, is not unconstitutional.

[Ed. Note.—Cited in Clinkscales v. Hall, 15 S. C. 604; Witte Bros. v. Clarke, 17 S. C. 327; McLure v. Lancaster, 24 S. C. 281, 58 Am. Rep. 259; Habenicht v. Rawls, 24 S. C. 464, 58 Am. Rep. 268; Aultman & Taylor Co. v. Rush, 26 S. C. 524, 2 S. E. 402; Wallace v. Craig, 27 S. C. 519, 4 S. E. 74; Gwynn v. Gwynn, 27 S. C. 533, 537, 4 S. E. 229; Aultman & Co. v. Gibert, 28 S. C. 310, 5 S. E. 806; Gleaton v. Gibson, 29 S. C. 516, 7 S. E. 833; Connor v. Edwards, 36 S. C. 569, 15 S. E. 706; Ellis v. Cribb, 55 S. C. 332, 33 S. E. 484.

For other cases, see Husband and Wife, Cent. Dig. § 393; Dec. Dig. ⟸112, 134.]

[9. *Husband and Wife* ⟸79.]

Under this provision of the law, the personal contracts of a married woman are binding upon her, and upon them she may be sued to judgment.

[Ed. Note.—Cited in State v. Moses, 18 S. C. 371; Connor v. Edwards, 36 S. C. 566, 15 S. E. 706.

For other cases, see Husband and Wife, Cent. Dig. §§ 317–323, 329; Dec. Dig. ⟸79.]

[10. *Husband and Wife* ⟸149.]

[Cited in Bridgers v. Howell, 27 S. C. 429, 3 S. E. 790, to the point that the main object of the provision of the Constitution seems to have been to exempt the property of the wife from the payment of the husband's debts.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 573, 574; Dec. Dig. ⟸149.]

[This case is also cited and approved in Witte Bros. v. Clarke, 17 S. C. 314.]

Before Pressley, J., Anderson, September, 1879.

Action commenced in 1879 by the plaintiffs against A. R. Campbell & Co. and Mary M. Campbell, upon the three notes set out in full in the opinion of this court. W. N. Mitchell was not served and A. R. Campbell put in no appearance. The three notes were given for a debt of A. R. Campbell & Co. to Pelzer, Rodgers & Co., then past due.

A. R. Campbell testified that his mother was not present when he settled with the agent of plaintiffs, and she knew nothing of

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*the extension of time given to A. R. Campbell & Co. by the plaintiffs; that she was not a partner and was not owing the firm anything, and had no interest in it; that when he offered his mother as security plaintiffs' agent left, and he then went to see his mother and told her that he expected it would be necessary for her to sign a note with A. R. Campbell & Co., and her reply was, "Well, you can sign my name." Then the following questions were put to witness: (1.) "Who signed this note?" Ans. "I did it for my mother." [Question objected to by counsel and was ruled out.] (2.) "What authority did you have?" (3.) "Did she authorize you to sign her name as surety for yourself, individually, or for the firm of A. R. Campbell & Co.?" (4.) "Was she aware that any extension of time was granted to A. R. Campbell & Co. by the plaintiffs, on the consideration that she would sign the notes?" All of which questions were ruled out and exceptions noted.

It was not pretended that the plaintiffs had any knowledge of the matters between A. R. Campbell and his mother, in regard to his signature to the notes for her, which defendants offer to prove by A. R. Campbell, or that he signed them for her.

Other facts are stated in the opinion.

Mr. J. L. Orr, for appellants, cited Wells on Marr. Wom., §§ 345, 352, 357, 423, 455, 473, 530–2; Pom. on Rem., § 322, et seq.; Story on Part., § 117; Dud. 362; 2 McM. 349; 46 N. Y. 175; 3 Paige 648; 3 Minn. 206; 5 Wait's Act. & Def. 231; 1 Kent 448; 1 Cranch 137; 10 S. C. 348; 11 S. C. 333; 7 S. C. 102; Dwar. Stat. 605; 3 Wait's Act. & Def. 676; 1 Wait's Dig. 830, §§ 91, 94, 832, §§ 118–120; 6 L. & Eq. Rep. 364; 47 Ind. 302; 38 Penna. St. 146; 42 Id. 325; 65 Barb. 159; 36 Ind. 414; 51 Miss. 599; 43 Miss. 72; 4 Allen 440; 25 Wend. 658; 15 Gray 328; 23 N. J. Eq. 526; 24 Mich. 199; 63 Ill. 60; 23 Iowa 397.

Mr. Joseph N. Brown, contra.

November 16th, 1881. The opinion of the court was delivered by

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*McGOWAN, A. J. This was an action on three notes, under seal, as follows:

$735.88. Belton, S. C., May 17, 1878.

On the fifteenth of November next, we, or either of us, promise to pay to the order of Pelzer, Rodgers & Co., without off-set, seven hundred and thirty-five 88-100 dollars, value received. Witness our hands and seals.

A. R. Campbell & Co. [L. S.]
Mary M. Campbell. [L. S.]

$213.44. Belton, S. C., May 17, 1878.

On the first of December next, we, or either of us, promise to pay to the order of Pelzer, Rodgers & Co., without off-set, two hundred and thirteen 44-100 dollars, value received. Witness our hands and seals.

A. R. Campbell & Co. [L. S.]
Mary M. Campbell. [L. S.]

$746.21. Belton, S. C., May 17, 1878.

On the first of February next, we, or either of us, promise to pay to the order of Pelzer, Rodgers & Co., without off-set, seven hundred and forty-six 21-100 dollars, value received. Witness our hands and seals.

A. R. Campbell & Co. [L. S.]
Mary M. Campbell. [L. S.]

A. R. Campbell and W. N. Mitchell, doing business at Belton, Anderson county, under

the name and style of A. R. Campbell & Co., became indebted to Pelzer, Rodgers & Co., who agreed to give indulgence for the time indicated in the notes if the mother of A. R. Campbell, one of the firm, would sign the notes as surety. Campbell took the notes and returned them, signed by Mrs. Campbell. The plaintiffs accepted them and gave the indulgence.

Mrs. Campbell was not connected with the firm of A. R. Campbell & Co., and signed the notes only to enable them to get indulgence on the debt. The complaint stated that Mrs.

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*Campbell was a married woman and owned in her own right a farm in Anderson county, worth $2000. The principal defence was that Mrs. Campbell, being a married woman, had no legal capacity to make a personal contract upon which judgment could be recovered so as to bind her separate estate. The Circuit judge held that she had such capacity and was liable. The plaintiff had a verdict for the amount of the notes, and Mrs. Campbell appeals to this court upon the following exceptions:

"1. Because his Honor erred in not dismissing the complaint on the demurrer; that it did not state facts sufficient to constitute a cause of action to charge the separate estate of defendant.

"2. A. R. Campbell signed the sealed notes in the firm name, without special authority. He could not bind W. N. Mitchell, the other partner, and Mrs. Campbell being surety, she is not bound by the contract, being different from that she signed. And his Honor erred in ruling that a sealed note now stands on exactly the same ground with an unsealed note in every respect, and that both Mitchell and Mrs. Campbell were bound.

"3. Because his Honor erred in ruling that if the constitutional clause defining the rights and powers of married women had been under the legislative department, the legislature could not have enlarged or narrowed its provisions, but being under the miscellaneous department they could do so.

"4. Because his Honor erred in not making the following charge, as requested by defendant's counsel: First. 'As to separate estate of wife, the constitution declares that she can bequeath, devise or alienate it the same as if she were unmarried. The legislature cannot enlarge its provisions so as to allow a married woman to contract and be contracted with generally.' Second. 'The proof by plaintiffs being that the only consideration for signature of Mrs. Campbell was the extension of time to A. R. Campbell & Co., she is not bound.' Third. 'That nothing appearing in the contracts showing an intention to charge the separate estate of defendant or to alienate it, and there being no proof of an intention to charge it, it cannot be made liable for the debts of A. R. Campbell & Co.' Fourth. 'That plaintiffs having failed to show any benefits or consideration accruing

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*to this defendant or her separate estate from them, she is not bound by said notes.'

"5. Because his Honor erred in holding that Mrs. Campbell was bound by the consideration of extension of time to A. R. Campbell & Co., when their own admissions show that Mrs. Campbell was not a party to any such agreement, and was not present when arrangements were made.

"6. Because this defendant is not bound by any agreement or consideration between A. R. Campbell & Co. and plaintiffs, of which she had no knowledge.

"7. Because this defendant having denied any consideration for her signing said note, before plaintiffs can make extension of time to A. R. Campbell & Co. sufficient consideration to bind her, they must show that she knew of that consideration before she signed the notes.

"8. Because his Honor erred in ruling that a married woman could bind her separate property as a surety to a contract wherein she was not interested.

"9. Because his Honor erred in holding that a married woman could bind her separate estate in a contract, where her separate estate derived no benefit therefrom, or where the contract itself expressed no intention to bind such estate.

"10. Because his Honor erred in ruling out the questions propounded to A. R. Campbell, a witness for the defence."

The second, fifth, sixth, seventh and tenth exceptions relate to alleged want of consideration for the signature of Mrs. Campbell to the notes in question, and to the exclusion of testimony as to whether her son had authority to sign for her, and whether, at the time, she knew of the extension of time given to A. R. Campbell & Co. It appears in the case, as admitted, that "the plaintiffs agreed to give A. R. Campbell & Co. the specified time in said notes if the defendant, Mrs. Mary M. Campbell, the mother of A. R. Campbell, would sign the said notes, and they were returned signed by her and accepted by plaintiffs." After this admission, proof as to who signed for Mrs. Campbell, whether such person had authority to do so, or whether she knew of the consideration of indulgence given to A. R. Campbell & Co., was immaterial and irrelevant. A. R. Campbell

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knew the consider*ation which was offered for the security, which, it was supposed, the name of his mother would afford. He procured his signature and got the consideration. Parol evidence was not admissible to explain the notes as to whether they were signed as surety for the firm or for A. R. Campbell, individually. The notes were the only evidence of the intention of Mrs. Campbell in signing them, and by them her responsibility must be tested. "There is no rule

better settled than that evidence of contemporaneous parol declarations is inadmissible to vary the terms of a written agreement." Wright v. Remington, 12 Vroom 54.

Mrs. Campbell had no connection with the business of A. R. Campbell & Co. In order to secure indulgence for them, at the instance of her son, who was one of the firm, she signed the notes. Was that consideration enough to make her, in this connection, considered as a person sui juris, liable upon the notes? We think it was. "An agreement on the part of the creditor to extend the time of payment to the principal for a definite time, is a sufficient consideration for the contract of suretyship or guaranty—the one agreement being a consideration for the other—and the delay usually operating both as a benefit to the principal and a detriment to the creditor." Brandt on Suretyship, § 8; Thomas v. Croft, 2 Rich. 115 [44 Am. Dec. 279].

But these were sealed notes, and it is urged that A. R. Campbell could not legally sign them for A. R. Campbell & Co.: that they are, in fact, not the notes of the other partner, Mitchell, and in consequence of this rule of law, of which she was ignorant, Mrs. Campbell, a mere surety, is released from liability. She signed the notes with A. R. Campbell & Co., and their tenor is: "We or either of us promise to pay," &c. When she signed she knew that they were sealed notes. There is no proof of fraud practiced upon her, or misrepresentations by the plaintiffs to induce her to sign, and even if there was a mistake in matter of law as to the liability of Mitchell upon the notes, that could not release her.

The question of Mitchell's liability has not been tried, and it may possibly be that he is not liable on the notes, but we suppose there is no doubt that he is still liable for the partnership debt for which the notes were given.

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The notes of A. R. Camp*bell alone, although in the name of A. R. Campbell & Co., did not merge the firm debt so far at least as Mitchell was concerned, and he is still liable therefor. Fleming, Ross & Co. v. Lawhorn & Co., Dud. 362; Pierce v. Cameron et al., 7 Rich. 116; Spear v. Gillet, 1 Dev. Eq. 466; 4 Dev. 90, 459.

All the other exceptions, in one form or another, make the question that Mrs. Campbell, being a married woman at the time she signed the notes, without advantage to herself or her estate, had not legal capacity to make such a contract, and, therefore, is not liable.

The relation of husband and wife, whether we regard the responsibilities of the parties to each other, or to the community and its members, is the most important known to society; indeed, it is "the parent, not the child of society." The exact status which the wife should occupy has always been a most fruitful source of discussion, especially as to her capacity to hold, change and dispose of property in her own right as separate from that of her husband. From the very nature of the subject it is not without difficulty. Husband and wife are separate, natural persons, with different faculties, sentiments and desires, and yet their relation makes them the heads of one family, with common interests, common hopes and common purposes. The doctrines of the old common law upon the subject are familiar. To speak in general terms, husband and wife are a unity, or, as it was expressed by the great law-giver, "they twain shall be one flesh." The civil existence of the wife was merged in that of the husband, whose duty it was to support and govern the family, and to enable him to do so he was, with small exception, entitled to the property, the earnings and the obedience of his wife, whose disabilities were complete.

In modern times the position of woman in the community, and particularly the wife, in regard to her husband, is different from what it was ages ago. But it is matter of wonder to observe what confusion still prevails, and how far the subject still seems to be from final and satisfactory settlement. Most of the states of the Union originally adopted the old common law of the mother country, modified as it had been by the introduction of trusts and the peculiar doctrine of "the separate estate" of married women, created by act of the parties and administer-

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ed *exclusively in courts of equity. But later, as property increased and the relations of a highly civilized society became more complex, there was developed a tendency to escape from what was regarded as the hard and unbending rules of the common law, and to bestow upon the wife a larger capacity to hold property in her own right, and to dispose of it without regard to the wishes of her husband. There is no doubt of such general tendency, but there never has been unanimity upon the subject. A part of every community adhered to the old rule as best calculated to promote harmony, prosperity and happiness, while another part pressed forward in the direction of what was called the civilized doctrine of emancipating the wife from the slavery of the old law and re-endowing her with the faculties and rights of a human being.

In this modern reform most if not all of the states joined, but not with even pace. Each made its own rules and regulations, and the result was an entire want of uniformity, and great confusion and perplexity in the principles applied to the vexed question of "the separate estates" of married women. In the language of Mr. Bishop: "Since the confusion of tongues at the Tower of Babel there has been nothing more noteworthy, in the same line, than the discordant and ever-

shifting utterances of the judicial mind on the subject of the power of a married woman, and her separate estate in the absence of specific provision in the deed of settlement. True, there has been sometimes a language, which, though limited in its sphere, was tolerably plain, but no sooner was the language in the way of being understood, when lo! some conquering power of another sort came in, and all was confusion once more." 1 Bish. on Mar. Wom., § 847.

In this "sea of troubles" two currents of opinion were dimly visible, one holding that a married woman, as to her separate estate, was a feme sole, and, as such, entitled to exercise all rights not taken away from her, and the other maintaining that as to such property she was still under the disabilities of coverture and entitled to exercise no rights except such as were expressly conferred upon her by the deed creating the estate. The courts in this state always adhered to the latter opinion. Reid v. Lamar, 1 Strob Eq. 27. Around and between these two

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great leading *currents there was every conceivable variety of opinion, expressed in qualifications, modifications, exceptions, explanations, &c. These intricacies and contradictions in the old law of the "separate estate," as created inter partes, were so great and bewildering that in considering questions growing out of our late laws, which create what is known as "the statutory separate estate," little assistance can be derived from the multitudinous decisions of other states upon the subject; none, indeed, except from the states which have laws similar to our own. On the contrary, the most laborious effort to harmonize and utilize these decisions will be found to be utterly hopeless, and, indeed, to make "confusion worse confounded."

For a series of years before the adoption of the constitution, efforts were made in the legislature of this state to pass a law making the property of the wife her separate estate, not liable to the debts of her husband, without the necessity of a deed to that effect or the appointment of a trustee. In 1868 the constitution was adopted, of which Article XIV., Section 8, declares as follows: "The real and personal property of a woman, held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried; provided, that no gift from the husband to the wife shall be detrimental to the just claims of his creditors."

Soon after the adoption of the present constitution the legislature passed the "Act to carry into effect the provisions of the constitution in relation to the rights of married women," ratified January 27th, 1870, (14 Stat. 326), re-enacted in the General Statutes 482, which provides as follows: "That the real and personal property of a married woman, whether held by her at the time of her marriage or accrued to her thereafter, either by gift, grant, inheritance, devise, purchase or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be her separate property."

Sec. 2. "A married woman shall have power to bequeath, devise or convey her separate

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property in the same manner and *to the same extent as if she were unmarried; *and if dying intestate, her property shall descend in the same manner as the law now provides for the descent of the property of husbands; and all deeds, mortgages and legal instruments of whatever kind shall be executed by her in the same manner and have the same legal force and effect as if she were unmarried.*"

Sec. 3. "*A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to contract and be contracted with in the same manner as if she were unmarried.* That the husband shall not be liable for the debts of the wife contracted prior to or after their marriage, except for her necessary support," &c.

In the outset it is claimed that in the effort to ascertain the powers of a married woman we must look alone to the constitution; that the act above cited purports to give to a married woman powers larger than those given by the constitution, and to that extent is without authority and void; that the constitution having undertaken to deal with the subject, its provisions are not merely fundamental, but legislative and exhaustive, and amount, by implication, to an inhibition against the legislature touching the subject. The parts claimed to be beyond the constitution are in italics. There is nothing in the act inconsistent with or in opposition to the constitution, but merely supplemental thereto. Both are upon the same view and in the same line, the declared object of the act being "to carry into effect the provisions of the constitution."

It is not perfectly clear that the provisions of the constitution, necessarily stated in general terms, do not authorize the detail of particulars declared by the act. The first section of the act is in almost the very words of the constitution. The same may be said as to the second section, with the exception that for the word "alienate" is substituted that of "convey," with an additional statement as to the modes of conveyance—"and all deeds, mortgages and legal instruments of whatever kind shall be executed by her in the same manner and have the same legal force and effect as if she were unmarried."

There is also in this section another addition: that upon the death of the wife intes-

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tate *her estate "should descend as the law now provides for the descent of the property of husbands."

It is plain that these apparent additions were nothing more than stating fully and particularly what was properly inferable from the powers given in the constitution "to devise, bequeath or alienate." So as to the third section. Can it be fairly and with entire confidence affirmed that the powers expressly given in the constitution to acquire property "by gift, grant, inheritance, devise or otherwise," do not include and authorize the subordinate powers specified by the act "to purchase property in her own name and take proper legal conveyances therefor, and to contract and be contracted with?" It is asked with some force, how could she purchase or convey without the power to contract? It is insisted that the particulars of the act are nothing more than the filling up of the general outline indicated by the constitution. The constitution was adopted in 1868, and the act was passed in 1870, to a large extent by the same persons who had framed the constitution: therefore, according to contemporaneous construction, the constitution allowed the provisions of the act, and they are not inconsistent but in harmony with each other. Simpson v. Willard, 14 S. C. 191.

But, assuming that some of the powers given by the act are not fully covered by the said section, but are over and above and supplemental thereto, is the act unconstitutional as to such original provisions, although not in violation of the terms or contrary to the spirit of the said section? It is not contended that there is any express prohibition against the legislature passing the act, but that the very existence of the provisions of the constitution negatives, by implication, the right of the legislature to touch the subject at all. It is no small matter to declare an act of the legislature unconstitutional. The legislature is the law-making power of the state upon all subjects not prohibited by the constitution, every part of which should, if possible, be so construed as to allow full force to Section 1, Article III., which vests the full legislative power of the state in the general assembly.

"The English parliament, in a political sense, is omnipotent, but with us it is the people, and the people speak and act through the legislature, except when restricted by the

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constitution of the *United States or of the state. No statute can be disregarded unless a constitutional violation can be pointed out." Thorpe v. R. & B. R. R. Co., 27 Vt. 142; Potter's Dwar. 60–65; Cooley on Const. Lim., §§ 87–173.

"It is an axiom in American jurisprudence that a statute is not to be pronounced void on this ground, unless the repugnancy to the constitution be clear and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the constitution must be specified, and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such result is one of delicacy and to be exercised always with caution." Township v. Talcott, 19 Wall. 673.

"The constitutionality of a law must be presumed until the violation of the constitution is proved beyond all reasonable doubt, and a reasonable doubt must be solved in favor of legislative action and the act be sustained." Cooley on Const. Lim., § 87.

The general objects of a written constitution are to lay down the fundamental principles and to limit the powers of government, and not to legislate on mere details. It is, in its nature, to be paramount, and in unchanging form is not suited to contain all the laws, which, from time to time, are necessary to conform to the ever-changing necessities and wishes of a people.

It is true that under certain conditions the power to legislate upon a subject may be taken away by a provision in the constitution simply affirmative as well as by express words, as where the provision is of such a nature that its purpose would be frustrated by further legislation on the subject, which occurs generally in reference to modes of procedure and in matters enumerated. But considering how easy it would have been to add words of exclusion, if such had been the intention, and that the alleged frustration of purpose must always be very much a matter of opinion, this "exhaustive grant" doctrine excluding, by implication, the power of legislation, is not favored. Implied limitations of legislative power are only admissible when the implication is necessary, as where language, conveying a particular intent, cannot have its proper force without such implication.

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*"It is not upon slight implication and vague conjecture that it is to be pronounced that the legislature has transcended its power, and that its acts are to be deemed void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Potter's Dwar. 65.

It seems that one of the rules of construction in such cases is this: If the provision introduces a new subject, and nothing appears to the contrary, that provision may be regarded as containing its own limit; but if the provision is upon the subject of ordinary legislation, in reference to which the legislature had acted before, that old right of legislation will not be taken away by implication, unless it is a necessary implication. Potter's Dwar. 72–74.

This rule has an illustration in the case of

Duncan v. Barnett, 11 S. C. 333 [32 Am. Rep. 476], cited by the defendant. That case involved the point whether the act of 1872, exempting from levy and sale "one-third of the annual products of agricultural laborers," in addition to the exemptions allowed by the constitution, was for that reason unauthorized and void. The constitution contains two provisions on the subject of homestead exemptions. Article I., Section 20, declares: "That a reasonable amount of property as a homestead shall be exempt from seizure and sale for the payment of debts," &c., and Article II., Section 32, indicates what is "a reasonable amount of property," by enumerating in detail the articles to be exempt, as follows: "The personal property of such person, of the following character, to wit: Household furniture, beds and bedding, family library, arms, carts and wagons, farming implements, tools, neat cattle, work animals, swine, goats and sheep, not to exceed in value in the aggregate the sum of $500," &c. This latter section, like an ordinary act of the legislature, indicates clearly the articles exempt, and this particular enumeration implies a limit. The act assailed added a new article, not embraced in the list, and it was held that "the legislature can exempt from levy and sale only such articles of personal property as are embraced within the enumeration contained in Article II., Section 32 of the constitution."

In delivering the judgment of the court,

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Judge Willard said: * "Until within a few years it has not been regarded as a legitimate exercise of legislative power to place the property of the debtor beyond the reach of his creditor, except to an inconsiderable extent. * * * It may well be considered that in solving the question of the legitimacy of such legislation the constitution had in view a limit that should be imposed to its unrestricted exercise. When it is treating of subjects that have been constantly dealt with by legislative bodies, with the sanction of the courts and the community, such an inference does not necessarily arise. In such cases some special ground would have to appear by inferring, in the absence of an express declaration to that effect, that the constitution, in prescribing the mode in which a power of that class should be exercised, intended to exclude its exercise in any other mode."

The case before us is, in several particulars, different from that of Duncan v. Barnett. Here there is no second section filling up with particulars the general power given in the first, which office, in reference to the rights of a married woman, seems to have been performed by the act of the legislature now assailed; and besides, in the matter now under consideration, the constitution was "treating of a subject that had been constantly dealt with by the legislature." The rights of married women have always been considered and treated as a legitimate subject of legislation in this state. Perhaps no other has been oftener before the legislature.

We can see no necessity for the implication in this case as drawn from the frame of the provision itself. It does not purport to be exhaustive or exclusive, but, in terms, is simply affirmative and without words of negation. The maxim expressio unius est exclusio alterius cannot control the construction. That doctrine as to the effect of omissions under certain conditions, might have some weight if, in this case, as in Duncan v. Barnett, a new subject of legislation had been then and there introduced by the constitutional provision; but it is not perceived why it should be applied so as to limit, by implication, legislative powers which already existed in regard to an old and general subject of legislation.

Nor is there a necessity for the implication

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arising out of the *nature of the subject. Based on the law as it then stood, the main object of the provision in the constitution seems to have been, not so much to declare the rights of the wife as to negative those of the husband in regard to her property—not to enable her, but to disable him and his creditors, and, therefore, no exhaustive catalogue of all her powers was intended to be given, but only a mention, in general terms, of such of them as were incident to the main purpose of excluding the rights of the husband. As was said in the case of Townsend v. Brown,† lately decided by this court, in reference to the mode of renunciation of a wife's dower under our present laws: "The leading object of the section just quoted [under consideration here] appears to have been to relieve the property of the wife from liability for the husband's debts, and to relieve it from any control by the husband; for the first provision is to exempt the wife's property from levy and sale for the debts of the husband, and the second is to authorize the wife to dispose of her property without, and even against the consent of the husband. The real purpose, therefore, does not appear to have been to confer any new powers upon a married woman by changing her legal status, but simply to protect her property from liability for her husband's debts, and to release it even from the partial control of the husband by dispensing with the necessity, which had previously existed, of obtaining his consent and concurrence before her property could be disposed of. These seem to have been the real purposes of the clause in question, and as they can be fully accomplished without in any manner affecting any of the other relations between husband and wife growing out of marriage, we think we are bound to confine the operation of this clause of the

†To appear in 16 S. C. [91].

constitution to its declared and manifest objects."

We conclude that there is nothing in the provision of the constitution upon the subject of the rights of married women which excludes the legislature from passing any act upon that subject that is not in violation of the terms of that provision; and that the act of 1870, admitted to be in accord with both its terms and spirit, is constitutional, and has the force of law.

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*The only other question remaining is whether the defendant, Mrs. Campbell, is liable to be sued to judgment on the notes as her personal contract. After protecting the property of a married woman from her husband's debts, it seems to have been the intention of the act to give to her the absolute right to contract without exception or qualification. The words are: "And to contract and be contracted with in the same manner as if she were unmarried; provided that the husband shall not be liable for the debts of the wife contracted prior to or after their marriage except for her necessary support." The proviso itself indicates that a married woman may contract debts after marriage other than those for her necessary support.

Witsell v. Charleston, 7 S. C. 88, decided in 1875. In this case there was a separate estate created by will prior to the constitution, and the principal question to consider was as to the effect the constitution has upon a separate estate which was in existence at the time of its adoption, and upon that subject we make no ruling here. It was, however, held "that under Article XIV., Section 8 of the constitution a married woman has power to alienate her equitable estate in stock held by her at the adoption of the constitution, and that she might pledge the same as security for her husband's debts." In referring to the married woman provision of the constitution in this case, the court says: "Its object was to enlarge what was before known as the wife's separate estate, so as to embrace all acquisitions, past or future, of such nature that if she were a feme sole they would vest in her as property, and to enlarge her powers over such property to the same extent as if she were a feme sole, and at the same time to shield that separate estate from liability to the husband's debts against her will. * * * Now that the constitution has reversed the rule of the common law, and substituted general competence for the former rule of incompetence as it regards the holding and acquisition of real estate, it is not for the courts, on nice readings of its text, to restore a state of things from which the courts of equity have long striven to be released. * * * We have been referred to cases decided in the courts of other states on statutes similar in their general intention to our own, some regarded as favoring the view that has been expressed, and others as opposing it. When the construction of our own

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constitu*tion is free from doubt, little aid can be obtained from the decisions of the courts of other states. In the present case the meaning of our constitution is free from doubt, and it demands interpretation at our hands according to the expressed intent of the people of the state who framed it, as our organic law."

Ross v. Linder, 12 S. C. 592, decided in 1879, is the only other case in our reports upon the subject. In that case, in considering the question whether the husband was a substantial or merely a formal party, the point arose incidentally whether a married woman could bind herself by a general personal engagement. It was held "that the ability of a married woman to bind herself by a contract cannot be disputed under the provisions of General Statutes 482."

In some of the states in which the power to contract has been given to a married woman, exceptions have been introduced limiting that power. In New York and New Jersey she is expressly restrained from assuming a liability as surety, but in Illinois she is not. The sixth section of the married woman's act of Illinois is in these words: "Contracts may be made and liabilities incurred by a wife, and the same enforced against her to the same extent and in the same manner as if she were unmarried, but, except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is an idiot or insane, or is confined in the penitentiary." Rev. Stat. Ill., 1874, p. 576.

A question arose in the State of New Jersey, as late as 1879, in regard to the liability of a married woman as surety for her husband, contracted in the State of Illinois, and the court of New Jersey, notwithstanding the express exception in their own law, held that the contract must be enforced according to the Illinois law, and that under the section above cited the wife was liable, and judgment was given accordingly. Wright v. Remington, 41 N. J. 51. In delivering the judgment, Justice Reed said: "The proviso contained in the fifth section of our married woman's act is absent from the Illinois statute, and there appears in the latter no restriction upon the contractual ability of the married woman to become endorser, surety

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or guarantor. Subject *to the exceptional instances of her engaging in partnership business, she is as unrestricted as a feme sole. There can, therefore, be no question but that the contract was valid by the law of Illinois. It is the duty of the courts of this state to recognize and enforce it unless it appears injudicious to the interests of the

state or of our citizens. But nothing approaching this result can be deduced, solely from the fact that the foreign statute confers upon the married woman the power to make a contract of suretyship. That it would have been an act of legislative wisdom to have incorporated into the Illinois act a provision similar to that in our own and the New York State married woman's act, by which the married woman is restrained from assuming a liability as surety, I think the testimony in this case demonstrates. But whatever may be our opinion of the policy of legislation beyond our state we are bound by the principles of comity to recognize its validity," &c.

In Massachusetts, under the act of 1874, which provides that "a married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, except that she cannot 'convey' property to or make contracts with her husband," it has been held that a married woman was liable on a promissory note, although the consideration for the note was a debt of the husband. Major v. Holmes, 124 Mass. 108; Kenworthy v. Sawyer, 125 Mass. 28; Goodnow v. Hill et ux., 125 Mass. 588.

In Maine, under an act of 1866, declaring that "the contracts of any married woman made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole," it was held "that a married woman was liable as surety on a note." Mayo v. Hutchinson, 57 Maine 547. In this case the court quaintly remarked "that the legislatures of this state have been gradually enlarging the rights and extending the liabilities of married women. The wisdom or expediency of the act is a matter solely for the legislature. Its language is not general, and there can be no reasonable doubt of its meaning. A contract of suretyship is a lawful contract, and for a lawful purpose. It is valid and binding on a married woman. The married defendant may have been indiscreet in entering

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*into it, but that is not the fault of the plaintiff. Almost all who sign as surety have occasion to remember the proverb of Solomon: 'He that is surety for a stranger shall smart for it; and he that hateth suretyship is sure.' But they are nevertheless held liable upon their contracts, otherwise there would be no smarting, and the proverb would fail."

In Kansas, under a like statute, it has been held that a married woman was liable on a note signed by her, and she was not permitted to allege that she did not intend to charge her separate estate. Derring v. Boyle, 8 Kansas 529; Wicks v. Mitchell, 9 Kansas 88.

In Ohio the act of 1866 makes the property of a married woman her separate estate, but no special power to contract is given; yet in the case of Williams v. Hancock, 35 Ohio St., decided in 1880, it was held that a married woman having a separate estate, may charge the same in equity by the execution of a promissory note for her husband or another. From the execution of the note a presumption arises that she thereby intends to charge her separate estate with its payment, (overruling Levis v. Earl, 30 Ohio St. 147, and Rice v. Railroad, 32 Ohio St. 380.)

In New York there is given to a married woman no express power to contract; but in the case of Manhattan Co. v. Thompson, 58 N. Y. 84, Judge Church seems to lament the absence of such power, in these striking words: "If, when the legislature changed the common law in essential particulars, in regarding the interests in property of the husband and wife to a considerable extent as distinct and independent, and in recognizing the capacity of the wife to judge and provide for what her welfare requires in acquiring and holding the legal title to property, and managing and disposing of the same as if unmarried, and without subjection to the control of the husband, the courts had adopted as a reasonable and legitimate sequence the corelative rule of capacity to contract debts as if unmarried, restricted only to their collection from separate property, it might well be claimed that the rights of married women would have been as well, if not better, protected practically, sound public policy and business morality more promoted, and a flood of expensive and vexatious litigation prevented." Mr. Wells,

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in commenting on *these views of Judge Church, remarks: "Manifestly, it must come to this everywhere."

In the case before us, Mrs. Campbell did not sign as surety for her husband, but for the firm of A. R. Campbell & Co., of which her son was a member. Therefore, none of the considerations of bad policy as to the wife's being allowed to sign as surety for her husband apply here. But, in considering the general subject, it is proper not to overlook the dangers of such a power under all circumstances.

It has been strongly urged upon us that to give a married woman the unrestricted right to bind herself by contract must result in the destruction of her separate estate; that, so far as her property is concerned, it will put her absolutely in the power of her husband, if not under his baronial authority, certainly under the influence of her affection for him; that every good wife will contribute her last cent to promote the success or to maintain the credit and honor of her husband. It is not for this court to consider the wisdom or policy of the law. That is exclusively for the legislative branch of the government. Our duty is simply to announce what the law is—not what it

should be. It may not, however, be inappropriate to say that all the old confusion would at once follow the renewed effort to give the wife two inconsistent characters—that of a feme sole without disabilities as to the power to acquire and hold property, and that of a feme covert under disabilities as to the mode of charging that property and making it liable for her contracts. With every enlargement of the rights of a married woman should come a corresponding increase of her responsibilities. When they take the right to control their separate estates they assume the risks of such control. When the law gives them the privileges of separate individual citizens, they take with it the responsibilities and dangers of such citizens. Given the right to contract, they assume the liabilities of contractors. At first hardships may, in isolated instances, ensue from the inexperience of women in matters of business, but such hardships always arise upon any change in the rules of property or business.

We cannot refrain from making the further observation that if the apprehended con-

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sequences should to some extent follow *the radical change in the law, some compensation may be found in its tendency, from another direction, to restore the old condition of absolute unity in interest of husband and wife. In the language of Chancellor Wardlaw: "We trust it may never be considered improper for the wife to contribute, by all lawful means, to the success of her husband's enterprises. In many cases it is both politic and dutiful that such power should be exercised."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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15 S. C. 602

(Case No. 1121.)

CLINKSCALES v. HALL.

(November Term, 1880.)

[1. *Husband and Wife* ⇐87.]

A married woman may be sued at law upon her personal contract entered into as surety for her husband, if it was based upon sufficient consideration, and was not procured by duress.

[Ed. Note.—Cited in Witte Bros. v. Clarke, 17 S. C. 327; Habenicht v. Rawls, 24 S. C. 464, 58 Am. Rep. 268; Aultman & Taylor Co. v. Rush, 26 S. C. 529, 2 S. E. 402; Connor v. Edwards, 36 S. C. 569, 15 S. E. 706.

For other cases, see Husband and Wife, Cent. Dig. §§ 346–353, 798; Dec. Dig. ⇐87.]

[2. *Husband and Wife* ⇐241.]

The provisions of Sections 298 and 310 of the code of procedure, requiring an execution against a married woman to direct a levy and collection out of her separate property and not otherwise, are merely directory, and not necessary to the validity of the execution.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 865; Dec. Dig. ⇐241.]

[3. *Judgment* ⇐519.]

A judgment, not absolutely void, cannot be assailed by the judgment debtor under supplementary proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 963; Dec. Dig. ⇐519.]

[4. *Husband and Wife* ⇐229.]

[Cited in State v. Moses, 18 S. C. 371, to the point that an action may be maintained against a married woman as surety without alleging a separate estate.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 816–835, 838, 840–843, 979, 980; Dec. Dig. ⇐229.]

[This case is also cited and approved in Witte Bros. v. Clarke, 17 S. C. 314.]

Before Pressley, J., Anderson, September, 1879.

The appeal in this case was from an order in supplementary proceedings commenced by Reuben Clinkscales, as administrator of Jeremiah Moore, under judgment obtained by the intestate in October, 1876. The opinion states the case.

Messrs. Murray & Murray, for appellants.
Mr. J. C. C. Featherston, contra.

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*November 21st, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action on a note under seal, as follows:

One day after date we, or either of us, promise to pay Jeremiah Moore or bearer the sum of three hundred and seventy-nine dollars and eighty-seven cents, value received, with interest at twelve and a half per cent. yearly. Witness our hands and seals this January 31st, 1874.

J. G. Hall. [L. S.]
M. Jane Hall. [L. S.]

The signers of the note were both sued and judgment by default rendered against them. Judgment and execution were issued in the usual form. The sheriff returned the execution unsatisfied, and supplementary proceedings were taken against the defendant, M. Jane Hall, who was ordered to appear at Anderson Court-house on September 18th, 1879, to be examined and make discovery on oath concerning her property, &c. She employed counsel, and it then appeared, for the first time, that she was the wife of her co-defendant, J. G. Hall, neither the complaint nor judgment and execution having made any reference to that fact. The judgment was in the usual form against parties sui juris, and the execution contained the mandate "to satisfy the said judgment out of the personal property of the said M. Jane Hall within your county; or, if sufficient personal property cannot be found, then out of the real property in your county belonging to such

judgment debtor, &c., * * * in whose hands soever the same may be," &c.

The attorney of Mrs. Hall advised her not to answer the interrogatories until it could be determined whether, as a married woman, she was liable. She was ruled to show cause why she should not be attached as for a contempt in refusing to answer touching her property. She answered the rule, disclaiming disrespect and assigning reasons for not answering interrogatories. The return was heard by Judge Pressley, who made the rule

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*absolute, and from that order Mrs. Hall appeals to this court upon the following exceptions:

"1. Because the defendant, M. Jane Hall, being a married woman, and having signed the note upon which the judgment in this case was obtained as surety for her husband, the whole proceedings, so far as they relate to her, are void ab initio.

"2. Because his Honor erred in holding that the judgment and execution in this case were valid, whereas he should have held that M. Jane Hall, being a married woman, the pleadings must show the fact, and such other facts as would charge her, under the statutes, as a married woman, and render her liable upon the contract sued on, and that the pleadings in this case having failed so to do, that the whole pleadings were absolutely null and void.

"3. Because the judgment and execution being without the authority of law, all subsequent proceedings under the same are absolutely null and void, and the defendant, M. Jane Hall, cannot be required by virtue of such proceedings to answer concerning her property under proceedings supplementary to execution.

"4. Because, if the pleadings were valid and the debt genuine and binding, his Honor erred in holding that the judgment and execution are valid, whereas they are contrary to the statutes of this state and null and void, and no proceeding can be had under them.

"5. Because his Honor erred in holding that a married woman can become a surety for her husband under the statute of this state, which provides that she may 'make a contract as if she were a feme sole.'

"6. Because the decision of his Honor is incorrect in that it enlarges the powers of married women beyond those allowed by the constitution of this state, and is repugnant to the provisions of said constitution relating to the property of married women."

The first, fifth and sixth exceptions insist that the proceedings were void "ab initio," for the reason that Mrs. Hall, being a married woman, had not capacity to bind herself by a personal contract upon which she could be sued in an ordinary action at law. In the case of Pelzer, Rodgers & Co. v. Campbell & Co., ante p. 581 [40 Am. Rep. 705], this court held that under our late constitu-

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tion and *laws, a married woman has capacity to bind herself by a personal contract just as if she were a feme sole. It is not necessary to repeat here the reasons for that judgment, to which reference is made. The consequence is that this plaintiff or his intestate had the right to sue the defendant at law, notwithstanding she was a married woman when she signed the note. It does not matter whether she gave it for property purchased by herself or as surety for her husband, only provided it was given on sufficient consideration and was not extorted under circumstances that would avoid any note upon the ground of duress. Wright v. Remington, 12 Vroom 41.

The second, third and fourth exceptions make the point that, even if the debt was legal and recoverable, the judgment and execution, not having the form required by law, are absolutely void, and, therefore, the supplemental proceedings based on them are also void. Under our law, as it stands at present, a married woman has the right to bind herself by a contract that may be sued to judgment against her, which is nominally a judgment in personam, yet in its character it is so far a judgment in rem that it can be enforced only against a particular kind of property. Subdivision 4 of Section 298 of the code of procedure, under the caption "Manner of Entering Judgment," provides that "in action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise." And in Section 310 it is declared that "an execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise."

These provisions are identical with those upon the same subject in New York. In that state, however, the law does not give a married woman the general power to contract debts, but only in reference to her separate estate, and hence it was logical in that state to enforce such contracts only against her separate estate. In this state a married woman has larger powers—she may contract and be contracted with as if she were unmarried—and it would seem a proper se-

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quence that in this state the judg*ment and execution should, in a corresponding degree, be more general in their tenor. Without regard to the difference in the laws of the two states as to the powers of a married woman to contract, our code follows that of New York as to the forms of judgment and process to collect. It may be that there is no great practical objection to this, as in this

state all the property of a married woman is declared to be her separate property. But this consideration at least furnishes a reason why we should not be more exacting as to the insertion of the particular words in question than is thought necessary in the practice of that state.

It has been held in New York that "in case of a judgment against a married woman it shall be expressly stated therein that the amount is to be levied or collected out of her separate estate, and not otherwise, and the execution in its terms should follow the judgment." Baldwin v. Kinnell, 16 Abb. 353. But it has also been there held that the words prescribed by the code are merely directory and not necessary to the validity of an execution, which, even upon motion to set it aside, might be amended. Wait's Ann. Code 533; Thompson v. Sargent, 15 Abb. 452; Moncrief v. Wood, 25 How. Pr. 94. In the case last cited a motion was made to set aside an execution for costs against a married woman, which, in its terms, did not follow the words of the code, but was general. Judge Brady said: "The execution, however, was perhaps erroneous in form, not directing, as it ought to have done, the collection of the amount stated in it out of the separate estate of the plaintiff, but the error is not of any consequence."

The case of Thompson v. Sargent was very similar to this. Judgment was recovered by one Thompson against Lydia Sargent, a married woman. An execution in the ordinary form of executions against property was issued to the sheriff and returned unsatisfied. The plaintiff procured an order under the code for the examination of the judgment debtor, which, with the execution and return, the defendant moved to set aside, precisely as the appellant did in this case. Judge Clarke held as follows: "In the execution against a married woman, it is not necessary to its validity that it should contain the words contended for, [the same as here.] The words are merely directory. Of course

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the *sheriff cannot levy on any other property than the separate property, and unless the execution contains a contrary direction, there would be no danger that the sheriff would levy on any other. I hold, therefore, that the execution is valid. Being valid, I also hold that all provisions of the code in aid of or supplementary to the execution, apply to this execution as well as to any other." This would seem to be conclusive as to the case under consideration.

There is another view. The execution not being absolutely void could not be assailed in a collateral proceeding. The Circuit judge held that "when defendant permitted judgment to be entered against her by default, that had power to cure many serious defects, and he hesitated to declare the execution invalid in a collateral proceeding, no motion or other steps having been taken to set it aside." The principle announced is correct. Where parties allow judgment to go against them without defence, they cannot afterwards complain of that judgment. It is wise as a rule to sustain records when not assailed directly by proceedings instituted for that purpose. The rule is certainly general where the matters complained of are mere irregularities.

It might be otherwise if the record were absolutely void. In accordance with this principle, it has been held in a number of cases in New York that "in supplementary proceedings the validity of the judgment and execution could not be inquired into." O'Neil v. Martin, 1 E. D. Smith 415; Saunders v. Hall, 2 Abb. 418; Bank v. Sargeant, 53 Barb. 422. We are constrained to follow these cases.

The judgment of this court is that the order of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full.

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*No. 1010. BRATTON v. GUY. November Term, 1880.

[*Covenants* ⇐17.]

This is the same case which was before this court at April Term, 1879, and reported 12 S. C. 42. Upon its return to the Circuit Court, plaintiff introduced his deed, which "in consideration of the sum of five dollars and twenty cents per acre," conveyed "a tract of land containing one thousand and fifty-three acres." The words "more or less" usually added, do not appear in this deed. The covenant of warranty is in words following: "And we do hereby bind ourselves and our heirs, executors and administrators, to warrant and defend forever all and singular the said premises unto the said John S. Bratton, his heirs and assigns, against us and our heirs, and all other persons lawfully claiming, or to claim the same, or any part thereof." Plaintiff also proved a deficiency of twenty-eight acres in the quantity of this land, and some other matters immaterial to the point decided, and then rested. The Circuit judge (Mackey) granted a non-suit, upon the ground that the action was barred by the statute of limitations. Upon appeal, this court held that there was no ground for this appeal; that the deed contains a warranty only in the usual form, and that the consideration expressed of a specified price per acre does not convert this warranty into "such a special warranty, as might possibly, under the old form of pleading, support an action of debt;" and that the question here raised was substantially decided on the former hearing.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 14–16; Dec. Dig. ⇐17.]

Opinion by McIVER, A. J., March 28th, 1881. S. P. Hamilton, for appellant. T. C. Gaston, contra.

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*No. 1011. ELDER & CO. v. C., C. & A. R. R. COMPANY. November Term, 1880.

[*Costs* ⇐254.]

Upon the hearing of the appeal in this case at November Term, 1879, three counsel were heard for the appellants. The appeal was sustained, (13 S. C. 279), and in the taxation of costs the clerk of the Circuit Court allowed appellants, the plaintiffs, as disbursements, the expense of printing three points and authorities, one for each counsel heard, and $4 for copying the "case for the printer," in addition to the "making and serving case containing exceptions, $10." Upon appeal to the Circuit Court, this taxation was approved. This court say that they could not hold that there was error on the part of the taxing officer in exercising his judgment as to what was necessary, in the printing of the points and authorities, but that there was no authority for the item of $4 for copying case for the printer.

[Ed. Note.—Cited in Durham Fertilizer Co. v. Glenn & Hemphill, 48 S. C. 495, 26 S. E. 796.

For other cases, see Costs, Cent. Dig. § 962; Dec. Dig. ⇐254.]

Opinion by McGOWAN, A. J., March 25th, 1881. J. H. Rion, for appellant. H. A. Gaillard, contra.

No. 1014. GANTT v. GANTT. November Term, 1880.

Rawls and Gantt jointly purchased a tract of land from Jones and gave bond and mortgage for the purchase money, and each of them made payments. In July, 1873, Gantt had paid $269.15 over and above the half of the aggregated payments, with interest. Jones then agreed to compromise balance for $1200, of which Gantt paid $398 and Rawls paid $486 [error of $16 here unaccounted for], thus entitling Gantt to receive from Rawls on that day $375.15 to equalize their payments. (Rawls claims that he had at that time some other outstanding demands against Gantt, arising out of other transactions.) By direction of Gantt, and with consent of Rawls, the bond and mortgage were assigned by Jones to the wife of Gantt, and Mrs. Gantt afterwards brought this action for foreclosure. *Held*—

[1. *Mortgages* ⇐256.]

That the mortgage was not satisfied as against Rawls.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 681; Dec. Dig. ⇐256.]

[2. *Husband and Wife* ⇐49½.]

That the assignment would operate as a gift by Gantt to his wife of his interest in this mortgage valid between themselves, and binding upon Rawls, there being no creditors before the court.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 251; Dec. Dig. ⇐49½.]

[3. *Mortgages* ⇐256.]

That the assignee took the bond and mortgage subject to then existing equities of set-off in favor of Rawls against Gantt; but subsequent transactions between Rawls and Gantt could not be brought into the accounting in this action.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 681; Dec. Dig. ⇐256.]

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[4. *Mortgages* ⇐563.]

*That Mrs. Gantt not having appealed from the Circuit decree which fixed the amount due her at $698, with interest from the date of the assignment, that amount is assumed to be the extent of her claim, and should be paid out of the mortgaged premises with judgment against the defendants for any deficiency; but as between the defendants, each should be required to pay out of his interest in the land such sum as would equalize their payments, and adjust the equities existing between them.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1622–1626, 1628; Dec. Dig. ⇐563.]

Opinion by SIMPSON, C. J., March 29th, 1881. H. A. Meetze, W. S. Monteith, for appellant. T. S. Arthur, contra.

No. 1026. WINSMITH v. WINSMITH. November Term, 1880.

[1. *Costs* ⇐13.]

In an equity suit, costs between the parties are wholly within the discretion of the court.

[Ed. Note.—Cited in Brown v. Brown, 44 S. C. 383, 22 S. E. 412.

For other cases, see Costs, Cent. Dig. § 21; Dec. Dig. ⇐13.]

[2. *Appeal and Error* ⇐1022.]

The finding of the referee, that there was no consideration to support a note, concurred in by the Circuit judge, confirmed, such finding not being without evidence to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⇐1022.]

[3. *Executors and Administrators* ⇐340.]

Action was brought by an administratrix to sell land in aid of assets, and creditors were called in; the administratrix, being herself a creditor, could as creditor object to the validity of a voluntary bond and mortgage given by her intestate, when presented for proof.

[Ed. Note.—Cited in Werts v. Spearman, 22 S. C. 215; Spoon v. Smith, 36 S. C. 592, 15 S. E. 800.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1425–1433; Dec. Dig. ⇐340.]

[4. *Executors and Administrators* ⇐340.]

And she might, as administratrix, show that conditions have been performed which, under agreement made by the mortgagee with her intestate, operated as a release of the debt and security.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1428; Dec. Dig. ⇐340.]

[5. *Mortgages* ⇐314.]

A written request, not under seal, made by a mortgagee to the register of mesne conveyances, to enter satisfaction on the record of the mortgage, was full authority to the register, and the entry made in pursuance of such request was an acknowledgment of the payment of the debt secured by the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 917; Dec. Dig. ⇐314.]

[6. *Estoppel* ⇐87.]

When a mortgagee by his conduct and declarations induces a creditor of the mortgagor to believe that the mortgage has been satisfied, and advises such creditor to take the mortgagor's notes for the debt due, such mortgagee will be estopped from afterwards asserting his mortgage as against the notes so taken.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 234; Dec. Dig. ⇐87.]

[7. *Fraudulent Conveyances* ⇐113.]

A bond and mortgage which were taken with a secret trust for the debtor, are void as to his subsequent, as well as subsisting creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 364; Dec. Dig. ⇐113.]

Opinion by McGOWAN, A. J., April 18th,

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1881. *Thomson, and Bobo & Carlisle, for appellants. Duncan & Cleveland, contra.

No. 1029. MAXWELL v. THOMPSON. November Term, 1880.

[1. *Appeal and Error* ⇐1017.]

The reference to a referee to hear, determine and report all the issues in an action at law does not make it a case in chancery; the referee's report stands as a special verdict, and only the errors of law are reviewable in this court.

[Ed. Note.—Cited in Aultman v. Utsey, 41 S. C. 310, 19 S. E. 617.

For other cases, see Appeal and Error, Cent. Dig. § 3997; Dec. Dig. ⇐1017.]

[2. *Contracts* ⇐127.]

A building contract provided that in case of any disagreement, the matter of difference should be referred to three disinterested persons as arbitrators; such agreement is not against public policy, but may be waived by the parties.

[Ed. Note.—Cited in Jones v. Enoree Power Co., 92 S. C. 267, 75 S. E. 452, Ann. Cas. 1914B, 293.

For other cases, see Contracts, Cent. Dig. § 611; Dec. Dig. ⇐127.]

[3. *Evidence* ⇐461.]

The contract further provided: "One-half the openings to be counted in with brick excepting the front to be not measured in with brick work." *Held*, that this provision was not free from obscurity, and therefore the referee committed no error in receiving testimony of the surrounding circumstances and the usage of bricklayers, and the testimony of experts as to the meaning of the word 'front' as used at that place in like contracts, to enable him to understand what the contract really was.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129–2133; Dec. Dig. ⇐461.]

[4. *Trial* ⇐25.]

Where a counterclaim affirmatively asserts the same matter, which the denials of the answer put in issue, the defendant is not entitled of strict right to the reply in evidence upon such counterclaim.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 58; Dec. Dig. ⇐25.]

[This case is also cited in Aultman v. Utsey, 41 S. C. 310, 19 S. E. 617, without specific application.]

Opinion by McGOWAN, A. J., April 18th, 1881. J. S. R. Thomson, for appellant. Evins, Bomar & Simpson, contra.

No. 1032. CHILDS v. FRAZEE. November Term, 1880.

At the hearing of the former appeal in this case (No. 843, March 24th, 1880, unreported,) this court did not consider the merits, but simply adjudged that there was error in this case in ordering a re-sale before the balance due by the purchaser at the first sale upon the cash portion of her bid was ascertained.

[2. *Judicial Sales* ⇐27.]

A purchaser of property sold under decree of foreclosure is liable for interest on the unpaid portion of the amount that was required by the order of sale to be paid in cash.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 54; Dec. Dig. ⇐27.]

[3. *Mortgages* ⇐518.]

A purchaser of land under a decree of foreclosure having failed to comply, a re-sale was ordered, and pending appeal from this order, the land was re-sold and was purchased by the mortgagee, who took titles and re-

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ceipted to the sheriff for the amount *of his bid, less the costs which he paid in cash; but upon the hearing of the appeal the order for re-sale was set aside as premature. *Held*, that this receipt of the mortgagee could not be claimed by the first purchaser as a credit upon the amount due on her unpaid bid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1520; Dec. Dig. ⇐518.]

[4. *Costs* ⇐13.]

Costs in an equity cause are in the discretion of the Circuit Court, and there appears in this case no abuse of that discretion.

[Ed. Note.—Cited in Brown v. Brown, 44 S. C. 383, 22 S. E. 412.

For other cases, see Costs, Cent. Dig. § 21; Dec. Dig. ⇐13.]

[5. *Mortgages* ⇐370.]

A re-sale was again ordered to be made by the sheriff; whether the sheriff or the master was the proper officer to make this re-sale is a question which the purchaser at the first sale may raise only when sued for a deficiency; it cannot be made by her an objection to the order of sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1101, 1101½; Dec. Dig. ⇐370.]

[This case is also cited in Dial v. Tappen, 20 S. C. 179, without specific application.]

Opinion by McIVER, A. J., April 25th, 1881. Bauskett & Lynch, for appellants. W. A. Clark, contra.

No. 1033. CAR HIRE CASE. Ex parte JOHN H. FISHER, Receiver of the South Carolina Railroad Company. In re GIBBES v. GREENVILLE & COLUMBIA RAILROAD COMPANY, and STATE, ex relatione the ATTORNEY-GENERAL, v. THE SAME. November Term, 1880.

[*Railroads* ⇐138.]

Where the cars of one railroad company were used by another with the mutual understanding at first that there was to be no charge for car service because of other advantages enjoyed by the owner of these cars from the connection between the two companies, then regarded a sufficient compensation, such owner must show when and how this understanding was changed before an implied contract to pay for the continued use of these cars will be raised, or remuneration for their use awarded to the car-owners.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 436–439; Dec. Dig. ⇐138.]

Opinion by McIVER, A. J., April 25th, 1881. D. T. Corbin, for appellant. James Conner, A. G. Magrath, contra.

No. 1042. VERNER v. JOHNS. April Term, 1881.

V. sold to A. & B. a tract of land and took their three notes payable in one, two and three years, and a mortgage of the land to secure the payment of the purchase money. A. & B. then conveyed to J., who afterwards gave his three notes to V., identical in date, time of payment, amounts, &c., the mortgage remaining open, and A. & B.'s notes were surrendered to them. Action was brought by V. after the first two notes were due, but before the third was payable, for foreclosure,

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&c. The Circuit judge, upon testimony *taken ore tenus found that the mortgage was not satisfied, that the intention of the parties was that J. should take the land encumbered with the lien of this mortgage, and that he assumed the payment of the debt, and that his substituted notes were not taken in payment. On appeal this court approved these findings of fact, and held that there was nothing in this arrangement obnoxious to the statute of frauds.

Opinion by HUDSON, A. A. J., (in place of McGOWAN, A. J.,) June 24th, 1881. J. J. Norton, for appellant. W. C. Keith, contra.

No. 1049. BUTTZ v. CAMPBELL. April Term, 1881.

Action on money demand and judgment by default, in December, 1879. A few days afterwards and during the same term, defendant gave notice of motion to open the default, upon affidavits showing that his failure to answer had been caused by illness, and that he had a good defence. The motion was heard upon these affidavits, and upon counter-affidavits which raised a conflict of statement. The Circuit judge refused the motion, and defendant then excepted and gave notice of appeal, and two days after the rising of the court gave to plaintiff formal notice of appeal. Defendant claimed that the Circuit Court should have granted the motion under Section 197 of the code. Plaintiff moved to dismiss the appeal, because no exception was served upon the respondent or the Circuit judge within ten days after the rising of the court. *Held*—

1. That there was no ground for the motion to dismiss the appeal.

[2. *Appeal and Error* ⇐957.]

That no error of law was disclosed in the order refusing the motion to open the default, and it must, therefore, be assumed that the order was the result of the conclusion of the Circuit judge as to the weight of the evidence, a conclusion with which this court cannot interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. ⇐957.]

Opinion by McIVER, A. J., July 8th, 1881. T. M. Mordecai, for appellant. C. W. Buttz, contra.

No. 1050. VOIGHT v. BRITTON. April Term, 1881.

[*Elections* ⇐96.]

The only point involved in this appeal is, whether a registration of voters was required for the municipal election held in the city of Charleston on October 6th, 1875. The com-

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missioners of elec*tion decided that there was no law upon the statute book requiring such registration, and that therefore the commissioners of election could not direct it—that the act of September 25th, 1868, (14 Stat. 108), in so far as it relates to elections in the city of Charleston, was repealed by the act of February 26th, 1873, (15 Stat. 403.) On appeal taken directly to this court, it was held that there was no error of law in the decision of the commissioners.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 97; Dec. Dig. ⇐96.]

Opinion by McGOWAN, A. J., July 8th, 1881. R. S. Tharin, for appellant. E. B. Seabrook, contra.

No. 1062. BLAKELEY & COPELAND v. FRAZIER. April Term, 1881.

[*Appeal and Error* ⇐2.]

This case was before this court on appeal at November Term, 1877, and may be found reported in 11 S. C. 122. Upon its second trial, the Circuit judge ruled that no additional testimony having been offered, he felt constrained by the opinion of this court to grant a non-suit. On appeal from that order, it was held that the order of non-suit upon the ground on which it was based, was erroneous; that this court did not intend, in its former opinion, to adjudicate upon the sufficiency of the testimony, but only to decide that the plaintiffs must prove that the amount paid by them had been overdrawn by Frazier, and that the award, legally construed, did not fix the amount.

The appellant moved for leave to amend his "case" by noting exceptions to rulings which he had overlooked until after the proper time had expired. The appeal was perfected prior to the act of December 24th, 1880, (17 Stat. 368.) *Held*, that this act did not reinstate rights which were lost before its passage, and that, under the act of December 19th, 1878, (16 Stat. 698), the motion must be refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3–7, 1882, 2421; Dec. Dig. ⇐2.]

Opinion by SIMPSON, C. J., July 30th, 1881. J. P. Carroll, for appellants. L. F. Youmans, attorney-general, A. J. Norris, contra.

[For subsequent opinion, see Blakely v. Frazier, 20 S. C. 144.]

No. 1063. JONES v. MASSEY. April Term, 1881.

After the decision of this court, reported in 14 S. C. 292, Judge Mackey passed an order restraining the sheriff of Lancaster county from putting James R. Massey into possession of the lands which he had elected to take under his mother's will. From that order this appeal was taken. *Held*, that Judge Mackey had misconstrued the opinion of this

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court, in regarding the possession of *this land as part of the statu quo intended to be preserved; that Massey's right to the land was not questioned, nor was that portion of the Circuit decree which ordered the possession to be restored to him interfered with; that Massey's right to the possession of this land has been fully adjudicated, and he should no longer be deprived of its enjoyment.

Opinion by SIMPSON, C. J., July 21st, 1881. Ernest Moore, for appellant. R. E. Allison, contra.

No. 1069. HOGG v. PINCKNEY. April Term, 1881.

[*Appeal and Error* ⇐632.]

Motion to restore to the docket an appeal dismissed by the clerk March 1st, 1881, under Rule VII., as then of force, the appellant having failed after notice requiring it, to serve upon the respondent three copies of his case as prepared for argument. But as that rule required the three copies to be served within twenty days after the return was filed, and as the return had not been filed when the notice was given, and no demand had been made under Rule II., as then of force, to have the return filed within ten days after such demand, the notice was premature, and entailed no waiver upon the appellant for non-compliance. Motion granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2771; Dec. Dig. ⇐632.]

Opinion by SIMPSON, C. J., August 1st, 1881.

No. 1075. OSTENDORFF v. BROWN. April Term, 1881.

[1. *Mortgages* ⇐578.]

The rule laid down in Ivy v. Clawson, 14 S. C., on page 272, approved; but where, in an action for foreclosure, the case, by consent, is put upon calendar 1, to be submitted generally to a jury, and the judge orders foreclosure and sale upon the force alone of the verdict, this court will not disturb the judgment on this ground.

[Ed. Note.—Cited in Peake v. Peake, 17 S. C. 427.

For other cases, see Mortgages, Cent. Dig. § 1655; Dec. Dig. ⇐578.]

[2. *Mortgages* ⇐509.]

The Circuit Court may order the sale to be made within six months from the date of the order. Chapter CXVI., Section 2, of General Statutes, page 536, has no application to this case.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1511; Dec. Dig. ⇐509.]

[3. *Judicial Sales* ⇐7.]

Since the masters' act of March 22d, 1878, (16 Stat. 609), all sales in the counties therein named, ordered by the court in equity cases, must be made by the master.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 20; Dec. Dig. ⇐7.]

4. This action was by an assignee, and the Circuit judge excluded testimony offered by defendant as to the relationship between plaintiff and his assignor. Fraud in the original contract was alleged in the answer, but

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no charge was made against *the plaintiff, and there was nothing in the case to show what relationship was meant. *Held*, that this court could not say that the Circuit judge was in error.

5. The judge's charge having probably induced the jury to believe that the assignee was not affected by the equities existing between his assignor and the defendant, a new trial was ordered.

Opinion by McGOWAN, A. J., September 12th, 1881. W. M. Thomas, for appellant. W. E. Klein, contra.

No. 1076. TALBOTT & SONS v. PARKER & CO. April Term, 1881.

Plaintiffs sold a steam-engine, corn-mill, &c., to one S., taking his notes, and a written agreement which the Circuit Court construed to be a chattel mortgage. Afterwards defendants recovered a judgment against S., and had this property levied upon as his property. Plaintiffs then brought action against the defendants and the sheriff, and obtained a verdict—the condition of the mortgage having been broken before action brought. The plaintiffs appealed, raising two points only, upon which this court *held*—

[1. *Chattel Mortgages* ⇐173.]

That it was not necessary for the plaintiffs to produce their notes to entitle them to recover, as the action was brought by the legal owners to recover the property, and their title was shown by the agreement, which was proved, and which showed the debt, whose existence was not, in terms, denied by the defendants.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 318; Dec. Dig. ⇐173.]

[2. *Chattel Mortgages* ⇦173.]

That there was no error in the charge of the Circuit judge that "the production by the plaintiff of the mortgage was sufficient prima facie to prove that the debt secured thereby was unpaid," there being no allegation by defendants of payment. If such allegation had been made, it was incumbent upon the defendants to prove it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 326; Dec. Dig. ⇦173.]

Opinion by McGOWAN, A. J., September 12th, 1881. J. H. Earle, for appellant. J. D. Kennedy, contra.

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME XVI

CONTAINING CASES OF APRIL AND NOVEMBER TERMS, 1881

BY ROBERT W. SHAND

STATE REPORTER

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(16 S.CAR.)

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER. HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

FIRST	CIRCUIT,	HON.	BENJAMIN C. PRESSLEY.
SECOND	"	"	ALFRED P. ALDRICH.
THIRD	"	"	THOMAS B. FRASER.
FOURTH	"	"	JOSHUA H. HUDSON.
FIFTH	"	"	JOSEPH B. KERSHAW.
SIXTH	"	"	THOMAS J. MACKEY.
SEVENTH	"	"	WILLIAM H. WALLACE.
EIGHTH	"	"	JAMES S. COTHRAN.†

ATTORNEY-GENERAL.

HON. LEROY F. YOUMANS.

SOLICITORS.

1*st Circuit.*—W. ST. J. JERVEY.	5*th Circuit.*—R. G. BONHAM.
2*d Circuit.*—F. H. GANTT.	6*th Circuit.*—T. C. GASTON.
3*d Circuit.*—J. J. DARGAN.	7*th Circuit.*—D. R. DUNCAN.
4*th Circuit.*—G. W. DARGAN.	8*th Circuit.*—J. L. ORR.††

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

† Hon. J. S. Cothran qualified as Judge of the Eighth Circuit, under the appointment of the Governor, as successor to Hon. Thomas Thomson, deceased, on May 18th, 1881. In December, 1881, he was elected by the General Assembly for the constitutional term of four years.

†† J. L. Orr qualified as Solicitor, under the appointment of the Governor, June 4th, 1881, as successor to James S. Cothran, elevated to the bench.

LIST OF ATTORNEYS

ENROLLED IN THE SUPREME COURT OF SOUTH CAROLINA DURING THE YEAR 1882.

ALLISON, R. B.....Lancaster.
AULL, ELBERT H.....Newberry.
BOMAR, EDW. EARLE.....Spartanburg.
BONHAM, JAMES.....Columbia.
BONHAM, Jr., M. L.....Abbeville.
BOWMAN, ILDERTON W.....Orangeburg.
BRUNSON, W. A.....Darlington.
CARSON, RALPH K.....Spartanburg.
CARTER, THURLOW S.....Lancaster.
CARY, JAMES P.....Oconee.
CHALMERS, JAMES.....Abbeville.
CHARLTON, L.....Edgefield.
CORRY, JAMES A.....Spartanburg.
CUNINGHAM, BENJ. D.....Laurens.
DE TREVILLE, J. C.....Walterboro'.
DUNOVANT, W. L.....Edgefield.
EFIRD, C. M.....Lexington.
EVANS, H. H.....Newberry.
EVANS, N. G.....Edgefield.
GALLUCHAT, M. CLINTON.....Newberry.
GANTT, LONGSTREET.....Barnwell.
GARY, FRANK B.....Abbeville.
GLOVER, JULIUS.....Orangeburg.
GOOD, W. P.....Yorkville.
GRAYDON, WILLIAM N.....Cokesbury.
GRUBER, W. B.....Walterboro'.
GUNTER, B. F.....Aiken.
HANAHAN, JAMES W.....Fairfield.
HAY, R. G.....Barnwell.
HAYNSWORTH, EDGAR C.....Sumter.
HAYNSWORTH, H. J.....Kingstree.
HERBERT, D. O.....Newberry.
HOLLINGS, E. B.....Charleston.
JONES, JOHN B.....Newberry.
JONES, W. M.....Pendleton.
KELLY, W. R.....Blackville.
LAWRENCE, F. D. J.....Charleston.
LEE, W. W.....Spartanburg.
MATTISON, J. S.....Anderson.
MCCRAVY, S. T.....Spartanburg.
MCLAUGHLIN, JAS. W.....Summerville.
MCLAURIN, J. L.....Bennettsville.
MERCHANT, W. ERNEST.....Newberry.
NOBLE, Jr., EDWARD.....Abbeville.
PRESSLEY, CHAS. P.....Abbeville.
PRICE, J. T.....Pickens.
RAGSDALE, G. W.....Fairfield.
RICE, D. P.....Lexington.
RICHARDSON, C. C.....Spartanburg.
ROGERS, THOS. IRBY.....Marlboro'.
SAWYER, CLAUDE E.....Aiken.
SMITH, ROBERT LOYD.....Charleston.
SNOWDEN, YATES.....Charleston.
TOWNSEND, D. A.....Union.
VARN, HENRY A.....Colleton.
WELBORN, ADAM C.....Greenville.
WERBER, Jr., F.....Newberry.
WHITNER, FRANK C.....Anderson.
WILLIAMS, EDWARD H.....Georgetown.
WINEMAN, MYER J.....Charleston.
WOODWARD, M. B.....Aiken.
YOUMANS, JULIUS P.....Hampton.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. W. D. SIMPSON, CHIEF JUSTICE.
HON. HENRY McIVER, ASSOCIATE JUSTICE.
HON. SAMUEL McGOWAN, " "

16 S. C. *1

*(Case No. 1082.)

DENT v. BRYCE.

BUILDING AND LOAN ASSOCIATION v. SAME.

(April Term, 1881.)

[1. *Evidence* ⇐158.]

Where the law required the board of county commissioners to fix the rate of taxation for county purposes, and to certify the same to the county auditor, a notification to the auditor of the tax levy for county purposes, signed by the chairman of such board, is not, in support of a tax-title, the best proof of the action of the board, nor did it confer upon the auditor authority to make the tax levy indicated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 493, 494; Dec. Dig. ⇐158.]

[2. *Schools and School Districts* ⇐103.]

But where the law prescribed no special mode of action in the matter of a school tax, and did not direct the manner of notification to the auditor, a circular directing a tax levy for school purposes, signed by the school commissioner and addressed to the auditor, is sufficient authority for the levy of such school tax.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 242; Dec. Dig. ⇐103.]

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[3. *Appeal and Error* ⇐842.]

* Whether a special tax has been directed by the vote of a school district is a question of fact for the jury, and cannot be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. ⇐ 842.]

[4. *Evidence* ⇐366.]

A circular purporting to have been issued from the comptroller-general's office should not be permitted to go to the jury as evidence, without proof that the signature of the comptroller-general thereto is genuine.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1522; Dec. Dig. ⇐366.]

[5. *Evidence* ⇐183.]

A county treasurer having testified that he had searched his office, where tax executions were generally filed, for the executions issued by his predecessor, but could not find them, there was no error in receiving as evidence the county treasurer's execution book to show that the taxes on the lands sold, and here in dispute, were unpaid, and that executions therefor had been issued and returned unsatisfied.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 612; Dec. Dig. ⇐183.]

[6. *New Trial* ⇐66.]

A verdict being rendered which the trial judge had charged the jury as matter of law that they could not render, his refusal to vacate it on motion for new trial was error. The jury are the judges of the facts, but they must take the law of the case from the judge's charge, which they are bound to follow whether right or wrong.

[Ed. Note.—Cited in Thompson v. Lee, 19 S. C. 489, 491; Altee v. South Carolina Ry. Co., 21 S. C. 559; McCord v. Blackwell, 31 S. C. 138, 9 S. E. 777; Brown v. Wilson, 45 S. C. 529, 23 S. E. 630, 55 Am. St. Rep. 779; Going v. Mutual Ben. Life Ins. Co., 58 S. C. 213, 36 S. E. 556; Virginia-Carolina Chemical Co. v. Kirven, 65 S. C. 205, 43 S. E. 658; Robert Buist Co. v. Lancaster Merc. Co., 68 S. C. 526, 47 S. E. 978; Towles & Arnett v. Atlantic Coast Line R. Co., 83 S. C. 505, 65 S. E. 638.

For other cases, see New Trial, Cent. Dig. § 133; Dec. Dig. ⇐66.]

[7. *New Trial* ⇐155.]

The motion being in substance to vacate the verdict, was properly heard when made, although designated a motion on the minutes for a new trial.

[Ed. Note.—Cited in Darlington Oil Co. v. Pee Dee Oil & Ice Co., 68 S. C. 52, 46 S. E. 720.

For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. ⇐155.]

[This case is also cited in State ex rel. Hagood v. Thompson, 18 S. C. 542, as to what is best evidence of an assessment.]

Before Thomson, J., Richland, April, 1879.

These were two actions heard together.

The first, Jesse E. Dent against Sarah H. Bryce, was an action to recover a lot of land in the city of Columbia; the second, The Mechanics' and Farmers' Building and Loan Association, of Richland, against the same defendant, was an action to recover the Bluff plantation, six miles below Columbia, in Richland county. This city lot and plantation were both forfeited to the State of South Carolina, for want of bidders, at a delinquent land sale made by the treasurer of Richland county, on June 5th, 1876, for the unpaid taxes of 1874 and 1875, due by Sarah H. Bryce as owner of this property, and were sold as forfeited lands by the State, through the treasurer of Richland, on November 30th, 1876, and were purchased by the plaintiffs, respectively, who received each a grant dated December 1st, 1876, under the seal of the State, and signed by "Daniel H. Chamberlain, governor, S. C."

The taxes unpaid and for which, together with penalties and costs, this real estate was sold, included a county tax of four mills, and a school tax of one mill. The county tax was

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*inserted in the tax duplicate under the authority of the notification from E. M. Weston, chairman, stated in the opinion of this court. The signature and official character of Weston were duly proven, but no other evidence was introduced to show action by the board of county commissioners. The only authority for the school tax was the following circular:

Office of School Commissioner,
Columbia, S. C., October 23d, 1874.

A. L. Solomon, County Auditor:

Dear Sir—There are five school districts in the county that have levied a district school tax:

School district No. 1.....One mill.
School district No. 2.....One mill.
School district No. 3.....One mill.
School district No. 4.....One mill.
School district No. 5.....Not any.
School district No. 6.....One mill.
School district No. 7.....Not any.
School district No. 8.....Not any.
School district No. 9.....Not any.

But you can do as you did last year; you can make a general levy of one mill on a dollar, on all taxable property in this county, for school purposes. I have the honor of being, Your obedient servant,

D. N. Simonds, School Commissioner, R. C.

The signature and official character of Simonds were duly proven.

Plaintiffs offered in evidence the original return of Sarah H. Bryce, made August 13th, 1873, which included this plantation and city lot, whose assessment was increased by the board of equalization, and, also, personal property to the amount of $1,694.

W. H. Gibbes, witness for plaintiffs, testified that he was county treasurer of Rich-

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land, and that tax executions were gen*erally filed in his office, but were not preserved with care; that he had made diligent search for the executions against Mrs. Bryce for the taxes of 1874–75, but could not find them; that the treasurer's execution book showed that two executions had been issued against the personal property of Mrs. Bryce for said taxes, and were returned unpaid and unsatisfied.

In the settlement of the case, the presiding judge reports his charge, and the motion for new trial, order thereon, &c., as follows:

The court will now call the attention of the jury to certain points made by the defense, being in the nature of exception to the proofs of the plaintiffs.

1. The want of power on the part of the assessors to assess the land in 1874 at a higher value than that contained in the defendant's listing or return, the defendant denying the right of the assessors to increase the valuation. Provision was made by the A. A. 1874 for a county board of equalization, giving them power to enter land on the tax list at its true value. This is the action objected to, which seems to the court without force.

2. Exception was taken to the levy of the tax of 1873 in relation to the school purpose. The defendant claims that there were no meetings of the taxpayers in the different school districts in Richland county, except in School District No. 1. You have heard the testimony of Mr. Agnew and others as to such meetings held here. You are without proof of actual meetings being held in the other school districts of the county. If there were no meetings in the school districts it would affect the title. If no meetings were held, then no school tax could be levied: or if meetings were held and not formally conducted, and a sale made thereunder for taxes, the title would be defective; a very small tax illegally levied (laid on) would vitiate the title. If you find such meetings were not held, the court instructs you the title is defective. The question of meetings, however, is one of fact, and for the jury.

3. Objection has been made, that a paper signed by E. M. Weston (without seal), chairman of county commissioners, directing a levy for county purposes and new court house, was informal and defective. Whether

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Weston is chairman of board *of county commissioners or not, is a question of fact for you, though the evidence that he was seems to be abundant and unimpeached.

4. The property in question belonged to the defendant. She took the same under her husband's will. The title vested in her, subject to payment of debts. I instruct you, she is the owner of the property, at least in the sense which renders it subject to taxation in her hands.

5. There was no proof by the production of the papers that executions against the defendant had been issued for the payment of

taxes. I instruct you, that if there was personal property sufficient to pay the taxes on the real estate, it should have been exhausted first and the land not returned as delinquent. It was the duty of the officer to levy on the personal estate before resorting to the real estate. This is a question of fact for the jury. If the jury come to the conclusion that there was personal property enough to pay the taxes, the land was improperly returned as delinquent. In 1873, there was considerable personal property—more than enough to pay the taxes at that time. If, when the executions were issued, there was personal property to have satisfied them, you should find for the defendant.

The grants in these cases were executed by the governor to the plaintiffs. The practice seems to have fluctuated since 1871. According to the Revised Statutes, the State became the purchaser on the same terms as a private individual. When a sale was made, the governor was required to issue the patent and the title then vested. The act of 1874 changed this. It declares that the land shall be forfeited and remain in the State until sold as forfeited real estate, and I infer that the auditor should make the deed. This was amended or changed by the act of 1875, which requires the governor to sign the patent. Under the act of 1876, it is clear the governor should not sign the patent. The lands in these cases were sold under the act of 1876, and I think the county treasurer should have made the title. The governor has no right, under this act, to convey the land. As a question of law, I instruct you, the grants do not convey the lands to the plaintiffs, and it follows your verdict should be for the defendant.

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*The court was requested to instruct the jury, that if there was a meeting in School District No. 1, a failure to hold meetings in the other school districts of the county could not affect the title in School District No. 1. The court instructed the jury, that if there was a levy of a school tax for the whole county, and if any school district had held no meeting, that would vitiate the title.

The jury found verdicts for the plaintiffs in both cases.

Upon the rendering of the verdict, the defendant's counsel gave notice of a motion for new trial upon the minutes of the court. These motions were afterwards heard and refused, as appear by the orders below in this case.

The motion for new trials was urged upon several grounds, but chiefly upon the ground that the verdicts were against the charge of the presiding judge. This is correct, and had the court continued to construe the law to be as it was stated to the jury, new trials would have been granted. But after argument of counsel, and a further examination of the tax acts, since 1870 to the present time, than could be had on the trial, the court is of opinion that the governor was the party to issue the deeds or patents, and that in this respect the parties' titles were good.

The jury having solved the other questions in the case in favor of the plaintiffs, new trials were refused.

The case was brought by defendant to this court by a simple notice of appeal from the order refusing a new trial, and upon the exceptions to testimony taken during the trial.

Other matters are stated in the opinion.

Mr. E. R. Arthur, for appellant.

The board of equalization could act only in 1870, and every fifth year thereafter. Const. Art. IX. § 6. No proof that an execution against real estate was ever issued. Abbott's Tr. Ev. 703, 704. No county tax was levied. 14 Stat. 274, § 3; Blackf. 98. The circular is not signed by a majority of the board, nor attested by the clerk, nor under seal, and does not profess to be under resolution. Const. Art. I. § 14; Cooley's Const. Lim. 521; 1 Strobh. 402. No school

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tax levied. 14 *Stat. 584. Part of tax being illegal, the sale is void. Black. Tax T. 160. The charge of the judge was the judgment of the court, and could be reviewed here, but was binding upon the jury. Const. Art. IV. § 4. It was the duty of the judge to construe the grants or patents. 3 S. C. 253; 6 Ibid. 351; Hill. New Tr. 326; 24 Geo. 372; Stark. Ev. 797. The instruction of the court, whether correct or incorrect, is binding on the jury. 4 Mass. 79; 4 Whart. 66; 40 Cal. 545. And if they fail to follow it, a new trial should be granted. 11 Mees. & W. 670; Stark. Ev. 797. A refusal to grant a new trial is error. 4 Mass. 79.

Mr. W. A. Clark, contra.

A motion on the minutes for new trial does not include this motion. Code, § 288, subd. 4; 3 Wait's Pr. 423; 7 Rob. 392; 19 How. Pr. 409. When the verdict is contrary to law a new trial will be granted, but not when contrary to an erroneous charge. 3 J. J. Marsh. 153; 2 Geo. 1; 17 Ibid. 267; 9 Miss. 400; 1 Yeates 327; 26 Geo. 701; 20 Amer. Dec. 131, notes; 2 N. & McC. *286. No formal executions for the collection of taxes are required. Gen. Stat. ch. XIII., §§ 3, 6; 3 Bl. Com. 6. Gibbes' testimony made the execution book the best evidence attainable. 31 N. Y. 115. Since 1873 (15 Stat. 479), the county commissioners do not fix the rate per centum of county taxes; it is done by the appropriation acts. 15 Stat. 515, 657; 16 Stat. 9, 286, 549. The courts will not require a seal to sustain the order of the county commissioners. 3 Rich. 35. The orders of the comptroller-general are all transmitted in the form of circulars. All of the exceptions here are too general to be considered. 3 Wait's Pr. 205.

Mr. J. P. Arthur, in reply.

September 20th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. These two cases were heard together on appeal, and as they involve the same questions, but one opinion will be pronounced.

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*The questions involved arise upon exceptions to the rulings of the Circuit judge upon the testimony offered at the trial and upon the refusal of the Circuit judge to grant a new trial, the defendant being the appellant in both cases. The actions were brought to recover real property, the plaintiffs in both cases claiming title under a tax sale, to support which they introduced a patent executed by D. H. Chamberlain, then governor of the State, conveying the land in dispute, and reciting that it had been sold to plaintiffs by Darling, the treasurer of Richland county, as forfeited land, on the 1st day of December, 1876. The patent recited the various acts under which the land had become forfeited. The plaintiffs, feeling it incumbent upon them to make out a complete title, undertook to show that all the steps necessary to forfeit the land had been taken by the proper officers previous to the sale at which they purchased, and that the sale had been conducted according to law. To this end, their testimony was directed, among other points, to the following: First, that a proper levy of county taxes had been made and ordered by the county commissioners; second, that the school commissioner had also levied a proper tax; third, that the county treasurer had conducted the sale under legal regulations from the comptroller-general; and fourth, that previous to the sale, executions had been issued to sell personalty, which had been returned unsatisfied. There were other points, but they need not be considered.

To prove the first point, a paper purporting to be a circular from E. M. Weston, chairman of the board of county commissioners of Richland county, directing the county auditor to levy a tax of four mills for county purposes, was offered. This paper was signed by E. M. Weston, as chairman of the board, and was without seal. To prove the second, a similar paper, purporting to come from the school commissioner, D. N. Simonds, was offered. To prove the third, a circular purporting to come from Thomas C. Dunn, comptroller-general was offered; and to prove the fourth, Mr. W. H. Gibbes, treasurer of Richland county at the time of the trial, was allowed to show from the books in his office that executions had been issued and returned unsatisfied. Mr. Gibbes introduced the exe-

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cution book. He testified that he *had made diligent search for the original executions, but could not find them, and he was satisfied, from the tax duplicate and the entries in the execution book, that the executions were issued and had been returned unsatisfied, as there was no evidence of payment. The defendant objected to all of this testimony, upon grounds which will be considered in their order.

The judge charged the jury, as matter of law, that the governor had no legal power to execute the patents, and, on that account, he instructed them that their verdict should be for the defendant. Notwithstanding this positive charge upon a matter of law, the jury found for the plaintiffs. The defendant moved for a new trial. This motion was urged upon several grounds, but chiefly because the verdict was rendered against the charge of the judge. The judge refused the motion, saying in substance that, upon reflection and a more thorough examination of the tax acts, he had become satisfied that the governor was the proper officer to issue the deeds or patents in such cases; and inasmuch as the jury had followed the law, although against instructions, he would refuse the motion for a new trial. We have nothing to do with the questions of fact involved in the case. This is not a case in chancery, but a case at law, and our jurisdiction is confined entirely to errors of law, if any, on the part of the Circuit judge, brought before us by exceptions.

Was it error on the part of the Circuit judge to admit as evidence the paper purporting to be a paper signed by E. M. Weston, chairman of the county commissioners, to show that a levy of four mills had been directed by that board? The point that this paper was without seal did not appear in the "case" when first made up, but the case was amended afterwards by leave of the Circuit judge. This was objected to by the respondent at the time, but this objection has not been urged here, and it will not be necessary to consider it.

Formerly the power to assess taxes for county purposes was vested in the county commissioners. See Act of 1869, 14 Stat. 274; Gen. Stat. p. 148, § 10. Their warrant of assessment, signed by the county commissioners, with the seal of the county, certified by the clerk, was the treasurer's authority to collect the taxes thus levied. 14 Stat. 237;

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15 Stat. 274, 407. In the *absence of this warrant, thus prepared and verified under the act of 1869, it would have been illegal for the treasurer to act. The act of 1869, however, was repealed by the act of 1873, and a change made in the mode of assessing and collecting both State and county taxes thereafter. Act 1873, 15 Stat. 479. By this last act the rate per centum of taxes for State purposes was fixed by the Legislature. 15 Stat. 515, 657; 16 Stat. 9, 286, 549.

This scheme was in force in 1874, when the taxes which have given rise to this case accrued; and under the act to raise supplies for the fiscal year commencing 1st Novem-

ber, 1874, § 8 (15 Stat. 658), a maximum of three mills in each of the counties in the State was provided for, the exact rate to be fixed by the county commissioners, and by them to be certified to the county auditor. It was necessary for the plaintiffs in these cases to prove that this rate for the county of Richland had been fixed by the county commissioners, and that it had been certified by them to the county auditor. The precise question between the parties as to this point was whether any rate of taxation had been fixed by the county commissioners and had been certified by them to the county auditor. The burden of proving this fact was assumed by the plaintiffs, and the circular of E. M. Weston was permitted by the judge to be introduced for that purpose. This circular is as follows:

"A. L. Solomon, County Auditor, Columbia, S. C.:

"Sir—You are hereby notified to levy for current county expenses three mills, and for the new court house one mill, upon all property, real and personal, returned for taxation in Richland county."

(Signed) "E. M. Weston,
"Chairman Board C. C."

It is a general rule of evidence that the best evidence which the nature of the question admits of must be introduced. This rule admits secondary evidence, where the party has shown that it is out of his power to produce primary. We think that the admission of this paper violated this general rule.

The act of the general assembly required

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that the rate of *taxation for county purposes should be fixed by the county commissioners, and should be certified by them to the county auditor. The question at issue was, had the rate of county taxes been thus fixed and certified? Now, was this note of the chairman of the county commissioners, addressed to the auditor, the best evidence which that question admitted of? It required the action of the board, as an organic body to fix the rate. This action should have been expressed by resolution or in some other way, showing the assent of the board, or a majority of them. The note of the chairman did not show that the board as a body had taken any action whatever on the subject. It is simply a notification from himself directing the auditor to levy the rate therein specified. The best or primary evidence which this fact required was the production of the proceedings of the board. If this was out of the power of the plaintiffs, then the way would have been open for the introduction of secondary evidence. And upon proof of this fact such secondary evidence as was within the reach of the plaintiffs might have been relied on; but there was no attempt to show, even prima facie, that the plaintiffs had exhausted all effort to produce the action of the board, or that any had been taken. The plaintiffs rested their case, as to this point, upon the note of the chairman alone. This, under the facts, we think was not only insufficient but incompetent at that stage of the case, and there was error in admitting it.

The act of 1874 not only requires that the rate of taxation shall be fixed by the county commissioners, but also, when fixed, that it shall be certified by them to the county auditor. This contemplates some regular proceedings, in such shape as to be the subject of a separate certificate, and the auditor had no authority to act until he received this certificate. As has been said, the primary evidence would have been the production of these original papers. If proof had been offered that these papers were out of the reach of the plaintiffs, the foundation would have been laid for the introduction of secondary evidence, and then possibly as secondary evidence this note of Weston might have been introduced. But even then, if this paper was intended to prove that the

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tax had been levied by the county *commissioners, it would amount to no more than a written declaration of Weston that the board had taken this action. It would be proving by the parties who testified to Mr. Weston's signature that Mr. Weston, by written declaration, had said that the board had levied the taxes, which he directed the county auditor to have collected. In this view it would be objectionable as hearsay, and therefore incompetent.

The exception of appellant as to the note of the school commissioner is not as well taken. The school commissioner had no power to direct a levy until authorized by a vote of the township. Whether this vote had been taken, was a question of fact to be passed upon by the jury and is not before this court. The question here is whether the paper in question was competent evidence to the point that a levy had been directed by the school commissioner. The act prescribes no special mode of action on the part of the school commissioner, nor does it direct the manner of notification to the treasurer. In the absence of all statutory regulations on the subject, we think any written communication by the school commissioner to the treasurer, directing the levy, would be sufficient. In this case the original paper, after proof of the signature of the school commissioner, was introduced. We see no error in permitting this paper to go to the jury.

The Dunn circular stands upon a different ground. That was introduced by the respondents to account for the fact that the lands had been sold at a different time from that prescribed by the act in reference to the sale of forfeited lands. The comptroller-general, it appears, was empowered by a spe-

cial act—"An act to provide for extending the time of holding delinquent land sales in the several counties of the State," 15 Stat. 936—to change the time of making these sales; and, by virtue of his powers under this act, it was alleged that he had fixed the time for these sales at a different time from that required by the general act on this subject. And this circular was offered and admitted to prove this fact. It purported to come from the comptroller-general's office, but there was no proof that the signature attached was genuine. In the absence of such proof, it had no foundation to go to

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the jury as an official paper, and we *think it was error on the part of the Circuit judge to admit it in that form.

We see no error in the ruling of the Circuit judge as to the evidence of Mr. Gibbes on the subject of the executions. Mr. Gibbes proved that he had looked for the original executions but could not find them. The execution book of the treasurer was then introduced, to show by the entries therein that these executions had been issued and had been returned unsatisfied. Mr. Greenleaf, vol. 1, p. 483, says that books "kept by persons in a public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties, * * * are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath and the power of cross-examining the person on whose authority the truth of the documents depends." This book, we think, belonged to that class. True, it indicated higher and better evidence, to wit, the original execution, but these were lost or mislaid, and it was not in the power of the plaintiffs to produce them. The book then became secondary evidence, which, under the rule, was admissible.

This brings us to the last ground of exception—the refusal of the judge to grant a new trial.

The plaintiffs relied upon the deed or patent executed by the governor. This paper involved two questions—first, the authority of the governor to execute such a paper; and, second, the fact of execution. The first was a question of law and the second a question of fact. To entitle the plaintiffs to recover, it was necessary that these questions should be resolved in their favor, because without this—let the other facts of the case be as they might—the defendant was entitled to the verdicts. The court was the judge of the question of law and the jury of the question of fact. Under our system this is the case in all jury trials. The court decides the questions of law and the jury the facts. The value of this system depends greatly upon the preservation of this distinction. The functions of each should not only be preserved intact, but should be kept separate and apart. So important was this re-

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garded by the founders of our judicial *system that it was expressly provided in the fundamental law of the State government—the constitution—that the judges should not only be limited to questions of law, but should be forbidden to comment on the facts. True, there is no such express inhibition upon the jury invading the province of the court, but this, no doubt, was because such invasion was not supposed possible.

It needs no authority, then, to say that the jury is bound to take the law from the court. This principle applies in every class of cases, except one not necessary now to be considered. And when the law is announced by the court it is the law of the case until overruled by a higher authority. It follows, then, that a verdict in direct conflict with the law of the court is a verdict against the law, and will in all cases be vacated in the first instance, either sua sponte by the judge, or on motion of the aggrieved party. Any other doctrine would lead to the utmost confusion. If the jury could question the charge of the judge, the result would be that in every case the whole case, both law and facts, would go to the jury, under the hope that, whatever might be the charge of the judge at the time, he could be satisfied afterwards that he was in error. This could not be tolerated. It would degrade the judiciary and unhinge the whole system. The argument of the respondent, by which he attempts to draw a distinction between a verdict contrary to the charge of the judge and one contrary to law, though ingenious, fails to meet the case. In fact, that doctrine would open the door to the very evil which a separation of the powers and duties of the court and jury was intended to prevent. So far as the jury is concerned, there is no such thing as the charge of the judge being contrary to law, because, whatever may be his charge, it is the law to them.

The question before the court is not whether the governor was authorized to issue the patent—and we have not considered that question—but whether the judge should have set aside the verdicts, which, as matter of law, he had directed the jury they could not render. In our opinion it was error on his part not to vacate their verdicts. Whether this motion was properly made to the court below on the minutes of the judge, under the code, we think is not material here. The

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motion was, in substance, to vacate the *verdicts as contrary to the law given to the jury by the court, and it was in order for the judge to hear it when made.

The judgment of this court is that the

judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 15

(Case No. 1083.)

MOORE v. HOLLAND.

(April Term, 1881.)

[1. *Interest* ⇐38.]

A note was executed in 1867 for $2,000, payable at one day, with interest at sixteen per cent. per annum, and, at the same time judgment was confessed thereon for the same amount, with interest at the same rate; judgment was entered five days afterwards for the debt so confessed, without specifying any rate of interest, and execution of fi. fa., in usual form, was issued. *Held*, in action by junior lien creditors of the defendant to the confession, that the rate of interest due on the judgment was regulated by the act of 1866, § 2, (13 Stat. 439,) and not by the agreement of the parties, and that the judgment bore only seven per cent. interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 80; Dec. Dig. ⇐38.]

[2. *Payment* ⇐42.]

Payments made and entered as credits "in part of this case," must be so credited by the court, and cannot be applied in extinguishment of the higher rate of interest stipulated for in the confession.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 121; Dec. Dig. ⇐42.]

[3. *Constitutional Law* ⇐152.]

Section 313 of the Code of Procedure, adopted in 1870, declaring that final judgments thereafter rendered, should not, of themselves, constitute a lien upon real or personal property, but that such lien might be obtained by levy, &c., did not impair the obligation of contracts entered into prior to its passage.

[Ed. Note.—Cited in King v. Belcher, 30 S. C. 385, 9 S. E. 359.

For other cases, see Constitutional Law, Cent. Dig. § 521; Dec. Dig. ⇐152.]

[4. *Assignments* ⇐106.]

A., having become the purchaser of a tract of land at sheriff's sale, transferred his bid to B., under agreement that any profit made on a resale should be credited on a debt then due by A. to B.; and shortly afterwards, B. resold at a profit, partly for cash and partly on a credit secured by mortgage. *Held*, that A. was entitled to a credit of this profit at the date of the resale, there being no proof that the balance due on the mortgage was not amply secured.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 184; Dec. Dig. ⇐106.]

[5. *Judgment* ⇐533.]

[Cited in Ryan v. Southern B. & L. Ass'n, 50 S. C. 190, 27 S. E. 618, 62 Am. St. Rep. 831, to the point that a judgment granted upon a contract determines and closes it, and gives means for its enforcement or redress for its breach.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 978, 983; Dec. Dig. ⇐533.]

Before Mackey, J., Edgefield, April, 1880.

This was an action commenced in September, 1878, by Mrs. S. E. Moore and others,

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the heirs at law of W. N. Moore, *deceased, and by Mary P. Lake and others, the heirs at law of Thomas Lake, deceased, against Bennett Holland, assignee of J. M. Richardson; Lycurgus Charlton, Judge of Probate, and successor in office to D. L. Turner; R. G. M. Dunovant, M. C. Taggart, Butler & Youmans, J. L. Addison and A. J. Norris, assignees of B. F. Yoe; M. A. Markert, and J. T. Gaston, sheriff of Edgefield county. Taggart was the owner of an interest in the Yoe mortgage. The case is fully stated in the opinion.

Messrs. Norris & Folk, for appellant Holland.

The note was merged in the judgment. Freem. on Judg. § 217; 7 Wait's Act. & Def. 320. But the confession of judgment was, itself, a contract between the parties, and bore the interest agreed upon. 8 S. C. 202; 9 Rich. Eq. 56; 3 Gray 411; 16 Cal. 373; 2 Sandf. 402; 4 Wait's Act. & Def. 184; 5 S. C. 125; 15 Wall. 610; 36 N. J. 390; 8 Rich. 164. Where there is no agreement, judgments bear interest at 7 per cent. under the statute; but parties may stipulate that a judgment shall bear a higher rate, and such agreement will be lawful. 2 N. & McC. 40; 9 Rich. 80. Applying the principles of these cases to this case, and the contract of the parties must be enforced, because their rights are not restricted by the act of 1866. See, further, 6 Am. Dec. 190; 2 Nev. 199; 96 U. S. 53; 2 Hill 408; 3 Rich. 125; 1 Strob. 115; 14 S. C. 341. Where contract is made in another State, the higher rate of interest which obtains there is allowed here. 7 Rich. Eq. 395. That parties might contract for any rate of interest, see Association v. Thompson, MS. Dec. No. 860. The proof is conclusive that there was such an agreement in this case. At least, the payments should be applied to the interest contracted for, as the evidence shows that it was paid with such an understanding; and, if the receipt does not so express it, the parol testimony so explains it. 7 Wait's Act. & Def. 445; 59 Pa. St. 59; 7 S. C. 233; 9 S. C. 92.

Mr. R. G. Bonham, for plaintiffs.

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*Mr. B. W. Bettis, Jr., for Markert, appellant.

Mr. J. P. Carroll, for R. G. M. Dunovant.

September 20th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. To a proper understanding of the questions of law involved in this case it will be necessary to insert the Circuit decree of Judge Mackey. This is the more important as a full statment of the facts of

the case will also be found in this decree compactly stated.

It is as follows:

Decree of Court.

On the 4th of January, 1858, R. G. M. Dunovant having been duly appointed guardian of Mary C. Brooks, who afterwards intermarried with George B. Addison, entered into bond to the then commissioner in equity in the penal sum of $25,000, conditioned for the faithful performance of his trust as guardian, with Thomas Lake, W. N. Moore and Z. W. Carwile as sureties thereto.

On the 21st May, 1868, the said George B. Addison and wife filed their bill in the Court of Equity against the said R. G. M. Dunovant, as guardian, and his sureties, praying for an account and settlement. And on the 11th of March, 1870, a decretal order was passed in the said case in favor of the said George B. Addison and wife for the sum of $2,000.

On the 28th December, 1873, the said George B. Addison and wife assigned the said decree to Martha C. Brooks, and the same was, on the 2d January, 1878, assigned, one-half to the heirs at law of Dr. Thomas Lake, and the other half to the heirs at law of W. N. Moore, deceased.

The referee reports as due on said decree, on the 1st October, 1879, the sum of $2,403.62, of which sum $1,955.55 is principal, bearing interest, and the balance accumulated interest and costs.

On the 25th February, 1867, the said R. G. M. Dunovant executed his bond to James M. Richardson, whereby he covenanted, one day after the date thereof, to pay to the said

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James *M. Richardson or bearer the sum of $2,000 in currency, with interest thereon from date, at the rate of sixteen per cent. per annum.

Suit was brought on said bond on the same day, to wit, the 25th February, 1867, by James M. Richardson; and on the declaration the following endorsement was entered by the said R. G. M. Dunovant, to wit:

"I confess judgment in this case to James M. Richardson, the plaintiff, in the sum of $2,000, with interest thereon from the 25th day of February, A. D. 1867, in currency, at the rate of sixteen per cent. per annum; and consent that judgment be entered up and execution be issued against me, without delay, this 25th February, 1867.

"R. G. M. Dunovant.

"Test—J. F. Cason."

Judgment in said suit was signed and enrolled on March 2d, 1867, in the following words, to wit:

"And the said R. G. M. Dunovant, the defendant, comes and defends the wrong and injury when, &c., and says he cannot deny the action of the said James M. Richardson, the plaintiff, nor, but that the said writing obligatory is the deed of him the said defendant, but that he owes to the plaintiff the said sum of $2,000 above demanded, in manner and form as the said plaintiff hath above thereof complained against him. Therefore it is considered that the said plaintiff, James M. Richardson, do recover against the said R. G. M. Dunovant, the defendant, his said debt, and also $16.12½, for his damages which he hath sustained, as well on occasion of the detaining the said debt as for his costs and charges by him about his suit in this behalf expended, by the said court, before the justices thereof, now here adjudged to the ——— ——— and with his assent; and be the said defendant in mercy, &c.

"Abney & Wright,

"Plaintiff's Attorneys."

Fi. fa. was issued on the said judgment on the said 2d March, 1867. The said execution

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and judgment were assigned to *Bennett Holland by the said James M. Richardson. The sums of $562 and $960 were paid on the said judgment on the 5th January, 1869, and on the 5th February, 1872, respectively, and the receipt thereof acknowledged on the sheriff's books in the following words, to wit:

"Received of the defendant $562 in part of this case, 5th January, 1869.

"Bennett Holland."

"Received of the defendant $960 in part of this case, 5th February, 1872.

"Bennett Holland."

The referee reports the sum of $1,745.47 due on the 1st October, 1879, of which $1,136.60 is principal, bearing interest.

On the 25th of December, 1871, R. G. M. Dunovant having been appointed guardian of his three children, William L., Robert L., and Carrie P., executed his bond to D. L. Turner, then Probate judge, in the penal sum of $7,000, conditioned for the faithful discharge of his trust as guardian, and on the same day, to supply the place of personal sureties to the said bond, he executed to the said D. L. Turner, Judge of Probate, a mortgage of the following described tract of land, to wit:

"All that tract of land containing four hundred and thirty-seven and one-half acres, more or less, bounded by lands of James Cresswell and others, said lands having been conveyed by Whit. Brooks to the said R. G. M. Dunovant, the 29th of October, 1851. Also, a portion of the Anna Williams tract, containing three hundred acres, more or less, to be cut off adjacent to tract above described."

This mortgage was not recorded until the 21st of December, 1876.

The referee reports due on this claim on the 1st of October, 1879, the sum of $2,241.48, of which amount the sum of $1,637.05 is principal, bearing interest.

On the 9th day of June, 1874, a verdict

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was rendered against *R. G. M. Dunovant, in the Court of Common Pleas, in favor of

the defendants, Butler & Youmans, but judgment thereon was not entered up until the 30th of January, 1877.

The referee reports the sum of $286.46 due on said judgment on the 1st of October, 1879, of which sum $208.90 is principal, bearing interest.

On the 25th of January, 1875, the said R. G. M. Dunovant, to secure the payment of $1,526.25, with interest at the rate of eighteen per cent. per annum, executed to M. A. Markert a mortgage of the following described tract of land, to wit:

"All and singular a certain tract or parcel of land situate, lying and being in the county of Edgefield, and said State, containing seven hundred acres, more or less, the same being a portion of the Reeves, Martin and Williams tract of land to me belonging, bounded by lands of the estate of Whitfield Brooks, lands of W. H. Holloway, lands of Kinard, lands of George A. Addison, lands of Henry May, lands of D. C. Bullock, and other lands of the said R. G. M. Dunovant."

This mortgage was recorded on 26th of January, 1875.

The referee reports the sum of $2,728.73 due on said mortgage debt on the 1st of October, 1879, of which sum $1,770.43 is principal, bearing interest.

On the 29th of May, 1876, the said R. G. M. Dunovant, to secure the payment of $950, with interest, executed a mortgage to B. F. Yoe, of a tract of land situate in the county of Edgefield, containing twelve hundred and fifty acres, more or less, and adjoining lands of G. W. Holloway, estate of Whitfield Brooks, lands of D. C. Bullock, lands of Henry May, Calvin Kinard and others.

This mortgage was not recorded until 27th of December, 1876.

The referee reports the sum of $1,179.13 due on said mortgage on the 1st of October, 1879, of which sum $988.80 is principal, bearing interest.

Several parties have become interested, by assignment, in this last mortgage since its execution. But there is no question before the court as to the ownership of the above claims.

The tract of land described in the mortgage

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to B. F. Yoe, is *the only property of the said R. G. M. Dunovant liable to levy and sale, and embraces the lands described in the mortgage to D. L. Turner, Probate judge, and in addition thereto four or five hundred acres more.

The land described in the mortgage to D. L. Turner, Probate judge, embraces the tract of land described in the mortgage to M. A. Markert, and in addition thereto about one hundred acres more.

On the 9th day of January, 1877, the whole of the lands of the said R. G. M. Dunovant, which are encumbered by said mortgages, were levied on under execution issued on the judgment in favor of James M. Richardson, and afterwards assigned to Bennett Holland. And in the year following the plaintiffs herein served their complaint setting forth the above facts, and alleging, among other things, that the said R. G. M. Dunovant invested the trust funds of his ward, Mary C., wife of George B. Addison, in the lands described in the complaint, and demanded judgment:

1. That the defendants, Bennett Holland and John T. Gaston, sheriff, their servants and agents, be enjoined and restrained from selling the lands of the said R. G. M. Dunovant as advertised under the levy made by the said John T. Gaston, sheriff, as aforesaid, and that the other defendants, their servants and agents, be also enjoined and restrained from attempting to enforce their liens on the said land.

2. That the lands purchased by the said R. G. M. Dunovant with the moneys of his ward, Mary C. Addison, be adjudged to be specifically liable for the payment of the judgment of said plaintiffs.

3. That the priority of the liens of the judgments and mortgages above set forth may be adjudicated. * * *

4. For their costs and disbursements in this action, and for such other and further relief in the premises as to equity may belong.

On the 22d day of March, 1879, it was referred, by order of this honorable court, to S. S. Tompkins, Esq., to take the testimony, to ascertain and state the amounts due on each claim and report the same.

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*On the 2d of October, 1879, the said referee filed his report, reporting, among other things, the above stated amounts as due on the said claims respectively on the first day of October, 1879.

No exceptions to the referee's report were filed by any of the parties, except by the defendant Holland, whose exceptions are substantially as follows, to wit:

1. That the referee in computing the amount due on the judgment in favor of James M. Richardson, and assigned to Bennett Holland, erred in not calculating interest on the said judgment at the rate of sixteen per centum per annum.

2. That the referee erred in not reporting that the amounts paid on said judgment were paid as interest, and not as a part of the judgment.

The law and the evidence considered, it is the opinion of the Court:

That the exceptions filed by the defendant, Bennett Holland, must be overruled. The note with all its incidents, including its power of accretion, or interest-bearing quality, merged in the judgment. Free. Judg.

A judgment at common law bore no interest. Free. Judg. § 441; [Warrington v. Glenn] 1 Hill 79. And it is not capable of being impressed with any higher or lower

rate of interest than that which the statute stamps upon it.

The act of 1866 enacts: "That in all money decrees and judgments of courts of law and equity hereafter enrolled or entered, * * * the legal interest shall be and remain at the rate of seven per centum per annum." 13 Stat. 429.

The judgment is not a confession of judgment. 6 Stat. 160, §§ 1, 2; 11 Stat. 72, 75; 3 Blackstone *395. It is a consent judgment by the court. But under our statutes there can be no difference in the grades of judgments as to the matter of interest. The judgment cannot be considered as a contract, for a contract in its final analysis made by debtor with creditor, is but a right of action conveyed by the debtor to the creditor, and the right of action ceases with the judgment, which is but the sentence of the law pronounced by the court. If the contract or note upon which the judgment is based had borne no rate of interest, still the judgment would bear interest at the

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legal rate of seven per *centum per annum. So the judgment could not bear a higher rate of interest, even though the note bore a rate exceeding seven per centum per annum. The other position of the defendant Holland, is equally untenable. He receipted for the two sums of money in part payment. These receipts were endorsed upon the sheriff's books, and were notice to third parties who could not be prejudiced by any private contract that might have existed between the judgment debtor and judgment creditor. But the evidence does not show that any contract that the judgment should bear sixteen per cent. interest existed, nor does it show that the payments were made under any contract to pay sixteen per cent. interest in consideration of forbearance. No doubt the judgment creditor and judgment debtor were under the impression that the legal effect of the judgment was to bear sixteen per cent. interest, and this alone would have prevented them from making any additional contract in regard thereto.

The judgment must be credited with the payments made, and it is a lien upon the entire tract of land, prior to all others, to the amount reported by the referee. But the proceeds of the sale of that portion of the land which was last mortgaged must first be applied toward the satisfaction of said judgment. Ad. Eq. 543, n. 1.

As against the mortgage to D. L. Turner, Probate judge, the defendant Markert stands in the position of an innocent purchaser for value without notice, and his mortgage is a lien to the amount reported by the referee upon the portion of land embraced in the said mortgage, prior to all others except the lien of the judgment in favor of James M. Richardson, assigned to Bennett Holland. The mortgage to D. L. Turner, Probate judge, was executed prior to the mortgage to B. F. Yoe, and also first recorded, and must therefore be next paid out of the proceeds of the land therein embraced.

The mortgage to B. F. Yoe is also a lien upon the entire tract of land, and, although last recorded, it was both executed and recorded before the judgment in favor of Butler and Youmans was entered up, and must therefore next be paid out of the proceeds of the sale of the entire tract of land.

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*The judgment in favor of Butler and Youmans is a lien upon the entire tract of land from the day it was entered, which being subsequent to the date of the foregoing liens, it is inferior to them and, therefore, cannot cannot be paid until they are satisfied.

The evidence does not establish any secret or equitable trust in favor of the plaintiffs, and the judgment under which they claim is not a lien upon the land, having been obtained on the 11th day of March, 1870, and no action having since been taken to make the same a lien. Code, § 313; 15 Stat. 871.

The act of 1870, denying to final judgments, thereafter rendered, the incidents of a lien upon real property, is not unconstitutional as regards contracts entered into prior to its passage.

The remedy may be modified without impairing the obligation of the contract. Sturges v. Crowninshield, 4 Wheat. 122 [4 L. Ed. 529]; Ogden v. Saunders, 12 Wheat. 270 [6 L. Ed. 606]; Mason v. Haile, 12 Wheat 370 [6 L. Ed. 660]; Bronson v. Kinzie, 1 How. 311 [11 L. Ed. 143].

The land should be sold in such parcels and upon such terms as will most conduce to the payment of all claims upon the same.

It is therefore ordered, adjudged and decreed:

1. That two surveyors, one to be nominated by plaintiffs and one by defendants, go upon the land and ascertain the boundaries of the various tracts of land described in the mortgage above mentioned, and further to divide the land into such parcels or tracts as will sell to the greatest advantage and report their action to this court at the next term of the same.

2. That upon the confirmation of the report of the said surveyors, the tract of land described in the complaint be sold by the master for Edgefield county, on such terms and at such a time as may then to the court seem just and proper.

3. That after the payment of the plaintiffs' costs, and the costs of the surveyors and referee, the judgment of Bennett Holland, assignee of James M. Richardson, be first satisfied out of the proceeds of the sale of the said land by the payment of the amount reported by the referee, with interest on the interest-bearing portion from the 1st day of

October, 1879. And for that purpose the proceeds of the sale of the portion of the land last mortgaged be first applied.

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*4. That the mortgage to M. A. Markert be next satisfied out of the proceeds of the sale of the land described therein by the payment of the amount reported by the referee, with interest on the interest-bearing portion from the first day of October, A. D. 1879.

5. That the mortgage to D. L. Turner, Probate judge, be next satisfied by paying into the Probate Court for the said county the amount reported by the referee, with interest on the interest-bearing portion from the 1st day of October, 1879, out of the proceeds of the sale of the land described in the said mortgage.

6. That the mortgage to B. F. Yoe be next satisfied out of the proceeds of the sale of the whole tract of land by the payment of the amount reported by the referee, with interest on the interest-bearing portion from the 1st day of October, 1879.

7. That the judgment in favor of Butler and Youmans be next satisfied out of the proceeds of the sale of the whole tract of land by the payment of the amount reported by the referee, with interest on the interest-bearing portion from the 1st day of October, 1879.

8. That the judgment in favor of George B. Addison and wife, under which plaintiffs claim, be next satisfied out of the proceeds of the sale of the whole tract of land by the payment of the amount reported by the referee, with interest on the interest-bearing portion from the 1st day of October, 1879.

9. That the remainder of the proceeds of the sale of the lands, if any there be, be paid to the defendant, R. G. M. Dunovant.

T. J. Mackey,
April 5th, 1880. Circuit Judge.

The judge overruled the exceptions of Holland, and upon the facts, as will be seen, decreed that the land be divided into suitable tracts for sale by surveyors; that it then be sold, the proceeds, after payment of costs, be applied, first, to the payment of the Holland judgment as reported by the referee, the interest to be calculated at seven per cent., and the payments already on it to be credited on that basis; second, to the Markert mortgage;

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*next to the D. L. Turner, Probate judge, mortgage; next to the B. F. Yoe mortgage; next to the Butler and Youmans judgment; then to the George B. Addison and wife judgment claimed by the plaintiff, and lastly, if any remainder, to be paid to the defendant, R. G. M. Dunovant.

From this decree the defendant Holland, the plaintiffs, the Probate judge, and the children of R. G. M. Dunovant appealed upon exceptions. Holland's exceptions raise the question whether his judgment should not have been estimated at sixteen per cent., and, if not, whether the payments made by Dunovant should not have been credited on the interest, estimated at that rate; the plaintiffs', whether the act of the general assembly, March 1st, 1870, denying to final judgments the incident of a lien on real property, did not impair the obligation of contracts made prior to its passage, and was, therefore, unconstitutional.

The exceptions of the Probate judge and the guardian ad litem of the minor children of Dunovant, raised the question whether the mortgage of Markert should not have been credited with the sum of $1,500, with interest from the 5th of February, 1878, the profit on the Roseland tract of land, which, by agreement, Markert was to give to Dunovant. These three questions are the questions which arise in the case, and to these attention will now be directed.

The Holland judgment was obtained on a note payable to James M. Richardson, dated the 25th February, 1867, and due one day after date, with interest at the rate of sixteen per cent. per annum. The judgment was by confession, made on the same day. This judgment was afterwards assigned to Holland, who had the active energy of the fi. fa. renewed in November, 1876. The confession, endorsed on the declaration, was for the sum of $2,000, with interest from the 25th February, 1867, the date of the note, at the rate of sixteen per cent. per annum, and the date of the endorsement was the same as that of the note, the 25th February, 1867. The judgment was entered for $2,000, no rate of interest being mentioned therein. The fi. fa. was the ordinary fi. fa. in such cases. Upon this, two receipts had been entered by Holland—"in

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part of this case"—one for *$562, 5th January, 1869, and the other for $960, 5th February, 1872.

Now, was Holland entitled to recover on this judgment, sixteen per cent., as specified in the note and in the confession, or was the Circuit judge right in restricting him to seven per cent. after judgment? We concur with the Circuit judge, and we do not know that we can add anything to the argument by which he sustains his opinion.

He held that the act of 1866 (13 Stat. 439) controlled this question. That act enacts that in all money decrees and judgments in law and equity hereafter enrolled or entered * * * the legal interest shall be and remain at the rate of seven per cent. per annum. This judgment was entered in 1867, the year after the passage of this act. Without attempting to vindicate or discuss the wisdom of this act, how can the appellant, when it is admitted "ita lex scripta est," evade its provisions? By what authority could the sheriff collect more than seven per cent. upon a fi. fa. in his office, when the act stands in the way? It is said that the defendant consented and still consents to it. This, no doubt, is so, but this can have no ef-

fect as to the construction which shall be given to a judgment of the court, which is regulated, not by the consent of the parties, but by the act of the general assembly, in such case made and provided.

A judgment is defined to be the final determination of the rights of parties in the action. Code, § 268. It may be granted in invitum, or by consent. In either case it is the action of the court, in the one case reached by the evidence and law applicable to the facts, in the other pronounced by the consent of the parties, when it is granted upon a contract, it determines what the contract is and closes it, giving the party in whose favor the judgment is rendered, the means of enforcing the contract thus determined, or redress for its breach.

A judgment of this sort involves two ideas —the contract upon which it is rendered and the judgment itself. The one is the act of the parties—the other is the act of the court. They are entirely separate and distinct.

Now, at the time this contract was made by Dunovant with Richardson, there were no

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usury laws in existence in this state, *and Dunovant had the right to contract to pay any per cent. for the use of money that he saw proper, and such contract, at whatever per cent. agreed upon, was enforceable through the court, either by confession of judgment, or by regular judgment obtained by suit. But Dunovant had no right to contract for the action of the court. The legislature is the only authority that can give power to the courts, and the legislature had said, previous to this, that the courts could give no judgment or decree to bear more than seven per cent. interest. The courts can enforce legal contracts of parties, as made, up to the time of the judgment, but, when the judgment is pronounced, the rights of the parties are determined up to that moment, and then the judgment must be enforced according to the law applicable to judgments.

We concur with the Circuit judge, also, as to the effect of the payments made by Dunovant on this judgment. The receipts on the back of the fi. fa. show that they were ordinary payments, in part of the debt within; and, while it may be that Dunovant could have paid such amounts as he desired on the interest, over and above the seven per cent. allowed by the act, independent of and outside of the judgment and fi. fa., yet when these payments were made and credited on the fi. fa., as in part of the debt therein, the court can make no other application but such as the act requires. So much for the exception of appellant Holland.

The plaintiffs' principal exception involves the constitutionality of the act of March, 1st, 1870, (Code, § 313,) which denies to final judgments the incident of a lien on real property. The plaintiffs contend that the obligation, upon which the decree under which they claim was obtained, was executed before the passage of this act; that, at that time, decrees and judgments had lien on real estate; that this was a part of the obligation of the contract, and that the act of 1870, supra, denying this lien, impaired this obligation, and was, therefore, unconstitutional, being in conflict with Article 1, section 10, of the Constitution of the United States. The correctness of this position depends upon the meaning of the term "obligation," when applied to contracts.

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*This term has been often and ably discussed before this. Many authorities might be cited from decisions and writers outside of our own State, among them the oftenquoted case of Sturges v. Crowninshield, 4 Wheat. 200 [4 L. Ed. 529], and Kent and Story, and many other authorities; but the meaning of this term having been so elaborately discussed and so fully determined in the recent cases of the State v. Carew, 13 Rich. 498 [91 Am. Dec. 245], and Wood v. Wood, 14 Rich. 154, in our own State, it would scarcely be becoming for this court so soon to renew this discussion as if it were an open question.

These two cases, cited from our own reports, decide, in brief, that the obligation of a contract "is the legal tie which imposes a necessity of doing or abstaining from a particular act, as distinguished from the imperfect obligation arising from gratitude, charity, or other moral duties, binding upon conscience, but having no legal remedy for their enforcement. This latter is the essence of the legal obligation."

This idea as to this term is not only found in the common law, but was familiarly recognized by the Roman jurists in the maxim "Sub hac conditione si volam nulla fit obligatio."

A well-recognized distinction is drawn between the contract itself and its obligation. The contract is the agreement of the parties; the obligation is the remedy which the law affords for its enforcement. There may be, and generally there is, a moral obligation in every contract, which ought to constrain the party making it to perform it, but with this the courts have nothing to do. If we were perfect beings, this moral obligation would at all times be sufficient, and there would be no necessity for courts or civil law; but, unfortunately, such is not the condition of humanity, and hence the necessity of some constraining power, more effectual, direct and imperative than the mere imperfect obligations classed as moral obligations.

The clear meaning of a legal obligation, as contradistinguished from a moral, cannot be better illustrated than by an unpaid note barred by the Statute of Limitations. There the legal obligation is gone, the moral remains; but the courts are powerless in such cases. Where, then, an act is passed which

materially interferes with and impairs the
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legal remedy which *the courts afforded before the passage of the act for the enforcement of contracts, such act is unconstitutional. Did the act of 1870, supra, have this effect upon contracts like this in this case? We think not. The lien on real estate which the previous law allowed to decrees and judgments was no part of the remedy of enforcement. It was a mere incident to the judgment which, in fact, had a tendency to delay and weaken its enforcement. Taking away this lien imparted to the judgment greater vigor and more speedy execution. Judgment having been obtained, this act required, in its effect, the party to act and to act promptly. The fi. fa. for its enforcement was left at his command, and the remedy for the collection of his money was in fact made more effectual. It relieved the party plaintiff from all claim for delay and further forbearance, and it required some prompt action on his part. Besides the act did not entirely destroy the lien, it only prevented the lien in the absence of a levy. By the terms of the act, by keeping the fi. fa. levied, a lien could not only be made to attach but it could be preserved.

Our conclusion is that the act of 1870 did not impair the obligation of the contract under which the plaintiff claims, and, therefore, that the ruling of Judge Mackey on this subject is not obnoxious to plaintiffs' exceptions. In any event the act of 1870 modified merely the previous remedy which, according to the authorities, may be done without impairing the obligation. Sturges v. Crowninshield, 4 Wheat. 122 [4 L. Ed. 529]; Ogden v. Saunders, 12 Wheat. 270 [6 L. Ed. 606]; Mason v. Haile, 12 Wheat. 370 [6 L. Ed. 660].

The Probate Judge, Charlton, and the guardian ad litem of the minor children of the defendant Dunovant, except to the decree because it fails to require the Markert claim to be credited with the profit made by Markert in the purchase and sale of the Roseland tract of land, to wit, the sum of $1,500 and interest. We think there is foundation for this exception. Dunovant had purchased this land in December, 1877, at the price of $5,000: his purchase was turned over to Markert under an agreement or contract that Dunovant was to have credit on his debt to Markert for the profit or advance in price that Markert might obtain in a resale. Markert did resell at an advance of $1,500 on the 5th of January, 1878. Why,
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then, should not *Dunovant have the benefit of this advance? It is said that the contract only allowed Dunovant the benefit of this profit when it was realized by Markert, and that Markert had not as yet realized it.

The evidence is that Markert, on the 5th of February, 1878, resold the land at the price of $6,500, $2,000 of which was paid in cash, and the residue amply secured by the bond of the purchaser and a mortgage of the premises. Now, under these circumstances, when the assets of Dunovant are being marshaled for distribution among his creditors, among whom is Markert, can he fold his arms and say, I have not realized this profit? If he had submitted evidence that the purchaser was insolvent, or even doubtful; that he had neglected to secure the debt by mortgage of the land, or, having done so, that the land had greatly depreciated in value, and was not now a sufficient security, or any evidence of this kind, showing that his actual realization of this profit was precarious, then there would be some justice in awaiting further developments; but when the proof is that $2,000 of the purchase-money has been paid and the residue is amply secured by the bond of the purchaser, with a mortgage of the premises, we think the court below might well have directed that Markert's claim should be credited with the $1,500 at the day of sale.

There were other questions raised in the exceptions of the different parties; but the questions above considered by the court embrace those principally discussed in the argument. We think that the decree of Judge Mackey should be affirmed as to all matters therein, except the last in reference to the profit in the resale of the Roseland tract of land by Markert.

It is the judgment of this court that the judgment of the Circuit Court be modified in accordance with the principles of this opinion, and for that purpose that the case be remanded to the Circuit Court.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. *32

*(Case No. 1085.)

Ex parte LYNCH, Trustee.

(April Term, 1881.)

[1. *Constitutional Law* ⇐26.]

A constitutional provision must, if possible, be so construed as not to abridge the full legislative power vested in the general assembly by Article II, § 1. Implied limitations of legislative power are only admissible when necessary to give proper force to a particular intent expressed in the constitution.

[Ed. Note.—Cited in McCullough v. Brown, 41 S. C. 234, 19 S. E. 458, 23 L. R. A. 410; State ex rel. George v. Aiken, 42 S. C. 231, 20 S. E. 221, 26 L. R. A. 345; State v. Parler, 52 S. C. 218, 29 S. E. 651.

For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. ⇐26.]

[2. *Constitutional Law* ⇐26.]

A constitution is intended to fix the fundamental principles of government, and limit its powers, but not to legislate on mere details.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. ⇐26.]

[3. *Constitutional Law* ⟸48.]
An act of the legislature is presumed to be constitutional, until the contrary is made clearly to appear by him who asserts the contrary.

[Ed. Note.—Cited in Feldman & Co. v. City Council of Charleston, 23 S. C. 66, 55 Am. Rep. 6; Mauldin v. City Council of Greenville, 42 S. C. 298, 20 S. E. 842, 27 L. R. A. 284, 46 Am. St. Rep. 723.

For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⟸48.]

[4. *Taxation* ⟸310.]
The provision in Article IX., § 6, of our State constitution, requiring a valuation and assessment of lands to be made in 1870, and on every fifth year thereafter, does not inhibit the general assembly from directing a re-assessment within the five years.

[Ed. Note.—Cited in State ex rel. Ross v. Kelly, 45 S. C. 460, 23 S. E. 281.

For other cases, see Taxation, Cent. Dig. § 511; Dec. Dig. ⟸310.]

[5. *Taxation* ⟸40, 49.]
The provision of Section 78, of the act of 1874, (15 Stat. 760,) requiring the auditor to add fifty per cent. to the assessment of the property of a taxpayer who fails to make return of such property for taxation, does not violate Sections 14 and 36 of Article I., nor Section 1 of Article IX., of the constitution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 84, 121; Dec. Dig. ⟸40, 49.]

[6. *Taxation* ⟸497.]
The correction, by the comptroller-general, of an error in a tax duplicate, is not a plain ministerial duty for which mandamus will lie, especially after he has acted upon an application for such correction; nor will such officer, on the relation of a taxpayer, be compelled, by mandamus, to ignore as unconstitutional, a statute imposing a penalty for a default in making return.

[Ed. Note.—Cited in State ex rel. Fouche v. Verner, 30 S. C. 280, 9 S. E. 113; State ex rel. Port Royal Min. Co. v. Hagood, 30 S. C. 524, 9 S. E. 686, 3 L. R. A. 841; State ex rel. School Dist. v. Rice, 32 S. C. 100, 10 S. E. 833; State ex rel. Burgess v. Bowman, 66 S. C. 145, 44 S. E. 569; State v. Burley, 80 S. C. 131, 61 S. E. 255, 16 L. R. A. (N. S.) 266.

For other cases, see Taxation, Cent. Dig. § 912; Dec. Dig. ⟸497.]

[This case is also cited in State ex rel. National Bank of Newberry v. Cromer, 35 S. C. 228, 14 S. E. 493, as to facts.]

Original application to the Supreme Court.

Petition for mandamus to the comptroller-general, filed December 7th, 1880, by John Lynch, trustee of Mary E. Allen, and heard on petition, order to show cause and return, on May 2d, 1881. The opinion states the case.

Mr. Robert A. Lynch, for the relator.

Mr. Youmans, attorney-general, contra.

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*September 24th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This is a petition in the original jurisdiction of this court for a writ of mandamus to compel the comptroller-general to have corrected an alleged error on the tax duplicate for Richland county, and that the true value of a house and lot in Columbia be placed upon said tax duplicate as the amount upon which taxes should be imposed. The comptroller-general resists the motion upon several grounds, viz.: That no error was committed by the auditor; that he has no authority to make the abatement demanded; and that what is asked to be done is not his clear ministerial duty, and, therefore, mandamus will not lie.

Section 6, Article IX., of the constitution, is as follows: "The general assembly shall provide for the valuation and assessment of all lands and the improvements thereon, prior to the assembling of the general assembly of 1870, and thereafter on every fifth year." The general assembly made an assessment in 1875, by act of 1874, and in 1878, in advance of the "fifth year," passed an act which provided for another assessment of lands to be made in 1879, "in the manner and according to the rules prescribed for assessment of real estate," &c. 16 Stat. 803. The manner of making assessments is prescribed by the "Act to reduce all acts and parts of acts providing for the assessment and taxation of property, into one act, and to amend the same." 15 Stat. 731. Section 78 of that act provides, "that whenever any taxpayer shall fail to make returns to the auditor of his county, within the time prescribed by law, it shall be the duty of the county auditor to enter on the tax duplicate, against such taxpayer, the property charged to him the previous year, with fifty per cent. penalty added thereto," &c.

John Lynch, trustee, failed to return for taxation, under the act of 1878, a house and lot on the southwest corner of Blanding and Richardson streets, in the city of Columbia, and thereupon John Meighan, the county auditor, in accordance with the legal requirements upon the subject, entered said house and lot on the tax duplicate at its previous

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assessment of $10,200, and added *thereto fifty per cent., making the taxable value $15,300. To this action of the auditor the relator objected and filed a petition, praying the comptroller-general to have the said fifty per cent. stricken off. The comptroller-general ordered the auditor to submit to the county board of equalization the question of the true value of said house and lot, directing, in case the board should reduce the value, that the fifty per cent. should be attached to the assessment so reduced, instead of the original assessment. Accordingly, the auditor did submit the value to the board of equalization, which reduced the value to $8,000, and this sum was placed on the duplicate as the proper valuation until the next assessment of real estate, but the comptroller-general refused to remit the fifty per cent. already added to the assessment for one year, 1879; thus making the total assessment $12,000. The relator, insisting that it

was the duty of the comptroller to correct also the action of the auditor in this particular, filed this petition for a writ of mandamus to compel him to do so.

The relator insists that he was not in default in failing to return the house and lot for taxation under the act of 1878, and the auditor had no right to increase the assessment fifty per cent., for the reason that the act of 1878, ordering a new assessment for that year, and the provision in the act of 1874, allowing assessment of fifty per cent. for default, are both unconstitutional and void. In relation to the act of 1878, he insists that the provision of the constitution which requires that after 1870 the assessment should be made "on every fifth year," amounts to a negation of the right to make it at any other time. That raises a question of construction. Does the declaration that the assessment is to be made "on every fifth year," withdraw from the general assembly the right to make it also at some intermediate time?

It is a delicate thing to declare an act of the legislature unconstitutional. This section of the constitution must be construed, if possible, as allowing full force and effect to Section 1, Article II., vesting the full legislative power of the State in the general assembly. Implied limitations of legislative power are only admissible where the implica-

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tion is necessary, as where *language, conveying a particular intent, cannot have its proper force without such implication. The general assembly has the general power of legislation upon all subjects not prohibited by the constitution. "The legislative department is entrusted with the general authority to make laws at discretion, and is only limited by express constitutional provision." Cooley Const. Lim. 87–172. "The constitutionality of a law must be presumed until the violation of the constitution is proved beyond all reasonable doubt, and a reasonable doubt must be solved in favor of legislative action and the act be sustained." Id. 182.

As we understand it, the object of a written constitution is to fix the fundamental principles and limit the powers of government, and not to legislate on mere details. It is fixed in its nature, and, therefore, unsuited to contain the laws which from time to time are made necessary by the ever-changing necessities and wishes of the people. A constitution has been defined to be "the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of the sovereign powers and directing to what persons each of these powers is to be confined and the manner in which it is to be exercised."

According to these familiar principles and authorities the presumption is that the act of 1878 is constitutional. The onus is upon the relator to make it clearly appear if it is not so. It does not seem to us that the provision which requires the general assembly to make an assessment of real estate "on every fifth year" necessarily amounts to an inhibition against their doing it at another time. The constitution could not have intended that the people of the State should remain under a false and erroneous assessment of real estate for a number of years, for the only reason that a new assessment could not be made except "on every fifth year." It is not a case for the application of the maxim "expressio unius est exclusio alterius." The provision is affirmative merely that the thing shall be done at particular intervals without negative words, such as "and at no other time." It is mandatory so far as it requires the assessment to be made at all events every fifth year, but that is the full intent of the provision, which does not

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purport to be exclu*sive and exhaustive. The period indicated is not of the essence, except so far as to require that it shall be done at the times indicated. Lord Mansfield held, in Rex v. Loxdale, 1 Burr. 447: "That there is a known distinction between circumstances which are of the essence of a thing required to be done and clauses merely directory. The precise time in many cases is not of the essence."

When there is no substantial reason why the thing to be done might not as well be done also at some other time, then the courts assume that the intention was that it might be so done. No injury would be done if the assessment were made every year. As was said by Parker, C. J., in Henshaw v. Foster, 9 Pick. 316: "In considering so important an instrument as a constitution, we are not on the one hand to indulge ingenious speculations which may lead us wide from the true essence and spirit of the instrument, nor on the other to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it."

The general assembly of the State has more than once construed this provision as affirmative merely, and when, in their opinion, the public good demanded it, ordered reassessments of the lands at times other than "every fifth year." Any other construction, we incline to think, would lead to absurd and alarming consequences.

It is also insisted by the relator that Section 78 of the act of 1874, which requires the auditor to add fifty per cent. to the assessment of the property of a taxpayer who makes default in returning his property for taxation, is illegal and void as repugnant to the following provisions of the constitution:

Section 36, Article I., which declares that "all property subject to taxation shall be taxed in proportion to its value. Each individual of society has a right to be protect-

ed in the enjoyment of life, liberty and property according to standing laws."

Section 1, Article IX., which requires the general assembly "to provide by law for a uniform and equal rate of assessment and taxation."

Section 14, Article I., of the Declaration of Rights: "No person shall be arrested, im-

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prisoned, despoiled or dispossessed of *his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land. And the general assembly shall not enact any law that shall subject any person to punishment without trial by jury; nor shall he be punished but by virtue of a law already established or promulgated prior to the offence and legally applied."

This opens a wide field, but we do not think the case requires a full discussion of these important provisions of the constitution. There is no doubt that the laws for the collection of taxes are summary and not in full accord with the spirit of the constitution, but they are sustained on the ground of State necessity and immemorial usage. It is said in the case of Parham v. Decatur County, 9 Ga. 352, that "the sovereign right to levy and collect taxes grows out of the necessities of the government—an urgent necessity, which admits no property in the citizen while it remains unsatisfied. The right to tax is co-equal with all governments. It springs out of the organization of the government. All property is a pledge to pay the necessary debts and expenses of government."

The Supreme Court of Tennessee, in McCarrol v. Weeks, 5 Hayw. (Tenn.) 246, decided that their summary tax laws were constitutional, holding this language: "It is certainly true that they have the character of summary proceedings, and it is equally true that they must of necessity be so; for if the government were necessitated to take the cautious and tedious steps of the common law, in giving personal notice, making up regular proceedings and having a trial by jury, judgment and execution, it would cease to exist for want of money to carry on its necessary operations. Loss of credit and the total extinction of the national faith—the basis of all regular government—must be the inevitable consequences."

In our own case of the State v. Allen, 2 McCord, 56, the court says: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'" And in

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Harris v. Wood, 6 Mon. 643, *the Court of Appeals of Kentucky remark that "taxes were always recoverable (before the adoption of the constitution), not only without a jury, but even without a judge; and the assessment of ministerial officers has been made to operate as an execution on the citizen, and the collector could distrain," &c. The same general doctrine has been asserted in other cases. See Blackw. Tax T. 31.

It is urged, however, that the fifty per cent. is not really a tax regulation, but in the nature of a penalty for default, and, therefore, cannot be imposed by the mere act of the auditor, without judicial proceeding and verdict of a jury. It is called "a penalty" in the act itself, but its nature is not necessarily changed by the name given. The provision lacks some of the characteristics of a penalty. It differs very materially from the law of 1820, which was construed in the case of the State v. Allen, supra, to be a penalty, pure and simple. That act imposed a punishment of $10,000 upon any person who should sell lottery tickets in the State, and, as substantially declared, for the purpose of suppressing vice; while the provision under consideration imposes no round sum of money upon the person, but only relates to the assessment of property and in strict regard to its value. The object manifestly was not so much to punish as to prevent defaults in making returns, and in that way to facilitate the collection of taxes. Such provisions have appeared in the tax acts of this State for a long series of years, and we are not aware that the courts have ever enjoined their enforcement. In the case of the State v. Hodges, 14 Rich. 277, Judge Wardlaw, after reviewing all the acts upon the subject, in his learned note, says: "A summary execution against defaulters has prevailed from the earliest period. At first (1701) it was issued by a justice of the peace (2 Stat. 182), afterwards by the chief justice (1716–1723). In 1734 (3 Stat. 388), and ever since, by the enquirers and collectors. * * In these cases, and in others, where double tax executions are spoken of, it seems plain that the legislature has considered it competent for a tax collector to adapt his execution to the exigencies of the case," &c.

As to the admitted necessity for an equal and uniform rate of taxation, it is sufficient

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to say that the assessment is upon the *property, according to its value, and applies equally to all defaulters. The State v. Railroad Corporations, 4 S. C. 376; United States v. Singer, 15 Wall. 121 [21 L. Ed. 49].

But, if in all this we should be in error, it has not been made to appear that what is required of the comptroller-general is his plain ministerial duty under the law. We have been referred to Section 66 of the act of 1874, as showing his ministerial duty in the premises. That section is in these words: "The comptroller-general shall, from time to time, prepare and transmit to the several

county auditors, all such forms and instructions as he may deem necessary to carry into effect the provisions of this act, and decide all questions that may arise as to the true construction of the same, or in relation to the duty of any officer under the same, and the forms thus transmitted shall be used by all county, town and municipal officers. The instructions thus given shall be obeyed by, and the decisions thus made shall be binding upon, all county, town and municipal officers." We do not see that this section imposes any plain ministerial duty on the comptroller-general, in case of alleged error on the part of a county auditor.

"To be entitled to a writ of mandamus, the relator must show that the respondent is bound to the performance of some certain, specific duty, of a ministerial character, imposed by law. It is certain when it must be absolutely performed, and the officer has no discretion. It is ministerial where an individual has such legal interest in its performance, that neglect becomes a wrong to him." Morton, Bliss & Co. v. Comptroller-General, 4 S. C. 431.

To have corrected an alleged error in a tax duplicate, is not a plain ministerial duty, but requires the exercise of discretion and judgment, especially when, according to the terms of the law, there has been no error. As the law reads, it was the duty of the auditor to add, and of the comptroller-general to have enforced, the fifty per cent.; but, in the face of the provision, we are asked to compel the comptroller to strike it off, on the ground that the law is unconstitutional. That can hardly be considered a duty "certain" and allowing of "no discretion," which can only be made to appear by ignoring the law as it stands. It is not the province of

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the comptroller-general to *decide upon the constitutionality of laws, under which it is his duty to act in supervising the collection of taxes. Besides, the comptroller has already rendered his judgment in the matter, and it has passed beyond his control.

Mr. High says: "As regards the duty of officers entrusted by law with the equalization of taxes and assessments, the courts may properly interfere by the writ (mandamus) to set such officers in motion, and compel them to act, upon an application properly presented by a taxpayer dissatisfied with the tax assessed against him. * * * But mandamus will not go to a board of supervisors, requiring them to make corrections in the assessment of taxes for their county, after the assessments have been completed and warrants have been issued to the receiver of taxes, and the matter has passed beyond the control of the supervisors. * * * The courts will not interfere with or control the action of such officers, when they have actually passed upon such application. The abatement or reduction of taxes improperly assessed is, in such cases, essentially a judicial rather than a ministerial act. * * * Nor, in such cases, can the ministerial officer object that the act of the legislature authorizing the tax is unconstitutional, since it is not in the province of such officers to determine the constitutionality of laws; nor will the courts, upon summary proceedings in mandamus, determine as to the constitutionality of statutes affecting the rights of third persons." High Extr. Rem. § 140.

The petition for a writ of mandamus is refused.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 40

(Case No. 1086.)

PRATER v. WHITTLE.

(April Term, 1881.)

[1. *Wills* ⇦194.]

Where a testator by will disposed of his entire estate, and subsequently sold all of his lands and part of his personalty, and then died possessed of some personal property, the will is not revoked and should be admitted to probate. How revocation is effected, expressly or by implication, considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 481; Dec. Dig. ⇦194.]

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[2. *Appeal and Error* ⇦1094.]

*Upon the issue of will or no will on appeal from the Probate Court, the trial is had de novo in the Circuit Court, and, therefore, a finding of facts by the Probate judge is not a matter to be considered by this court on appeal.

[Ed. Note.—Cited in Ex parte Jackson, 67 S. C. 59, 45 S. E. 132; Mordecai v. Canty, 86 S. C. 479, 68 S. E. 1052; Briggs v. Caldwell, 93 S. C. 271, 76 S. E. 616.

For other cases, see Appeal and Error, Cent. Dig. § 4341; Dec. Dig. ⇦1094.]

[3. *Wills* ⇦221.]

The probate of a will settles all questions as to its proper execution, but does not determine its construction, nor the validity of its clauses. Therefore, on application to prove a will, a revocation which does not wholly defeat it presents no question for the Probate Court to determine.

[Ed. Note.—Cited in Marshall v. Marshall, 42 S. C. 446, 20 S. E. 298.

For other cases, see Wills, Cent. Dig. § 540; Dec. Dig. ⇦221.]

[This case is also cited in Ex parte Apeler, 35 S. C. 420, 14 S. E. 931, as to the right of trial by jury on actions appealed from probate courts.]

Before Townsend, J., Edgefield, October, 1877.

Milton A. Prater, executor of James M. Whittle, deceased, against Rebecca Whittle, the widow of testator, and his other heirs; application to prove will in solemn form, after demand by the widow that it should be so proven. The trial was had in the Court of

Probate for Edgefield, in 1872. Other facts are stated in the opinion.

Mr. Ernest Gary, for appellants.

Messrs. A. J. Norris, and Youmans, attorney-general, contra.

September 24th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. On March 9th, 1870, James M. Whittle executed his will, by which he gave to his son-in-law, Milton A. Prater, almost his entire estate, either immediately upon the death of the testator or in remainder after the death of the defendant Rebecca Whittle, and appointed the said Prater executor.

On April 3d, 1871, the said Whittle executed two other papers—a deed, whereby he conveyed his entire real estate, and a bill of sale, whereby he transferred certain personal property to the said Prater, and received for the said property Prater's note for $4,900.

In 1871 James M. Whittle died, and Prater, as executor, proposed to prove the will. The

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widow (Rebecca) and others *objected, and an issue was made in the Probate Court for Edgefield county to test the validity of the will. The Judge of Probate heard the case, took the testimony and decided that James M. Whittle was competent to make a will; that the paper propounded had been executed without fraud or undue influence and with all legal formalities as his last will and testament, but he refused to admit it to probate upon the ground that the deed and bill of sale of his property, executed by testator subsequently, operated as an implied revocation of the will. The plaintiff, Prater, appealed to the Circuit Court. By consent, it seems, Judge Townsend heard the case without a jury, upon the testimony taken by the Probate judge, and reversed the judgment of the Probate judge. The defendants appeal to this court upon the ground that "His Honor erred in deciding that the deed and bill of sale from James M. Whittle to Milton A. Prater did not wholly revoke the will of the said James M. Whittle."

The single question in the case is whether the execution of the deed and bill of sale by the testator, after he executed his will, operated as a revocation of the will so entirely as to exclude it from probate and leave the estate intestate. This is simply a question of probate, not in the least affected by the provisions of the paper as being just or unjust, or by the proper construction thereof in consequence of changes in the property. Where it appears that a will has been properly executed by a person of sufficient capacity, exercising volition, no matter how it may disappoint just expectations, or how unequal it may be, it is the testator's will, and will be so declared. The law allows a person to declare in his life-time what disposition shall be made of his property after his death, only provided he is of sound mind and makes the declaration according to formalities carefully prescribed. Such declaration so made is his will, which, for many reasons, is regarded an instrument of a solemn character, and not to be lightly revoked or set aside. There is no doubt here of the execution of the paper by a person competent and according to all the required formalities. The only question is whether it was afterwards revoked. The statute declares that "no will or testament in

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writing of any real or *personal property, or any clause thereof, shall be revocable but by some other will or codicil in writing, or other writing declaring the same, attested and subscribed by three witnesses as aforesaid, or by destroying or obliterating the same by the testator himself or some other person in his presence and by his direction and consent." Sec. 7, ch. 86, Gen. Stat. 443. This informs a testator who desires to revoke his will what is necessary to be done. As we understand it, this provision not only prescribes the necessary formalities for the revocation of a will duly executed, but declares that nothing else shall have that effect.

Our courts have held in accordance with this view. In Floyd v. Floyd, 3 Strob. 54 [49 Am. Dec. 626], it is said: "A will executed according to our acts of 1789 and 1824 can only be revoked in three ways: 1. By an instrument in writing, executed with the same solemnities as the will. 2. By obliteration. 3. By burning and destroying; and, 4, impliedly by marriage and birth of issue."

In Watkins v. Watkins, 13 Rich. 66, it is said: "By the act of 1789 no devise is revocable except by another will or writing, attested by three witnesses, declaring the revocation, or by the destruction or obliteration of the will by the testator himself, or by some other in his presence and by his direction and consent." It is clear that this case was not brought within either of the requirements of the statute by the mere execution of the deed and bill of sale, and it follows that there was certainly no express revocation.

It is urged, however, that, notwithstanding the statute, a revocation may be implied from such facts as show a total change in the intentions of the testator. It is true that there is one state of facts which the law expressly declares shall be taken to be a revocation. Section 8, chapter 86, of the Gen. Stat. provides that "if any person making a will shall afterwards marry and die, leaving his widow or having issue, unless the will shall have been made in contemplation of marriage, expressed on its face, and shall contain a provision for future wife and children, if any, it shall be deemed and taken to be a revocation to all intents and purposes," &c.

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*But, excepting this case, specially provided for, it would seem that revocations to be

implied from facts supposed to show a change of intention on the part of testator—always uncertain and doubtful— are excluded by the express words of the statute, which positively declares that "no will or testament in writing shall be revocable but by some other will," &c. If the statute left the subject of implied revocations precisely as they stood before its passage, it is difficult to understand what was accomplished by it. Upon this subject we incline to agree with what was said in regard to a similar statute of the State of Vermont in the case of Graves v. Sheldon, reported in 15 Am. Dec. 657: "I cannot admit that an alteration in the circumstances of the devisor will, in any case, amount to a revocation in law, or that an intended alteration in his estate will have that effect. It is true that the intention of the testator is to be principally regarded, but that intention is to be inferred from such facts only as the statute authorizes us to notice. * * * Does the fact of a change in a man's circumstances afford a stronger presumption of an alteration of his intentions than the fact of his preserving his will unaltered and unrevoked does of his intentions remaining the same? I confess I am unable to see it in that light. The statute has secured the rights of widows, unprovided for, and of posthumous children. The necessity of the rule, if it exists in England, is thus far obviated here. The only implied revocations, therefore, known to the laws of this State are such as result ex necessitate rei. It is said by Justice Buller, in his argument in the case of Goodtitle v. Otway, 1 Bos. & P. 615, that there is not a maxim in our law better established than this: that all implications are ex necessitate; that upon any other ground they would be capricious and arbitrary."

In the very nature of the case there must be such a thing as a revocation from necessity. A will is ambulatory, and when the whole estate is disposed of in the life-time of the testator there is nothing left for the will to act upon when it speaks. "If A. devise all his estate to B., and afterwards alienates the whole of it to C., it is necessarily a total revocation, for there is nothing for the will to act upon. If he devise Blackacre to B. and Whitacre to C., and afterwards dispose of

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Blackacre, *it is a revocation pro tanto. Revocation pro tanto may operate either by altering the quality of the estate in abridging the interest or by diminishing the quantity of the thing demised." In the case before us, the whole estate was not disposed of by the deed and bill of sale. The Circuit judge found that all the land devised by the will was covered by the deed, but as to the personal property he held "that it does not appear that the bill of sale transferred all of it. For aught this court knows there may have been considerable personal property left for disposition under the will. Besides there was a sale of the real and personal property conveyed to Milton A. Prater for the price of $4,900, and at the time of the execution of the deed, a note for the purchase was taken to secure its payment."

It is true the argument was made here that this court should assume the fact to be as held by the Probate judge, and not as found by the Circuit judge, upon the ground that the testimony used having been taken by the Probate judge he must be assumed to have had a better opportunity to estimate its proper force. The relation of the Probate judge to the case was in no way analogous to that of a referee appointed to hear and determine issues referred. Upon appeal from the Probate Court, on a question of will or no will, issues of fact are tried de novo in the Circuit Court. The act allowing the appeal provides as follows: "When such certified copy shall have been filed in the Circuit Court, such court shall proceed to the trial and determination of the questions according to the rules of law; and if there shall be any questions of fact or title to land to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by jury." Code, § 62.

The act of 1839 required an issue to be made in the Circuit Court. 11 Stat. 47. In the case of Myers v. O'Hanlon, 12 Rich. Eq. 203, Chancellor Carroll said: "In truth, the validity of contested wills is tried and determined practically in the Court of Common Pleas. The primary decree of the ordinary in such controversies is regarded by the parties as comparatively immaterial. It is upon appeal to the law courts that the actual contest, the substantial trial, really occurs. In legal contemplation, the Court of Common

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Pleas has but appellate jurisdiction *in such cases. But by the express provision of the act of 1839, if an issue of fact is involved the cause is to be tried anew, as though it were an original cause in that court, and the parties are at liberty to raise new questions never considered by the ordinary, or even made before him." Peeples v. Smith, 8 Rich. 90. That the parties did not call for a jury and allowed the judge to decide the case on the testimony already taken, cannot alter the nature of the issue. The judgment of the Circuit Court alone is under appeal here.

The probate of a will settles all questions as to the formalities of its execution and the capacity of the testator, but does not affect the validity or invalidity of any particular clause or settle any question of construction. A revocation, therefore, which does not wholly defeat the will, presents no question for the Probate Court to determine. All questions as to the construction of the will must be settled by subsequent proceedings in the equity jurisdiction. So little has the Probate Court to do with the contents of a will or its

construction, that it is laid down as an elementary principle that "the bare nomination of an executor, without giving any legacy or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved." 1 Wms. Ex. 185; Jolliffe v. Fanning & Phillips, 10 Rich. 200. In this case Judge Withers said: "If the paper be duly executed by one competent, agreeably to the forms prescribed and in the presence of the requisite number of credible witnesses, and contain the revocation of all prior wills and the appointment of an executor, (as the testamentary paper before us does,) and be silent in fact or for want of validity as to all other matters, it is a will, and must be admitted to probate accordingly."

The judgment of this court is that the judgment of the Circuit Court be affirmed, and the case remanded to the Probate Court of Edgefield county for such action as may be necessary to carry out the principles herein announced.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. *47

*(Case No. 1087.)

CHARLESTON v. OLIVER.

SAME v. SAME.

(April Term, 1881.)

[1. *Licenses* ⇐41.]

The City Court of Charleston, under the authority of an ordinance of that city, may give judgment for the amount of a license tax and penalty, or imprisonment for thirty days, in case of non-payment.

[Ed. Note.—Cited in Floyd v. Perrin, 30 S. C. 10, 8 S. E. 14, 2 L. R. A. 242.

For other cases, see Licenses, Cent. Dig. § 86; Dec. Dig. ⇐41.]

2. State v. Hayne, 4 S. C. 403, and State v. Columbia, 6 Id., 1, recognized and followed.

[3. *Constitutional Law* ⇐14.]

Words and phrases in a constitution should be interpreted according to their ordinary and popular meaning, unless the context requires a technical sense.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Dec. Dig. ⇐14.]

[4. *Constitutional Law* ⇐83.]

The provision in Article I., Section 20 of the constitution, that "no person shall be imprisoned for debt, except in cases of fraud," has no application to taxes, which are not a debt within the meaning of this section.

[Ed. Note.—Cited in City Council of Charleston v. Ashley Phosphate Co., 34 S. C. 552, 13 S. E. 845.

For other cases, see Constitutional Law, Cent. Dig. § 151½; Dec. Dig. ⇐83.]

[5. *Licenses* ⇐5½.]

Power to a municipal corporation to make assessments on its inhabitants, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city, does not authorize the imposition by such municipality of a license tax on business.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. ⇐5½.]

[6. *Statutes* ⇐121.]

A statute, authorizing a municipal corporation to require payment for licenses from persons engaged in any calling, business or profession within its limits, does not violate Articles I., VIII. or IX. of the constitution of the United States, or Article I., Section 12, or Article II., Section 33 of the constitution of this State.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 173; Dec. Dig. ⇐121.]

[7. *Statutes* ⇐121.]

But such authority being conferred by a section of a statute whose title is "An act to regulate the assessment and taxation of personal property in the city of Charleston," such statute violates the constitutional provision contained in Article II., Section 20, that every act shall relate to but one subject, and that shall be expressed in the title, and, therefore, this section of the act had not the force of law.

[Ed. Note.—Cited in Connor v. Green Pond, W. & B. R. Co., 23 S. C. 434; Floyd v. Perrin, 30 S. C. 9, 8 S. E. 14, 2 L. R. A. 242; State v. Fields, 68 S. C. 149, 46 S. E. 771; State v. O'Day, 74 S. C. 449, 54 S. E. 607; Croxton v. Truesdel, 75 S. C. 426, 427, 56 S. E. 45; State v. Hunter, 79 S. C. 97, 60 S. E. 226; State v. Burley, 80 S. C. 130, 61 S. E. 255, 16 L. R. A. (N. S.) 266; Jellico v. Commissioners of State Elections for Charleston County, 83 S. C. 487, 65 S. E. 725; Southern Power Co. v. Walker, 89 S. C. 95, 71 S. E. 356.

For other cases, see Statutes, Cent. Dig. §§ 146, 173, 174; Dec. Dig. ⇐121.]

[8. *Licenses* ⇐6.]

[Cited in Information against Oliver, 21 S. C. 325, 53 Am. Rep. 681; Information against Jager, 29 S. C. 443, 7 S. E. 605; City Council of Charleston v. Ashley Phosphate Co., 34 S. C. 551, 13 S. E. 845; Florida Cent. & P. R. Co. v. City of Columbia, 54 S. C. 276, 32 S. E. 408, to the point that it was competent for the legislature to authorize a city to impose a license tax on the publishers and printers of newspapers.]

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 5; Dec. Dig. ⇐6.]

[9. *Municipal Corporations* ⇐956.]

[Cited in State ex rel. Ross v. Kelly, 45 S. C. 462, 23 S. E. 281, to the point that the act of 1783 (7 St. at Large, p. 97), incorporating the city of Charleston, confers upon the city power to assess property.]

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2010–2013; Dec. Dig. ⇐956.]

[This case is also cited in Fairly v. Wappoo Mills, 44 S. C. 255, 22 S. E. 108, 29 L. R. A. 215, as to facts.]

Before Pringle, Recorder, Charleston, January, 1881.

These were two actions in the City Court of Charleston, brought by the city council of Charleston against W. J. Oliver to recover license fees, in the one case for publishing a daily paper, and in the other for job printing, and, also, in both cases, the penalties for non-

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payment, the complaint also demanding *imprisonment for thirty days if the judgment was not paid. Defendant demurred and answered as follows:

First. The defendant above named demurs to this complaint, because:

1. It is a criminal action, and not cognizable by complaint; and,

2. Criminal and civil proceedings cannot be combined in the same form of action as are set forth in the complaint; and,

3. The plaintiff hath no right to pass the ordinance of 17th December, 1879; and,

4. No assessment or notification thereof has been or is alleged to have been given to defendant; and,

5. A license is not a tax in Charleston city; and,

6. There is no imprisonment for debt in this State.

Second. The defendant, for answer to said complaint, says:

That he never contracted with the plaintiff touching a license.

He prays to be hence dismissed with his costs, &c.

The judgment of the court, rendered by Hon. W. Alston Pringle, recorder, was as follows:

The following statement of the law and facts covers the ground taken in both demurrers and the answers:

The allegation that the defendant is indebted to the plaintiff is a sufficient allegation that neither the license nor the penalty has been paid.

The legislature, by the act of 1st March, 1870, authorized the city council of Charleston to require payment for licenses from persons engaged in business in the said city. By another act of the same date, the legislature authorized the city council to impose imprisonment in the alternative for all violations of the city ordinances.

The ordinance of the city council, under which the defendant is liable for the payment of the licenses and penalties for which these suits are brought, imposes an imprisonment of not more than thirty days as an alternative in default of payment. There is no provision in the ordinances limiting the requirement for a license to persons employing more than one hand.

It has been already decided that the licenses

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required by the *ordinances of the city council of Charleston are taxes. Cooley Tax. 13–14.

Under this authority the defendant is liable for the amount of the licenses and the penalties, and, in default of payment, to an imprisonment of thirty days in each case, and the judgment should be so entered up.

Defendant appealed, in both cases, to this court, upon the following grounds:

1. Because, the demurrer should have been sustained for the reasons set forth therein, which are re-asserted.

2. Because the act of 1870, authorizing the city to require payment for licenses for "all trades and professions," is unconstitutional under Sections 20 and 33 of Article II., and Section 12 of Article I. of the State constitution, and Section 10 of Article I., Articles I., VIII. and IX. of the United States constitution.

3. Because the ordinance of 17th of December, 1879, is ultra vires, in its prohibitory clause, of the act of 1870, which contains no prohibition; is illegal in its requirements for license for want of any prohibitory act, and is unconstitutional under the foregoing sections of the State and United States constitutions, as well as under Section 20, Article I., of the State constitution.

4. Because, "All taxes * * * shall be considered and held as a debt payable to the city," by the fifty-second section of the city ordinance of 1870, and the demand sued for is styled "a debt" in the complaint.

5. Because the demand is not for taxes, but for penalties, which are "monetary obligations."

6. Because the act of 1st March, 1870, relates to the police powers of the city, and not to taxation, and if it relates to the latter it is unconstitutional, under the foregoing sections of the State and United States constitutions.

Mr. W. M. Thomas, for appellant.

Mr. G. D. Bryan, contra.

September 27th, 1881. The opinion of the court was delivered by

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*McIVER, A. J. These were proceedings instituted in the City Court of Charleston, for alleged violations of one of the ordinances of that city: one for carrying on the business of publishing a daily newspaper without a license, and the other for carrying on the business of a job printer without a license. The recorder held that the defendant was liable in each of the cases "for the amount of the license and penalty, and, in default of payment, to an imprisonment of thirty days," and directed that judgment be so entered up. From these judgments the defendant appealed on various grounds, which are set out in the "case," by which questions are raised: 1st. As to the form of the action. 2d. As to the constitutionality of the act of 1st March, 1870, conferring power upon the city council to require the licenses in question. 3d. As to the power of the city council to pass the ordinance requiring the licenses. 4th. As to the right to impose imprisonment as a penalty for the non-payment of a license tax. 5th. As to the necessity for notice to the defendant of the imposition of the tax.

The constitution, Article IX., Section 8, provides that "the corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the

jurisdiction of the body imposing the same."

By Section 7 of an act entitled "An act to regulate the assessment and taxation of personal property in the city of Charleston," approved 1st March, 1870, (14 Stat. 409,) it is provided that "the city council of Charleston is hereby authorized to require the payment of such sum or sums of money, not exceeding five hundred dollars, for license or licenses, as in their judgment be just and wise, by any person engaged or intending to be engaged in any calling, business or profession," &c.

By another act entitled "An act relative to the power of the city council of Charleston, to impose punishment for the violation of city ordinances," approved March 1st, 1870, (14 Stat. 382), the city council of Charleston is "authorized to impose, for the violation of ordinances, imprisonment in the workhouse or jail, not exceeding thirty days, in

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addition or in the alterna*tive to penalties now authorized to be imposed by ordinances of said city." In pursuance of these acts, the city council of Charleston passed an ordinance on the 17th December, 1879, by which all persons engaged in the occupations therein named, among which are those of publishing a daily newspaper and job printing, are required to take out a license therefor, and providing that any person who shall exercise any of the callings, or carry on any of the occupations named, without taking out such license, "shall besides being liable to the payment for the license, be subject to a penalty of twenty per cent. of the amount of such license, to be sued for and collected in the City Court, or any other court of competent jurisdiction, or to imprisonment, not exceeding thirty days, as may be adjudged by the recorder."

The objection to the form of the proceeding, we regard as untenable. By Section 3 of Chapter 106, Gen. Stat. 498, the City Court is invested with jurisdiction of all causes arising under the ordinances of the city council of Charleston; and where, as in this case, no mode of enforcement is prescribed by the charter, we see no reason why the mode pursued in this case is not sufficient. 2 Dill. Mun. Corp., § 344.

The next inquiry is as to the constitutionality of the act of 1870. The general question of the power of the legislature to impose a license tax, has been conclusively settled in the case of the State v. Hayne, 4 S. C. 403, where most of the constitutional objections raised in this case were considered and disposed of. This case was followed by the case of the State v. Columbia, 6 S. C. 1, in which it was held that the legislature could empower a municipal corporation to impose a license tax on persons following particular callings, or pursuing particular occupations, within the corporate limits of such municipality. So that we consider that many of the constitutional questions raised by the appellant in these cases, have already been adjudicated, and it is only necessary for us to refer to the cases, as we have done, in which these questions have been determined.

There are, however, two constitutional questions raised here which are not determined in those cases, and which it will be necessary for us now to consider: 1st. Whether the provision subjecting the person, who fails or refuses to pay his license tax,

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*to imprisonment, is in violation of Section 20, Article I., of the constitution, which declares that "no person shall be imprisoned for debt, except in cases of fraud," and, 2d, whether the city council of Charleston have been constitutionally invested with power to impose a license tax.

To determine the first question, it is necessary to inquire whether a license tax is a "debt" in the sense of the word as used in the clause of the constitution above cited. We do not think it is. In determining the construction of words or phrases in a constitution or statute, we are not required to confine our attention to the abstract, technical meaning of the word or words employed, but must look to their ordinary and popular meaning also. The object being to ascertain the intention of the framers of the constitution, which must be gathered from the words used, we must necessarily give to those words the sense in which they are generally used by those who framed and those who adopted the constitution, unless there is something in that instrument showing that the words in question were used in a different sense.

Chief Justice Marshall, in Ogden v. Saunders, 12 Wheat. 332 [6 L. Ed. 606] declares the rule on this subject to be "that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended." We may also look to "the object to be accomplished, or the mischief designed to be remedied or guarded against, by the clause in which the ambiguity is met with. When we once know the reason which alone determined the will of the law-makers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent." Cooley Const. L. 65.

Guided by these principles we do not think that there can be any doubt that the framers of the constitution and the people who adopted it designed to use the word "debt," in the clause under consideration, in its ordinary sense, and did not intend that it should be held to embrace taxes levied for the support of the government or any of its agencies.

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The manifest object was *to deprive the citi-

zen of the power to have his fellow-citizen imprisoned for non-payment of his debt. This power, in the hands of private individuals, had long been a subject of discussion, and had been previously circumscribed by the enactment of the Insolvent Debtors' and Prison Bounds acts, which had no application to taxes, and the object of the clause in question, undoubtedly, was still further to limit this power by confining its exercise to "cases of fraud."

This view is fully sustained by the authorities. In Cooley Tax. 13, it is said: "Taxes are not debts in the ordinary sense of that term, and their collection will in general depend on the remedies which are given by statute for their enforcement. * * * The law abolishing imprisonment for debt has no application to taxes, the remedy for the collection of which may include an arrest if the legislature shall so provide." Again, at page 414, the same writer says: "A municipal corporation, empowered to grant licenses and to impose a fee therefor, may lawfully make the failure to take out a license and pay the fee subject the offender to the penalty of fine and imprisonment."

The next inquiry is whether the city council of Charleston have been constitutionally invested with power to impose a license tax. Municipal corporations possess no powers except such as are conferred, either expressly or by necessary implication, by the legislature, either in their charters or in some subsequent act. It is contended here that the power to impose a license tax can be derived from the provisions of the original charter of the city of Charleston, (act of 1783, 7 Stat. 97,) and, also, that it is expressly conferred by the seventh section of the act of 1st March, 1870, 14 Stat. 409, which has been above cited.

By the fourth section of the original charter the city council is "vested with full power and authority to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city, as shall appear to them expedient." The first question, therefore, is, do these words confer the power to

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impose a license tax, or do they simply *confer the power to impose a tax upon property? for it is very obvious that the two things are essentially different. One is a tax on persons, while the other is a tax on property. In the one case there must be an assessment of the value of the thing to be taxed before the tax can be levied, while in the other case there is not only no necessity for an assessment, but it would be impracticable.

In Section 33, of Article II., of the constitution, it is provided that "all taxes upon property, real or personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax." Section 1, of Article IX., declares that "the general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property," &c. Again, in Section 8, of Article IX., where provision is made for conferring the taxing power upon municipal corporations, it is declared that such taxes must be uniform "in respect to persons and property within the jurisdiction of the body imposing the same." These clauses contemplate two subjects of taxation—persons and property—in both of which the rule of equity or equality is required to be observed, but in only one—property—is such equity to be secured by an assessment of value, as that would not be applicable to the other. State v. Hayne, 4 S. C. 423.

Now the power conferred by the original charter upon the city council of Charleston was the power "to make such assessments on the inhabitants of Charleston, or those who hold property within the same," which plainly gave the power to tax property only and not persons, and therefore the power to impose a license tax cannot be derived from the original charter. This seems to have been the received opinion for many years, as otherwise there would have been no necessity for the seventh section of the act of 1st March, 1870, in which the legislature undertook to confer this power upon the city council. That this act does, in unmistakable terms, confer the power to impose a license tax, cannot be doubted; but it is contended that the

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seventh section *of the act of 1st March, 1870, is unconstitutional, and, therefore, has not the force of law.

Various objections have been urged to the constitutionality of this section, none of which are sustainable except the one based upon the provisions of Section 20, Article II., of the constitution, which provides that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." The section here in question is found in an act the title of which is "An act to regulate the assessment and taxation of personal property in the city of Charleston." It does not purport to be, and is not in fact, an act regulating taxation in the city of Charleston, but is confined, as its title imports, except in the section in question and one other, to the assessment and taxation of personal property. The question then is: Does this act relate "to but one subject?" and is that subject "expressed in the title?" and the practical inquiry is whether the subject—taxation of personal property—is the same as, or does it include, taxation of callings or occupations, usually denominated license taxes? That these two things are not the same, but, on the contrary, are essentially different in their nature, we have already seen, and we think it equally clear that the one does not include the other.

If the title of this act had been an act to regulate taxation in the city of Charleston, then it is very clear that anything relating to the general subject of taxation might properly have been included in the act, and provision might have been made for levying taxes upon any or all the different subjects of taxation contemplated by the constitution. Such, however, is not the title of the act, but it is restricted to one branch of the two general subjects of taxation contemplated by the constitution—personal property.

Again, it will be observed that the title of this act is, not to provide for, but to regulate the assessment and taxation of personal property. This word implies the previous existence of the power to impose taxes on one of the subjects of taxation—property—and only pointed to a purpose to provide certain regulations as to the mode of exercising such a power. It certainly cannot be regarded as

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indicating a purpose to confer a *new power of taxation, by authorizing the taxation of persons, and it was therefore well calculated to mislead.

In Cooley Const. Lim. 143–4, the purpose of this and other similar constitutional provisions is said to be: "1st, to prevent hodgepodge or 'log-rolling' legislation; 2d, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, 3d, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." This author, at page 149 of the same work, also says: "As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the constitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if, in fact, the legislature have not seen fit to make it so."

While, therefore, we think that there has been, and ought to be, a general disposition to give a liberal construction to constitutional provisions like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of construction (Cooley Const. Lim. 146), and while we fully agree with the Supreme Court of the United States where, (San Antonio v. Mehaffy, 96 U. S. 315 [24 L. Ed. 816]) adopting the language of the Texas Court in San Antonio v. Lane, 32 Tex. 405, it holds that: "When an act of the legislature expresses in its title the object of the act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction that every law shall embrace but one object and

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that *shall be expressed in its title," we cannot but regard the section of the act in question as being obnoxious to the constitutional objection which we have been considering.

The subject of the act, as expressed in the title, is the assessment and taxation of personal property, while the matter provided for by the seventh section is wholly different and has no relation to the subject expressed in the title. No one on reading the title of the act would for a moment suppose that the object was to confer a new and distinct power of taxation on the city council, by which a new and distinct subject of taxation was provided for, and it was very well calculated to mislead the people. It may be, when the people were informed by the title of the act that the object was merely to regulate the assessment and taxation of personal property, which had always been a subject of taxation, that they would have been content to leave that matter in the hands of their representatives; but if the title had informed them that the object was to confer an additional taxing power upon the corporation by creating a new and distinct subject of taxation, their apprehensions might have been aroused and they might have desired to be heard "by petition or otherwise." The power to impose a license tax was not at all necessary to the object expressed in the title, nor did it furnish any means by which such object could be best carried into effect. It was not even incidental to or in any way connected with it, but, on the contrary, was wholly distinct and independent. It is true that the legislature, under an act to regulate taxation in the city of Charleston, might have conferred the taxing power to the fullest extent authorized by the constitution, and might have provided any lawful means to render such power most effectual; but the legislature have not seen fit to adopt such a comprehensive title, and, on the contrary, have employed a much more restrictive one, and the court "cannot enlarge the scope of the title."

We are compelled, therefore, to declare that Section 7 of the act of 1st March, 1870, 14 Stat. 409, is in violation of Section 20, Article II., of the constitution of this State, and consequently there is no law authoriz-

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ing the city council of Charleston *to impose the taxes which are sought to be enforced by these proceedings.

Under this view of the case the other ques-

tions suggested by the appeal cannot arise and need not therefore be considered.

The judgment of this court is that the judgment of the court below, in each of the cases, be reversed, and that the proceedings be dismissed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 58

(Case No. 1088.)

LEWIS v. BROWN.

(April Term, 1881.)

[1. *Costs* ⇐172.]

Under Section 337 of the Code of Procedure, attorneys are entitled to have their costs and disbursements inserted in the entry of judgment—the amount of costs which they are entitled to receive, and of disbursements paid to officers for fees, being regulated by the subsequent act of 1880 (17 Stat. 296).

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 665; Dec. Dig. ⇐172.]

[2. *Costs* ⇐204.]

The theory of the law is that the fees of sheriffs and witnesses are disbursements paid by the prevailing party, but it is not error in the taxing officer to charge them in the bill of costs as due to those officers.

[Ed. Note.—Cited in Cureton v. Westfield, 24 S. C. 459; Dauntless Mfg. Co. v. Davis, Id., 540; Bryan v. Ream, 59 S. C. 341, 37 S. E. 921; Mitchell v. Barrs, 64 S. C. 200, 201, 41 S. E. 962.

For other cases, see Costs, Cent. Dig. §§ 772–774; Dec. Dig. ⇐204.]

[3. *Costs* ⇐207.]

In the absence of any showing to the contrary, it must be assumed that witnesses were entitled to the fees allowed by the clerk in his taxation.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 784; Dec. Dig. ⇐207.]

[4. *Appeal and Error* ⇐936.]

The production of a subpœna writ is not essential to entitle a witness to the taxation of his fees; and, quere, is it necessary for the witness to show that he has been subpœnaed?

[Ed. Note.—Cited in Atherton v. Atlantic Coast Line R. Co., 82 S. C. 475, 476, 64 S. E. 411.

For other cases, see Costs, Cent. Dig. § 817; Appeal and Error, Dec. Dig. ⇐936.]

[5. Costs ⇐25.]

The act of 1880 (17 Stat. 303), in its repeal of Section 330 of the code, also repealed the proviso, which was made a part of that section by the act of 1878 (16 Stat. 409), limiting costs to an amount not exceeding the recovery.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 83; Dec. Dig. ⇐25.]

[6. *Appeal and Error* ⇐226.]

Even if the clerk erred in the ground taken to support his taxation, it cannot avail the appellant here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1324; Dec. Dig. ⇐226.]

[7. *Costs* ⇐4.]

Semble: Disbursements should be taxed under the fee bill which was of force at the time they were incurred. This case distinguished from Kapp & Rothschild v. Loyns, 13 S. C. 288.

[Ed. Note.—Cited in Benbow v. Richardson, 21 S. C. 602.

For other cases, see Costs, Cent. Dig. §§ 2, 3, 109; Dec. Dig. ⇐4.]

Before Aldrich, J., Sumter, June, 1880.

Action by Kennedy Lewis against Robert Brown. The opinion states the case.

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*Mr. Marion Moise, for appellant.

Mr. Jos. H. Earle, contra.

September 27th, 1881. The opinion of the court was delivered by

McIVER, A. J. This action was commenced before a trial justice in August, 1875, and the plaintiff, having obtained judgment for only one dollar, appealed. The case was heard in the Circuit Court at April Term, 1880, when a verdict was rendered in favor of the plaintiff for $66.66.

On the 25th May, 1880, application was made to the clerk to insert in the judgment "the following items of costs and disbursements, to wit:

"To plaintiff's attorney's costs	$ 17 00
"To sheriff's costs	41 65
"To witnesses' fees	160 00"

The application was granted by the clerk, to which the defendant excepted on the following grounds:

1. Because there is no statute giving any costs to the plaintiff's attorney.

2. Because the sheriff's bill of costs was not itemized.

3. Because the sheriff has no right to tax any costs at all against the defendant, but must look to the plaintiff, who employed him, for his fees.

4. Because no costs could be taxed for the witnesses, as they must be paid by the party who summons them.

5. Because no costs could be taxed for the witnesses without producing the subpœna writs under which the witnesses were summoned.

The 6th is substantially the same ground as the 5th.

7. Because the right to have costs taxed in favor of the plaintiff, either for witness fees, or for the fees of officers of court, has been taken away by statute.

8. Because, in no event, can the plaintiff recover more costs than the amount of the verdict or recovery.

9. Because "the clerk decided that appeals

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from trial justices' *judgments rested upon different grounds from those cases brought originally in the Common Pleas, and, that in the former class of cases, costs, to any amount, could be taxed."

The Circuit judge sustained the taxation of costs as made by the clerk, and from his judgment this appeal has been taken, upon

the same grounds as were relied upon in the Circuit Court.

The code, Section 329, does repeal all statutes establishing or regulating the costs or fees of attorneys, and leaves the measure of their compensation to be determined by the agreement of the parties; but, at the same time, and, as a substitute for the attorneys' costs, or, as it is expressed in the code, "by way of indemnity" for his expenses in the action, the prevailing party is allowed certain sums of money, which allowances are termed in the code "costs." The idea seemed to be that the attorney should not be allowed any longer to tax his costs against the losing party, but that he must look to his client for compensation, and, as this would throw an additional expense upon the party, provision was made to indemnify him against such additional expense by certain allowances termed "costs."

The code next proceeds, in Sections 330 and 331, to provide when costs shall be allowed as of course, and, in Section 332, when they shall be allowed in the discretion of the court, and then, in Section 333, 334 and 335, establishes the amounts to be allowed. And, after providing in Section 336 for the interest which may accrue between the date of the verdict or report and the time when final judgment shall be entered, it provides in Section 337 that "The clerk shall insert in the entry of judgment, on the application of the prevailing party, * * * the sum of the allowances for costs, as provided by this code; the necessary disbursements, including the fees of officers allowed by law; the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing when required by a rule of the court. The disbursements shall be stated in detail and verified by affidavit. A copy of the items of the costs and disbursements shall be served with a notice of adjustment." The next section provides for the amount of the fees to which the clerk shall be entitled, and the next, for the

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*amount of the fees of referees, but no provision is made for the amount of the fees to which a sheriff or a witness shall be entitled, and they are, therefore, left to be regulated by the previous statutes upon this subject.

It will thus be seen that in Section 337, a distinction is recognized between the sums allowed to the prevailing party, by way of indemnity for his expenses, which allowances are termed "costs," and which were designed as a substitute for the costs formerly allowed to the attorneys, and the "necessary disbursements" made by the prevailing party in paying the fees of officers and witnesses; for that section provides that the clerk shall insert in the judgment, not only the sum of the allowances for costs, as provided by this code, which, as we have seen, was designed as a substitute for attorneys' costs, but, also, "the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses," &c.

The act of 22d March, 1878, 16 Stat. 624, while not referring in express terms to the provision of the code abolishing attorneys' costs, does, by implication, at least, restore the right of attorneys to charge costs, for it declares the amount of the costs which attorneys, as well as the other officers therein named, "shall be authorized to receive," and concludes with a general clause repealing all acts and parts of acts inconsistent with its provisions. While the law stood thus, it might have been a very serious question whether the prevailing party was not entitled to the costs allowed him by the code, and his attorney to the costs allowed him by act of 1878, for, while so much of Section 329 of the code as repealed the statutes establishing and regulating the costs of attorneys, was manifestly inconsistent with, and therefore repealed by, the act of 1878, yet there was no necessary inconsistency between the remainder of Section 329, and Sections 330, 331, 332, 333, 334 and 335, providing for costs to the prevailing party, and the act of 1878, providing for costs to the attorney.

Next, however, came the act of 20th February, 1880, 17 Stat. 296, amending the foregoing act as to the amount of fees to which the several officers therein mentioned shall be entitled, and expressly repealing Sec-

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tions 329, 330, 331, 332, 333, 334 *and 335 of the code, which abolished the right to attorneys' costs, and regulated the amount of the allowances, termed costs, to which the prevailing party should be entitled; but it does not repeal Section 337 of the code, by which the prevailing party was not only entitled to have inserted in the judgment the sum of allowances, termed costs, but also his necessary disbursements, including the fees of officers and witnesses, as fixed by law.

It seems to us, therefore, that these acts do not deprive the prevailing party of the right originally secured to him by the code, of requiring the clerk to insert in the judgment his necessary disbursements, including therein the fees of officers (amongst whom now are the attorneys) and witnesses, as fixed by law, and that the only effect of these acts is to deprive the party of the amount previously allowed as costs, and give to his attorney the costs allowed by these acts, and to fix the amounts of the costs and fees of the officers therein named, and witnesses. We think, therefore, that the appellant's first ground cannot be sustained.

The second ground seems to have been taken under a misapprehension of the facts, as it is stated in a note to the "case" that the sheriff's bill of costs was itemized.

The third and fourth grounds may be considered together. It is quite true, that the theory of the law is that the fees of officers and witnesses are to be paid by the party who calls their services into requisition, but in itemizing the bill of disbursements to be inserted in the judgment, we do not see how the fact that these items are set down as sheriffs' or witnesses' fees, instead of being stated as cash paid sheriff or witnesses for their fees, can make any practical difference. The prevailing party is entitled to have the amount of such fees taxed, and if, as set down in the bill, they appear to be due to these officers and witnesses, rather than to the prevailing party, we do not see how the other party can be prejudiced thereby. These grounds cannot be sustained.

The fifth and sixth grounds depend upon the decision of questions of fact, upon which the finding below is conclusive, unless manifest error is shown. In the absence of any showing to the contrary, we would, of course, take it for granted that the clerk had satisfactory evidence before him that the witness-

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es had been *subpœnaed, and had attended court in obedience to such mandate. The production of the subpœna writ was not essential, as it may have been lost, and, if so, secondary evidence would have been competent and sufficient. Indeed, we are not prepared to say that it is necessary that a witness, who has attended court, should be able to show that he has been duly subpœnaed, in order to entitle him to charge the fees allowed by law; for if he attends voluntarily, we do not see why he should not be just as much entitled to his fees as if he had been compelled to attend.

The seventh ground has already been disposed of, inasmuch as we have seen that there is no statute which deprives the prevailing party of his right to require the clerk to insert in the judgment, the amount of costs now allowed attorneys, as well as the fees of the other officers of court, and of the witnesses, as a part of his necessary disbursements.

The eighth ground cannot be sustained. The act of 4th March, 1878, 16 Stat. 409, did amend Section 330 of the code, by inserting in it a proviso: "That in no case shall the plaintiff be allowed costs to an amount exceeding the amount of his verdict or recovery," but this section has been repealed by the act of 20th February, 1880, 17 Stat. 333, and the proviso, which had become a part of it, must also be regarded as repealed.

The ninth ground raises a question which does not seem to have been considered in the Circuit Court, and as we are merely called upon to correct the errors of that court, it is a matter of very little consequence what view the clerk took; for as it is quite certain that the Circuit judge did not commit the error assigned in that ground, it cannot avail the appellant here, even if sustainable at all. But under the view which we have taken of the case, it is not a practical question whether the clerk was right or wrong on this point.

It will be observed that we have confined ourselves to the questions raised by the exceptions, and have not undertaken to consider a question discussed in the argument—whether the sheriff should be allowed the fees, as fixed by law at the time the services were rendered, or as fixed at the time the case was heard and the verdict rendered—because no such question is presented by any of the exceptions. We may say, however,

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that while *the case of Kapp & Rothschild v. Loyns, 13 S. C. 288, does establish the proposition that "costs," under the code, are governed by the fee bill of force at the time of the verdict, and not at the time of the taxation, it does not touch the question presented in the argument here. For, as we have seen, there is a distinction between the costs allowed by the code to the prevailing party and "disbursements." The latter are presumed to have been made at the time the services were performed, and, therefore, should be taxed under the laws fixing their amount at that date, as the object is simply to re-imburse the prevailing party for the outlay, while the former were in the nature of damages, and "the rule of the statute prevailing at the time of the recovery of the verdict would be the proper measure of such damages as are ascertained by the court as matter of law, and included in the judgment." Kapp v. Loyns, supra.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 64

(Case No. 1091.)

SMALL v. SMALL.

(April Term, 1881.)

[1. *Equity* ⇐381.]

The Circuit judge is not bound to consider the verdict of a jury on an issue ordered out of chancery as a correct finding of the facts, but may decree contrary to such finding. Ivy v. Clawson, 14 S. C. 272, approved.

[Ed. Note.—Cited in Rynerson v. Allison, 28 S. C. 85, 5 S. C. 218.

For other cases, see Equity, Cent. Dig. § 816; Dec. Dig. ⇐381.]

[2. *Execution* ⇐234, 303.]

One who purchases land sold under her execution for less than the amount due, but fails to receive the sheriff's deed, is entitled, nevertheless, to assert her equitable title to such land in an action brought for its partition, to which action she is made a party defendant.

[Ed. Note.—Cited in Lorick & Lowrance v. McCreery, 20 S. C. 428; Fields v. Watson, 23 S. C. 49.

For other cases, see Execution, Cent. Dig. §§ 658, 901; Dec. Dig. ⇐234, 303.]

[3. *Executors and Administrators* ⟸454.]

Lands of a testator in the hands of his devisees unpartitioned, may be reached as assets of the estate under proper judgment against the executors, as such, for a legacy which, under a provision of the will, is declared to be in lieu of dower, and so accepted; but where the judgment and execution ran against the executors de bonis propriis, only the interest of the executors, as individuals, could be sold, and not the interest of other devisees.

[Ed. Note.—Cited in Fields v. Watson, 23 S. C. 50.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1914, 1925; Dec. Dig. ⟸454.]

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[4. *Executors and Administrators* ⟸454.]

*The form of the judgment and execution in such case is not an irregularity which may be disregarded in favor of the widow, who purchased the land under her own irregular process. Forms must be exact to entitle one to sell land without making the owner a party.

[Ed. Note.—Cited in Huggins v. Oliver, 21 S. C. 156; Fields v. Watson, 23 S. C. 55; Bonham v. Bishop, Id., 102.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1909–1928; Dec. Dig. ⟸454.]

Before Hudson, J., Lancaster, October, 1880.

This was an action commenced July 29th, 1873, by Dilla Small and Uriah Small, devisees of John B. Small, against Marion Small and others, heirs and devisees of the same John B. Small, and against Mary Small, his widow; and, upon the death of Mary Small, it was revived against her devisees. The Circuit decree, after a statement of the facts repeated in the opinion, was as follows:

At a previous hearing of this cause, Judge Thomson, in June, 1879, ordered that this question of title be submitted to a jury. This was, at a subsequent term of the court, done, whilst Judge Wallace presided, but no further hearing of the cause was had. The verdict of the jury was against the McAteers, and in favor of the children and grandchildren of John B. Small. But there is no record of the testimony submitted to the jury, nor of the questions of law raised before the court, nor have we any report of the case by the presiding judge by which we are to be enlightened. We are here without the aid which is usually to be derived from the verdict of a jury upon an issue of fact. From all that we can gather, it seems that the absence of the sheriff's deed to Mary Small was considered fatal to her claim of title, and decisive against the McAteers. It is clear that Mary Small, the execution creditor, became the purchaser at the sale and entitled to a deed, unless it appears that she either did not comply with the terms of sale, or that some other good cause prevented the sheriff from making titles. But, if the proceeds of sale were applicable to her fi. fa., Mary Small, by the purchase alone, without further compliance, became entitled to her deed. There is no evidence that she did not comply, nor that the money did not belong to her, and the presumptions are all in her

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favor—so much so, that it devolves *upon those resisting her title to show that she did not comply with her bid, and did not get titles; and nothing of the sort is shown, or attempted to be shown, so far as the court is informed. The verdict seems to be based upon the naked fact of the non-production of a deed.

Under the circumstances, we are not disposed to receive the verdict of the jury as a correct finding of the facts; and we find that, by virtue of the sale aforesaid, Mary Small became the lawful purchaser of this land, and either actually received titles from the sheriff, or became entitled to demand and receive the same, and that those claiming under her by devise are now entitled, in her stead, to receive titles. The fact that she devised the land is a strong circumstance in connection with the memorandum of levy and sale, going to show that she got titles. If the sale was valid, the McAteers must prevail in this action, and we are thus brought to the next and most interesting question submitted to us. It is contended by the plaintiffs that the lands of the testator, J. B. Small, devised or descended, cannot be submitted to the payment of a pecuniary legacy. That the devisees and heirs have an estate and a right which is superior to that of a mere pecuniary legacy, and the property of the one cannot be taken to pay the claim of the other, is a well-established general rule in law and equity. But, in the present case, the legacy is given in lieu of dower, and is regarded as standing in lieu of a debt due by the testator for the purchase-money of this estate, or inchoate right of the widow, which is highly favored in courts of justice, and in the eye of the law. Hence, a pecuniary provision in lieu of dower is regarded as standing on higher ground than a mere pecuniary legacy. It is an offer to buy the widow's estate in the husband's lands, and, when accepted by the widow, the contract of sale is complete, and the debt is due by the estate. If the personal assets be insufficient to pay other pecuniary legacies, this one does not abate ratably with them, but remains a charge upon the estate. See Stuart v. Carson, 1 Des. 500, and cases there cited; Heath v. Dendy, 1 Russ. 543; Isenhart v. Brown, 1 Edw. (N. Y.) 411. Now the McMullen tract of land has reverted to the estate of testator, and was distributable generally

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among his children. It *was no longer a specific devise, and hence was liable, in our judgment, to levy and sale to satisfy this claim of dower.

We find, therefore,

1. That it was sold lawfully, and that Mary Small became the purchaser thereof, and that her devise to the McAteers gave

them a good title, as against the children and grandchildren of the testator, who, in this action, seek partition.

2. That if sold, but so as to give Mary Small no legal title, it is still liable to the lien of this fi. fa., and that her personal representatives can yet have the fi. fa. levied and the land sold.

But, as our finding is in favor of the McAteers in the first instance, it follows that the complaint must be dismissed, and that the children and grandchildren of J. B. Small, who are parties to this action, must pay the costs and disbursements thereof to the McAteers, and such is the judgment of the court.

The land described in the complaint having, by consent of parties, been previously sold, and the fund being in court, it was ordered to be paid over to the McAteers (defendants), or their attorneys.

The devisees of John B. Small, named in the complaint, appealed from the foregoing decree, and from the order of the court to carry out the same, on the exceptions stated in the opinion of this court.

Mr. R. E. Allison, for appellants.
Mr. Ernest Moore, contra.

October 1st, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action to partition a tract of land containing two hundred acres among "the children" of John B. Small, deceased, under a devise in his will. The land was claimed by Mary Small, the widow of the testator, and the question became one of title.

John B. Small died in 1856, possessed of a small unincumbered estate. He made provision by his will, (of which his sons, Uriah Small and John S. Small, were executors,) for his wife, Mary, and his children. Among

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other provisions he made the *following: He devised a tract of land, known as the "McMullen land," to his grandson, John Van Buren Tye, and if he should die without leaving wife or children, the same should revert and "be equally divided among his children." It does not appear that the said grandson ever had possession, as he died before he attained majority without wife or child. This proceeding was to partition this land among the children under the will.

The widow, Mary Small, claiming the land, was made a party, and died pending the litigation, having devised the land to her kinsmen, John and Richard McAteer, who were made parties, and claimed to set up her title.

The testator, by his will, gave to his widow, Mary, in lieu and bar of her right of dower five hundred dollars, "to be paid to her by my executors out of my estate all for the support of my wife, Mary, during her life, and, at her death, to be returned to my estate, to be equally divided amongst my children, whatever of my said legacy that may not be economically expended for the above purposes," &c. Mary, being dissatisfied with the amount allowed her for maintenance, filed a bill against the executors, Uriah Small and John S. Small, to compel assent to her legacy.

Chancellor Lesesne heard the case June 27th, 1867 and ordered the defendants to pay the plaintiffs, forthwith, one hundred dollars, and thirty dollars at the end of every three months, until the sum of $563.75 should be exhausted. This decree was not appealed from, but was enrolled and execution issued thereon, directing the sheriff "that of the goods and chattels, lands and tenements of said Uriah Small and John S. Small, defendants, you levy the same," &c. Under this execution, the land in question was sold as the property of the testator, John B. Small. At the sale, the plaintiff in execution, Mary Small, bid off the land for $40. It does not appear that she took a deed from the sheriff, but it is claimed that the land thereby became her property, passed under her will and now belongs to her devisees, the defendants.

This action was commenced in 1873. Judge Thomson, who first heard it, ordered an issue

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as to the title, which was tried *before Judge Wallace, 1879, and the jury found for the devisees, the actors in the issue. It was also referred to a referee, who took the testimony, and found that "the McAteers are entitled, if to anything, to the land herein sought to be partitioned," &c. The plaintiffs excepted to this report. The case was heard by Judge Hudson, who decided that the land belonged to the McAteers, and dismissed the complaint, and the plaintiffs appeal to this court upon the following exceptions:

1. "Because the Circuit judge, contrary to the finding of the jury, has found, without any sufficient evidence, that the legal title to the land described in this complaint was vested in the McAteers, instead of the devisees of John B. Small, deceased.

2. "Because the Circuit judge erred in holding that the onus of proving that Mary Small received from the sheriff no deed or title for the land in question, rested on the devisees of John B. Small, deceased.

3. "Because Mary Small and her devisees having claimed title to the land in question, it was incumbent on them to make out their chain of title, and the judge erred in ruling otherwise.

4. "Because the devisees of John B. Small, deceased, in the record of Mary Small against Uriah Small and John S. Small, as executors of John B. Small, deceased, to compel assent to the legacy of Mary Small, as offered in evidence in this cause, were not parties, and their rights as such devisees could, in no way, be affected by said record, and the sale of the land thereunder was a nullity so far as said devisees are concerned, and Mary Small could not, under said sale, take title even if

she had received the deed from the sheriff.

5. "Because the Circuit judge erred in not sustaining the exceptions filed to the referee's report."

As to the first exception relating to the issue at law. This subject has lately been considered by the court, and it will not be necessary to do more than refer to the authority. This was an equity suit to be decided by a judge sitting as chancellor. Judge Thomson thought proper to order an issue to be tried by a jury. That was not to be final and decide the case, but to inform the conscience of the judge. "When a judge, sitting in what would have been called a suit

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in equity, orders an issue *upon any question of fact, it is an interlocutory order, made to enlighten his conscience, reserving the consideration of further questions in the cause until after the trial of the issue. * * * Judgment is not entered on the verdict, but it is reported, to be dealt with in connection with the whole case in which the issue was ordered. The judge who hears it finally, sitting as chancellor, is not required to regard the finding of the jury as conclusive of the fact submitted, any more than he would the report of a referee, but, on the contrary, is bound to consider all the evidence in the whole case, including the finding and the evidence to support it, and pronounce his judgment accordingly." Ivy v. Clawson, 14 S. C. 272.

The judge says: "There is no report of the testimony submitted to the jury, nor of the questions of law raised before the court, nor have we any report of the case by the presiding judge by which we are to be enlightened. Under these circumstances we are not disposed to receive the verdict of the jury as a correct finding of the facts," &c. The judge was not bound to consider the verdict as a correct finding of the facts, and, in refusing to do so, we cannot say that there was error.

The second and third exceptions relate to the absence of proof as to the execution of a deed by the sheriff to Mary Small. She was the plaintiff in execution, and not bound to pay her bid to the sheriff. He could not have recovered the money from her, as she was entitled to have it credited on her execution. Cobb v. Pressly, 2 McMull. 417. She had equitable title, which may be set up in this proceeding. McElmurray v. Ardis, 3 Strobh. 215. Equity regards that as done which ought to have been done.

The fourth exception raises a more difficult question. It is contended that when Mary Small sued Uriah Small and John S. Small, describing them as executors, not making the other devisees parties, their shares were not reached by the judgment, and did not pass under the sheriff's sale. It does not follow, necessarily, because the other devisees were not made parties to the suit against the executors, that the interest of such devisees could not be reached under a judgment and execution against the executors alone. This was manifestly not an action to make

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*land, in the possession of devisees, liable for a debt of the ancestor, but against the executors, as representatives of the estate. Whether the interest of devisees, not parties, was sold, depends upon two inquiries: First, whether the land was still in the hands of the executors, to be administered as assets of the estate of the testator, and, second, whether the claim was a debt of the estate, and the judgment pronounced thereon had the proper scope and form to give it a lien upon the property of the estate. It was held very early in our State, that, under the statute (5 Geo. II.) making land assets for the payment of debts, executors, whose duty it is to provide for debts, must, so far as creditors are concerned, have some qualified right to control lands devised, and in that view it was decided "that under a fi. fa. against an executor, lands in his possession, to be administered, might be sold, provided the fi. fa. directed levy of the lands, goods and chattels of the testator in the hands of the executor to be administered," &c. See Smith v. Grant, 15 S. C. 136, where the authorities are collected.

The above expresses the exact point ruled in the numerous cases from D'Urphey v. Nelson, 1 Brev. 289, down to the case above cited. Much that has been said in the cases as doctrine and dicta has been disapproved, and it has been frequently said that they are not to be extended one step further. Drayton v. Marshall, Rice Ch. 387 [33 Am. Dec. 84]; Jones v. Wightman, 2 Hill 579; Vernon v. Valk, 2 Hill Ch. 261; Bird v. Houze, Spears Eq. 250; Hull v. Hull, 3 Rich. Eq. 86.

Taking this as our guide, let us apply the principles to this case. We agree with the Circuit judge that the "McMullen land," being still undivided, was theoretically in the hands of the executors as assets to be administered, and might be sold under a judgment against the executor as such, without making the other devisees parties. We also agree with him that the claim of Mary Small, upon which she obtained judgment against the executors, being a provision in lieu and bar of dower, may be considered as a debt of the testator, but we think the judgment was only against the defendants named, and could sell nothing beyond their property. If it was Mary Small's purpose to recover against the executors, so as to bind the estate

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of *the testator "de bonis testatoris," the scope of the judgment was fatally defective in being against Uriah Small and John S. Small, individually, and in not ordering the money made "of the lands, goods and chattels of the testator in the hands of the executors to be administered." Both the judgment and execution ran against Uriah Small and John S. Small de bonis propriis, and Mary Small, the purchaser, acquired title to

their individual shares, but she acquired no title to the other shares, which could only be legally sold under an execution running "de bonis testatoris."

It may be said that the form of the judgment and execution was a mere irregularity in the proceedings, which the purchaser at a sheriff's sale is not bound to look into. There is such a considerate rule, but we think this was more than a mere irregularity. Forms must be exact when the right is claimed to sell land without making the owner a party.

It does not appear from the proceedings that Mary Small sought to obtain a judgment which would bind the estate of her deceased husband. Her complaint was against the conduct of the executors. The character of her cause of action would seem to indicate that her purpose was to obtain precisely such a judgment as was rendered against Uriah Small and John S. Small as individuals; but, be that as it may, she cannot claim want of notice as an innocent purchaser. She was the plaintiff in execution, and is fairly chargeable with knowledge of the terms of her own process.

The children of John B. Small, except Uriah Small and John S. Small, have never been divested of their interest in the McMullen land. The defendants, John McAteer and Richard McAteer, are the owners of the shares of Uriah Small and John S. Small, and the said parties, as tenants in common, are entitled to partition the same.

The judgment of this court is that the judgment of the Circuit Court be modified in accordance with the views herein expressed, and the case remanded for such orders as may be necessary to carry into effect this judgment.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. *73

*(Case No. 1092.)

MOBLEY v. DAVEGA.

(April Term, 1881.)

[1. *Bills and Notes* ⇦125.]

A note payable twelve months after date, "with interest from date, at twelve and a-half per cent. per annum, interest payable annually," and described by the maker, in a mortgage contemporaneously executed, as a note "with interest thereon at the rate of twelve and a-half per cent. per annum till paid," draws the same rate of interest after maturity as before. The rule laid down in Langston v. Railroad Company, 2 S. C. 248, approved.

[Ed. Note.—Cited in Miller v. Hall, 18 S. C. 145.

For other cases, see Bills and Notes, Cent. Dig. § 281; Dec. Dig. ⇦125.]

[2. *Interest* ⇦37.]

[Cited in Maner v. Wilson, 16 S. C. 476; Watkins v. Lang, 17 S. C. 17; Wilson v. Kelly, 19 S. C. 168; Baum v. Raley, 53 S. C. 40, 30 S. E. 713, to the point that it is a question of intention whether the interest specified in an obligation shall continue after it becomes due.]

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. ⇦37.]

Before Hudson, J., Chester, October, 1880.

Action was instituted in January, 1880. The opinion states the case.

Mr. S. P. Hamilton, for appellant.

Mr. T. C. Gaston, contra.

October 1st, 1881. The opinion of the court was delivered by

McGOWAN, A. J. On January 1st, 1872, the defendant, Abram H. Davega, gave to the plaintiff a sealed note in these words:

"$2,270.00. Chester, January 1st, 1872.

"Twelve months after date, I promise to pay Samuel W. Mobley, or order, twenty-two hundred and seventy dollars, with interest from date at twelve and a-half per cent. per annum, interest payable annually, for value received.

"Witness my hand and seal.

"A. H. Davega. [L. S.]"

On the same day, Davega executed a mortgage of a lot in the town of Chester to secure

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the payment of the note, the preamble *of which, describing the note, states "with interest thereon at the rate of twelve and a-half per cent. per annum from the first day of January, A. D. 1872, till paid, as in and by said sealed note and condition thereof, reference being thereunto had, will more fully appear," &c.

The interest on the note for one year was paid when it fell due, and sundry other payments were made at different times thereafter, but a large amount still remaining due, the plaintiff instituted these proceedings to foreclose the mortgage, and the question arose as to the manner in which interest should be calculated on the note—whether the note, after maturity, continued to bear interest at twelve and a-half per cent., according to its terms, or only the legal rate of seven per cent. per annum. The case came on to be heard before Judge Hudson, who referred it to the clerk of the court to compute the amount of interest due upon the note, who computed the interest up to date at twelve and a-half per cent., as indicated in the note, and reported that the sum of $2,696.71 was still due. Judge Hudson confirmed the report and decreed foreclosure for the sum stated, and the defendant appeals to this court upon the following exceptions:

1. Because his Honor, the presiding judge, erred in not holding that the special contract, as set forth in the sealed note mentioned in the pleadings, terminated at the expiration of the twelve months.

2. That he erred in not holding that after the termination of the special contract, interest could only be calculated at seven per cent. according to law.

3. Because his Honor erred in confirming the report of the referee, wherein interest was calculated on said sealed note at the rate of twelve and a-half per cent. per annum, with annual interest at that rate to the date of the decree.

The single question is: What was the contract of the parties—that is to say, what was their intention, as disclosed by the papers themselves? When this note and mortgage were executed, it was lawful for parties to agree in writing, signed by the party to be charged therewith, for any specific rate of interest. Did these parties intend that the note should bear interest at twelve and a-half per cent. after as well as before it fell

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due? The *usury law, subsequently passed, does not touch the inquiry. This court has declared that the rule is properly laid down in the case of Langston v. The S. C. Railroad Company, 2 S. C. 248, as follows: "If the debt bears a fixed rate of interest on its face higher or lower than that prescribed by law as the legal one, where the parties do not contract that it shall be the rate after the debt becomes due, the interest fixed by law attaches on it for the detention of the principal sum," &c.

Did these parties contract that twelve and a-half per cent. per annum "should be the rate after the debt became due?" The referee and Circuit judge both decided that they did. In cases of such concurrence upon a question of fact this court rarely disturbs the judgment. It is probable that the parties intended to make no contract as to the rate of interest beyond the time the note was to fall due, and if they did intend to provide for that period at all, is it not improbable that they would fix the interest at a lower rate after than before due? The use of money due, but still detained, is not less valuable than that which is detained by the terms of the contract.

In construing a paper, every word, if possible, should have its full effect. The terms of the note are "with interest from date at twelve and a-half per cent. per annum, interest payable annually." The word "annually" conveys a very distinct idea that the matter might not stop at the end of one year, but go into years beyond. It is defined as follows: "Yearly," "returning every year," "year by year." The use of the word indicates a mutual stipulation for an indefinite extension of credit, and annual payment of interest during the extension. Sharpe v. Lee, 14 S. C. 341, and the authorities there cited.

Besides, in this case, the note and mortgage to secure it were executed at the same time, and the mortgage, a solemn deed of the defendant, described the note as bearing interest at twelve and a-half per cent. per annum from January 1st, 1872, "till paid." Mr. Jones, in his work on mortgages, says: "The note and mortgage, when made at the same time, and in relation to the same subject, are a part of one transaction, and constitute one contract, and must be construed together as if they were parts of one instrument. They explain each other so far as the

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indebted*ness is concerned. The mortgage usually describes the note, stating the date, amount, the makers of it, and the time when it is payable. Such description serves to identify the note. The mortgage may describe the debt as well, and thus may qualify the terms of the note. For instance, where a note was given, payable in five years from date, with interest at ten per cent., and, at the same time, a mortgage was given to secure the payment of the note, in which it was stipulated that the interest should be payable annually, the agreement was held to be that interest at ten per cent. was payable annually, and that foreclosure might be had for the non-payment of the interest." 1 Jones Mort. § 71.

The judgment of this court is that the judgment of the Circuit Court be affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 76

(Case No. 1093.)

WALKER & TRENHOLM v. KEE.

(April Term, 1881.)

[1. *Partnership* ⇐160.]

A promissory note payable to a partnership firm, A. & B., was endorsed by A. before maturity in the name of A. & B. to another firm, A., B. & C., and at the same time it was endorsed by A. in the firm name of A., B. & C. to D. D. knew to whom the note originally belonged, and saw the endorsements made. At the time, A. & B. were indebted to A., B. & C., and B. afterwards said to D. that the note was a good collateral. *Held*, that there was no fraud in the transfers, and that D. was entitled to the note.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 251; Dec. Dig. ⇐160.]

2. Where a vendee of land receives only a bond for titles, and, at the same time, executes his promissory notes for the purchase-money, the transaction constitutes an executory contract for the sale of land, which, in favor of endorsees of the notes for value before due, who had knowledge of the contract, may be specifically enforced in equity, by directing payment of the notes, or, on failure, a sale of the land, and an application of the proceeds to such indebtedness.

[Ed. Note.—Cited in Blackwell v. Ryan, 21 S. C. 121; Clark v. Wright, 24 S. C. 535; Tant v. Guess, 37 S. C. 497, 16 S. E. 472.]

[3. *Specific Performance* ⇐17.]

The vendee having failed to comply with his contract, executed an obligation to pay rent to the vendors' assignees, who claimed under an assignment made by the vendors subsequent to the transfers of the notes, and this obligation was deposited by such assignees with the clerk to

await the judgment of the court. *Held*, that the endorsees were entitled to this rent obligation.

[Ed. Note.—Cited in Blackwell v. Ryan, 21 S. C. 122.

For other cases, see Specific Performance, Cent. Dig. § 40; Dec. Dig. ⟸17.]

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*Before Hudson, J., Lancaster, October, 1880.

These were actions by Walker & Trenholm against A. M. Kee and R. M. Miller and T. G. Cureton, assignees of Stevens & Cureton, and of Cureton, Ardrey & Co.; and by The Merchants' and Farmers' National Bank, of Charlotte, N. C., against the same defendants. The two actions were commenced in 1879, and were afterwards consolidated and heard together.

The object of the action, the contract of Kee, and other matters are stated in the opinion. From the testimony it appears that Walker & Trenholm received the notes assigned to them in consideration of moneys advanced by them to Cureton, Ardrey & Co., and in ignorance of the consideration on which the endorsement of Stevens & Cureton was based. This endorsement was made by Cureton. They had knowledge of the contract with Kee which secured these notes, and relied upon it as security for the repayment of their advances.

The Charlotte Bank took the Kee note as collateral for notes then due them, and retained it by agreement to secure the payment of renewals of the bank notes. It was represented to them by Cureton at the time of its deposit that this Kee note was secured by the land for which it was, in part, given. The cashier of the bank saw Cureton endorse this note with the firm name of Stevens & Cureton, and at the same time with the firm name of Cureton, Ardrey & Co. The business of the two firms with the bank was done almost entirely by Cureton. The Massey note was as follows:

"$1,200.00.

"Fort Mills, S. C., Jan'y 4th, 1878.

"Sixty days after date we promise to pay to the order of B. H. Massey, twelve hundred dollars, negotiable and payable at Merchants' and Farmers' National Bank, Charlotte, N. C., with interest after maturity at eight per cent. per annum, value received.

(Signed) "Cureton, Ardrey & Co.

(Endorsed) "B. H. Massey."

This note was discounted by the Charlotte bank, having never before been in circulation. In North Carolina, interest at eight

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*per cent. by contract is not usurious. The president of the bank testified that the bank would not have received the notes but for the collaterals, and only valued the collaterals on Kee because of the supposed lien on the land; that "Stevens afterwards also explained the matters to us. * * * I am not sure that Stevens specially referred to the bond for titles, but certainly spoke to us of the Kee notes as good collaterals. Don't remember that he ever until lately told me that he was not aware that we had the Kee note."

J. H. W. Stevens testified—

The notes of Mr. Kee belonged to Stevens & Cureton. Mr. Cureton endorsed them over to Cureton, Ardrey & Co.; but they were never the property of that firm. I was the managing partner of Stevens & Cureton. Cureton did much of the bank business, as he lived near the bank in Charlotte. After Cureton went to Fort Mills, I drew all the checks. Just before our firm made an assignment, I was, for the first time, made aware that the bank had the collaterals. I complained of Cureton for making the transfer. I turned the papers over to Cureton to allow him to raise money of Walker & Trenholm for Stevens & Cureton—T. J. Cureton was my partner, and often raised money for the firm. The note of A. M. Kee was never before pledged to raise money. Cureton had no instruction at all from me. I was dissatisfied as soon as I found out that he had transferred the notes to the bank of Charlotte for Cureton, Ardrey & Co.

T. J. Cureton testified—

I am a member of Stevens & Cureton and of Cureton, Ardrey & Co. The latter firm is largely indebted to the bank in Charlotte by the two notes in question. I pledged the note of A. M. Kee and the land contract upon which the note is based as collateral for the two $1,200. Stevens knew of the pledge only a short time before the assignment. At the time of the pledge the books of Stevens & Cureton show that Stevens & Cureton were largely indebted to Cureton, Ardrey & Co. I owned half interest in Stevens & Cureton, and one-third interest in Cureton, Ardrey & Co. I generally had to raise money from the bank. I did all the bank business, and

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would at no time have hesitated *to use collaterals of either firm. I never tried to conceal this transaction with the bank. Stevens often visited me.

Cross-examined—

I had many book-keepers. Sometimes kept books myself. Stevens had full opportunity to examine our books. He managed at Lancaster, and I at Fort Mills. The land sold to Kee was a good part of the assets of Stevens & Cureton, as it turned out. The bank of course knew when I endorsed and turned over the Kee note, that it was the property of Stevens & Cureton.

Re-direct examination—

The Kee notes belonged to Stevens & Cureton, and were by me transferred by endorsement to Walker & Trenholm and the bank, and before maturity.

The Circuit decree, after a statement of facts, was as follows:

In January, 1879, Walker & Trenholm brought suit against A. M. Kee, on the notes transferred to them, and recovered judgment. To this action the aforesaid assignees were co-defendants with Kee, and vigorously assailed the validity of the transfer of the notes upon the ground that T. J. Cureton negotiated the notes without authority from J. H. W. Stevens, and in fraud of the rights and interest of the firm of Stevens & Cureton. The defense failed, and upon appeal to the Supreme Court the judgment below was affirmed.

To the present suit, so far as the transfer to the bank is concerned, the same defense is interposed, and upon a similar state of facts.

It is scarcely necessary to say that the judgment of the Supreme Court so recently rendered as above stated, is decisive of this issue as to the title of the bank to the note aforesaid. We are thus brought to the consideration of the present case.

A. M. Kee, it is said, is insolvent, and neither Walker & Trenholm have been able to collect of him their judgment on the notes aforesaid, nor can the aforesaid bank collect the notes owned by it. Of Kee's insolvency, there is no question. Hence both parties have united in this action, the object of which is to subject the land purchased of

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Stevens & Cureton, by Kee, to *the payment of the notes given for the purchase-money. The title to this land never passed from Stevens & Cureton until the assignment to Miller and Cureton, February 18th, 1878, and then the transfer was made subject to the contract of A. M. Kee, who makes no defense to this action, but who, if able to pay, only desires to know to whom he can rightfully make payment. The assignees claim said land, and deny plaintiff's right in any manner to subject it to the payment of the judgments and notes which they hold against Kee; and it is here that the real issue of the cause arises. I am clearly of opinion that the plaintiffs are entitled to the relief demanded. Neither Stevens & Cureton, nor their assignees, have any interest in this land sold to Kee, except that the fee is in the assignees, subject to the contract with Kee. By the sale of the notes, every dollar of the money due for the land has been realized by the vendors. To the holders of the notes, Kee is alone responsible, and upon payment to them of these notes, could sue out titles from Stevens & Cureton (or rather their assignees), and no resistance could be raised to his demand for titles upon paying the notes. When the notes were traded, they were accompanied by copies of the contract with Kee, which was represented as a security strengthening the notes; and, although there was no written assignment of this contract to Walker & Trenholm, nor to the bank, yet the notes were represented as resting upon it as security, and were bought on the faith of this supposed security. The purchasers are accordingly, as against Kee, entitled to all the remedies for enforcing payment of the notes which Stevens & Cureton possessed. They had a right, on Kee's default, to have the land sold and proceeds applied to the payment of their notes, and to this remedy these vendees, the plaintiffs, are equally entitled, just as clearly as would be the purchaser of a note secured by a mortgage entitled to the foreclosure of the mortgage. The sale of a note carries with it all the liens, legal or equitable, given to secure it.

We deem it unnecessary to cite many of the numerous authorities bearing on this issue in support of the view. In 1 Jones on Mortgages, § 235 et sequentia, is to be found a full and clear exposition of this doctrine. The

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author says: "An *assignee of a note or bond, given for purchase-money by one who has taken a contract of sale, or who has taken a conveyance in which a lien on the land is expressly reserved, like the assignee of a note secured by mortgage, is entitled to the benefit of the security, and may enforce specific performance of the contract of sale, or may enforce the lien reserved." The lien is regarded as incident to the debt. The discussion is full and very forcible, and further extracts are unnecessary. I refer to this book for further information. The plaintiffs are entitled to demand of Kee a specific performance of his contract by a given day, and on his failure to comply, they are entitled to have the land sold by order of this court, and titles made to the purchaser so as to bar and foreclose the said Kee, Stevens & Cureton, and all persons claiming under them, of all right to redemption. In the application of proceeds of sale, Walker & Trenholm, being the oldest assignees, are entitled to be first paid, and then the Merchants' and Farmers' Bank, and it is so adjudged. Let the plaintiffs prepare the necessary order to carry this decree into effect—an order in the nature of a judgment of foreclosure and sale.

It was brought to the attention of the Circuit judge, that the clerk held an obligation of Kee for rent, described in the following receipt:

Received of R. M. Miller and T. G. Cureton, a lien in their favor as assignees, signed by A. M. Kee, and two hundred dollars in cash; said lien being for $650, which lien and money is in controversy in the above action, and to be by me turned over to the parties who may be entitled by the judgment of the court. The depositing of said money is in no way to prejudice the rights of any of the parties, but is made only to prevent litigation, trouble, and expense, in an effort now being made to bind said Miller and Cureton to security for

rent of the place on which A. M. Kee now resides, and is one of the objects of said suit.

D. A. Williams, Clerk C. C. P.

July 16th, 1880.

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*Thereupon the following order was passed:

It is further ordered, that D. A. Williams, as clerk of this court, do proceed to enforce the collection of the rent due on the rental obligation or lien represented to have been placed in his hands by the said assignees of Stevens & Cureton, to secure rent for the same lands for the present year, the same having been deposited with said clerk as security—a security to said plaintiffs in case they finally succeed in this action, and that said clerk do hold the proceeds of rent until the further order of this court.

There was still another order directing details of sale, execution of papers, application of proceeds and that all the parties to this action be barred of any further right, title, &c., to the Kee land.

The exceptions are copied in the opinion.

Messrs. Wylie & Hough, for appellants.

The question of title to the notes held by Walker & Trenholm has been settled by the case in 14 S. C. 142. But the bank had knowledge of the misappropriation of the assets of Stevens & Cureton for the purposes of Cureton, Ardrey & Co.; the bank is therefore guilty of collusion, and has no title to the note. 3 Kent 41; 4 Johns. 251; 8 Ves. 542; Story Part. § 133.

The only evidence of indebtedness by Stevens & Cureton to Cureton, Ardrey & Co. is the testimony of Cureton in reply. It is not alleged in the pleadings, the notes were included in the general assignment, the assignees say nothing of any such indebtedness, and Stevens had no knowledge of the endorsement of the notes for such purpose.

The title to the notes gives no lien on the land. There was no deposit of the contract—only an exhibit of a copy. Story Eq. Jur. § 1020. Stevens & Cureton had no lien; they had title, and this they never transferred. There is no vendor's lien in this State. 2 Des. 509. The delivery of the notes would not pass the legal title, and the equitable title was in Kee. A partner has no right to as-

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sign real estate or a mortgage to *pay a creditor of the partnership. Story Part. §§ 92, 94, 101. Walker & Trenholm have paid less than the amount of the Kee notes; how then can they enforce a conveyance? The question of usury will not be discussed. The assignees are certainly entitled to the rents until sale of the land. This whole doctrine of equitable mortgages has been regarded by some English judges as in violation of the statute of frauds.

Messrs. Allison & Connors, contra.

October 1st, 1881. The opinion of the court was delivered by

McGOWAN, A. J. The firm of "Stevens & Cureton," consisting of J. H. W. Stevens and Thomas J. Cureton, were in business at Lancaster Court House, and that of "Cureton, Ardrey & Co.," consisting of the same partners and one J. W. Ardrey, at Fort Mills, York county.

On December 18th, 1876, Stevens & Cureton, being the owners of several tracts of land, contracted to sell the same to A. M. Kee for the sum of $9,025. The contract was in writing, signed by all the parties, and, among other things, contained this provision: "For the payment of the purchase-money the party of the second part is to execute to the parties of the first part, at this signing, a warranted right and title to the house and lot in Fort Mills, S. C., known as the 'Kee house,' upon which the said Kee now resides, valued at fifteen hundred dollars in this trade, and four promissory notes of this date [describing them in amounts, and payable in 1877–78 and '79]. Now, should the party of the second part pay, or cause to be paid, all the said notes, &c., at maturity, then, when the last note is paid, the parties of the first part bind themselves to make to the party of the second part a warranted deed of right and title to the lands above described; but, should the party of the second part fail to pay, or cause to be paid, either or any of the above described notes, as they shall mature, then this contract becomes null and void and of none effect, and the parties of the first part shall have the right to peaceable possession to said above described lands, with a forfeiture on

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the part of the party of the *second part of all payments, &c., which may have been made previously, &c." Four notes were executed in accordance with the agreement. The "Kee house" was conveyed and Kee went into possession of the lands sold.

During the year 1877, T. J. Cureton endorsed the second and third of the notes to Cureton, Ardrey & Co., and they transferred them for value to Walker & Trenholm, of Charleston. Prior to February 18th, 1878, the said T. J. Cureton also endorsed the fourth and last note to the firm of Cureton, Ardrey & Co., and they, being indebted to the Merchants' and Farmers' National Bank of Charlotte, N. C., to an amount exceeding $2,400, transferred and delivered to said bank the aforesaid last note for $2,325, collateral security for their debt. These transfers respectively were made before the notes fell due. T. J. Cureton was the actor in both transactions, and made the transfers first by Stevens & Cureton to Cureton, Ardrey & Co., and then by Cureton, Ardrey & Co. to the parties.

On February 18th, 1878, each firm made an assignment for the benefit of creditors to the

same assignees—R. M. Miller and T. G. Cureton. In the assignment of Stevens & Cureton was included the lands which had been sold as aforesaid, "subject to a contract of sale to A. M. Kee."

In January, 1879, Walker & Trenholm sued A. M. Kee on the note transferred to them and recovered judgment. To that action the aforesaid assignees were parties, and denied the title of plaintiffs to the notes on the ground that T. J. Cureton negotiated the notes without authority from Stevens, and in fraud of the rights of Stevens & Cureton. The defense failed, and, upon appeal to the Supreme Court, the judgment below was affirmed.

A. M. Kee being insolvent, Walker & Trenholm holding their note with judgment on it, and the bank holding the note transferred to them, have united and instituted this action to compel specific performance of the land agreement, and, as incidental thereto, to sell the land in payment of their debts. Judge Hudson heard the case and decreed for the plaintiffs, and ordered the land sold.

It seems that Kee, the purchaser, upon

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failure to comply with *the terms of sale, acknowledged his liability to pay rent, and gave an obligation to pay it, which, under some agreement, had been deposited with the clerk of the court, "to be turned over to the parties who may be entitled by the judgment of the court." In a supplemental order Judge Hudson directed the clerk to collect this obligation and hold the proceeds subject to the future order of the court. From these orders the defendants appeal to this court on the following exceptions:

1. "Because his Honor erred in finding as fact that T. J. Cureton endorsed the fourth and last note to Cureton, Ardrey & Co., being a note made by A. M. Kee to Stevens & Cureton for $2,325, when the evidence established the fact that it never was endorsed to them and never belonged to them.

2. "Because the evidence established the fact, and his Honor should have so found, that the said note was in the hands of T. J. Cureton for the purpose of raising money for Stevens & Cureton, and that T. J. Cureton, without the knowledge and consent of J. H. W. Stevens, transferred the said note to Merchants' and Farmers' National Bank, one of the plaintiffs, for the debt of Cureton, Ardrey & Co., and that said bank knew the note belonged to Stevens & Cureton, and, at the time of said transfer, the said T. J. Cureton, in presence of J. R. Holland, cashier of the bank, endorsed the firm name of Stevens & Cureton thereon.

3. "Because the transfer and endorsement of the said note of $2,325 by T. J. Cureton, under the facts and circumstances, was a fraud on J. H. W. Stevens, and Stevens & Cureton, and their creditors, and said bank, having knowledge of said facts and circumstances, had no right to receive the same, and was guilty of fraud in so doing, and his Honor should have so held, or, at least, that the bank acquired no title to the note, but that it belonged to defendants as assignees of Stevens & Cureton.

4. "Because his Honor erred in finding, as fact, that copies of the contract for purchase of the land by Kee accompanied the delivery of the notes to plaintiffs, when, from the evidence, such copy accompanied only the notes delivered to Walker & Trenholm, and none accompanied the one delivered to the bank, and because his Honor failed to find, when

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plaintiffs' evidence *established the fact, that the copy so furnished to Walker & Trenholm by Cureton, Ardrey & Co., or T. J. Cureton, was by them returned.

5. "Because neither the plaintiffs, Walker & Trenholm, nor the Merchants' and Farmers' Bank, have any lien, equitable or otherwise, on the said Kee lands, and his Honor should have so held.

6. "Because there was no assignment of said land, equitable or otherwise, by Stevens & Cureton to plaintiffs, or either of them, or to Cureton, Ardrey & Co., or by them to plaintiffs, or any right or interest in said land, or charge created on the same to pay plaintiffs' claims, and his Honor should have so held.

7. "Because Kee, under the terms of the contract for purchase, having forfeited all right to the land before this action, and having surrendered the same to the assignees, his Honor erred in holding 'that no resistance could be raised to his demand for titles upon payment of the notes, and that plaintiffs are entitled to demand of him specific performance, and upon his failure so to do, to have the land sold and titles made to purchasers so as to bar and foreclose said assignees, and Stevens & Cureton, and those claiming under them.'

8. "Because, if plaintiffs stand in the place of Kee, they are not entitled to the land, or to have it sold for their claims, unless they pay to these defendants the balance of notes in their hands over and above their claims respectively against Cureton, Ardrey & Co., and his Honor should have so held.

9. "Because the note of $1,200, by Cureton, Ardrey & Co., to B. H. Massey, and by him endorsed to said bank, partly to secure which the Kee note of $2,325 was deposited, as it is alleged, as collateral, bears on its face interest at eight per cent., and is, therefore, usurious, and his Honor should have so found, and allowed no interest or costs to said bank.

10. "Because his Honor, by an order after the decree, to wit, on October 8th, 1[illegible] erred in directing D. A. Williams, clerk, to take possession of and hold the rents of the said land, which plaintiffs are not entitled to, but which belong to these defendants.

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*11. "Because the decrees and orders thereon are contrary to the law and evidence."

The first four exceptions relate to a question of fact, viz., whether Stevens & Cureton endorsed bona fide the fourth note to Cureton, Ardrey & Co., and they transferred the same for valuable consideration to the bank. It is insisted by the assignees that the bank has no title to the note they hold, for the reason that it was given to Stevens & Cureton, and could not be assigned by one of the firm to secure a debt due by himself or another person or firm; that T. J. Cureton could not assign a note of Stevens & Cureton to secure a debt due by Cureton, Ardrey & Co. It has been already decided that the plaintiffs, Walker & Trenholm, have title to the notes assigned to them, and judgment has been rendered upon them in their favor against Kee. See opinion in former case of Walker & Trenholm v. Kee, 14 S. C. 142. The same question substantially, which was then decided, is now renewed as to the note transferred to the bank. The steps taken in the assignment to the bank were identical with those which were taken in the assignment to Walker & Trenholm. We do not see any particular in which the testimony in one case differs essentially from that in the other. In both, T. J. Cureton, for the firm of Stevens & Cureton, first assigned to Cureton, Ardrey & Co., and then in their name assigned as collateral security for debts of Cureton, Ardrey & Co. T. J. Cureton was a partner of both firms, and, as such, was the agent of each as to all transactions within the scope of its business. Stevens & Cureton were indebted to Cureton, Ardrey & Co., and it was within the authority of either of the partners of the firm of Stevens & Cureton to assign a note belonging to them to secure that debt. So Cureton, Ardrey & Co. were indebted to the bank, and it was within the scope of T. J. Cureton's agency, as partner of that firm, to transfer a note belonging to it as collateral security for that debt, whether such note was originally given to them, or they had acquired it by assignment. Cureton cannot, and does not, object to the transfer, and it seems, from the testimony, that Stevens, the other partner, some time after the transfer, confirmed it, or at least informed the presi-

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dent of the bank that *"the Kee note was a good collateral." The bank certainly has possession of the note, and we concur with the Circuit judge that there was no proof of fraud in the transfers by which it reached the plaintiffs, and that they have title to the same.

The other exceptions make a question of law. It is insisted that even if the transfer of the notes to the plaintiffs respectively were valid, and gave them the legal title thereto, that the transfer alone did not operate as an assignment of the land or any charge upon it, the legal title to which is still in the defendants as assignees of Stevens & Cureton, and, consequently, the plaintiffs are not entitled to have it sold towards payment of the notes.

It is true that Kee executed no mortgage to secure the purchase-money of the land. It is also true that, according to our decided cases, we have not, in this State, what is known technically as "the vendor's lien," as declared and enforced in the English Chancery—that is, a lien upon land sold to secure the purchase-money, whether the vendor has, or has not, executed titles to the vendee. But as to all executory contracts for the sale of land in which the title-deed is not executed, but the vendor gives a bond for titles, we have what is equivalent to the vendor's lien in the well-recognized equity doctrine of specific performance of contracts for the sale of land. In reference to the doctrine of specific performance, equity makes a difference in contracts concerning land and those about personalty. As to the latter, specific performance will not generally be decreed, for the reason that no particular or peculiar value is attached to any one thing over another of the same kind, and compensation in damages given by a law court will meet the full merits as well as the full object of the complaint. "But in contracts respecting a specific messuage or parcel of land, the same considerations do not ordinarily apply. The locality, character, vicinage, soil, easements or accommodations of the land generally, may give it a peculiar and special value in the eyes of a purchaser. * * * and, therefore, compensation in damages would not be adequate relief," &c. Story Eq. § 146.

After some controversy upon the subject, this principle is well established in this State

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as applying both to the vendor and *vendee of lands. The leading case upon the subject is that of Gregorie v. Bulow, reported in Richardson's Equity Cases, 235, which, overruling the case of Bacon v. Roche, previously decided, held that "a vendor may sustain a bill against a vendee for the specific performance of a contract for the sale of the land." In that case Judge O'Neall laid down the principle which has ever since been followed. He said: "It is conceded that the vendee may come into equity to compel the vendor to perform by executing titles, and that upon this bill the court will decree him to pay or secure the money, according to his contract, before they decree the execution of titles. If the court has the power to relieve one of the parties in the same contract, must it not, of necessity, possess the same power as to the other? Contracts for the sale of land in equity are regarded as dependent; the vendor cannot be compelled to part with his land until the vendee pays or secures to be paid the purchase-money, and the vendee

cannot be compelled to pay until he receives a good and sufficient title in law," &c.

Although we do not recognize what is known as "the vendor's lien," we regard the doctrine of specific performance as to executory contracts for land as settled beyond controversy in this State. The contract in this case was executory, and the vendors, Stevens & Cureton, had the right to require specific performance, and the only question is whether the assignees of the notes have the same right.

Some confusion seems to have arisen from regarding the notes as nothing more than promissory notes, pure and simple. The fact is, they sprung out of the agreement for the sale of the land and are only a part of it. They were executed at the same time with the agreement, and have on their face the statement that they were given "in part payment for a tract of land," &c. They must be considered in connection with the agreement, and, thus considered, the papers constitute, both in form and substance, an executory contract for the sale of land. The transfer of these notes, accompanied with the agreement or with knowledge of its existence and contents, carried to those who acquired title to them all the rights which attached to them in the hands of Stevens & Cureton. The

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transfer was in fact, as it was *intended to be, not merely an endorsement of the paper as promissory notes, but a sale and transfer of the land trade and all rights incident thereto. The plaintiffs, before they accepted the notes, were informed of the nature of the land trade and the connection of the notes therewith; indeed, the notes, upon their face, gave such information, and the plaintiffs have now the same rights which Stevens & Cureton had originally to ask specific performance. 1 Jones Mort. § 235; Muller v. Wadlington, 5 S. C. 346.

Judge Story says: "It may also be stated that, in general, where the specific execution of a contract respecting lands will be decreed between the parties, it will be decreed between all persons claiming under them in privity of estate, or of representation, or of title, unless other controlling equities are interposed. If a person purchases lands with knowledge of a prior contract to convey them, he is, as we have seen, affected by all the equities which affected the lands in the hands of the vendor. The lien of the vendor for the purchase-money attaches to them, and such purchaser may be compelled either to pay the purchase-money, or to surrender up the land, or to have it sold for the benefit of the vendor. * * * On the other hand, if the vendee, under such a contract, conveys the same to a third person, the latter, upon paying the purchase-money, may compel the vendor, and any person claiming under him in privity, or as a purchaser with notice, to complete the contract and convey the title to him. The general principle upon which this doctrine proceeds is, that from the time of the contract for the sale of the land, the vendor as to the land becomes a trustee for the vendee, and the vendee as to the purchase-money a trustee for the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either, with notice, becomes subject to the same equities as the party would from whom he purchased." Story Eq. §§ 788, 789.

We are not called upon to decide whether A. M. Kee, who entered upon the land under a contract to purchase, and paid part of the purchase-money, would be liable, in an action for specific performance, to account for rents and profits of the lands before judgment. It

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seems that under the provision in *the agreement as to forfeiture, or for some other reason, the purchaser admitted his liability to pay rent after a certain time, and gave a rent obligation, which is now in the hands of the clerk, "to be turned over to the parties who may be entitled by the judgment of the court." Having determined that all the rights of Stevens & Cureton, quoad the notes, were transferred to the respondents and that they have the right to ask specific performance of the agreement as to the land for their payment, it would seem to follow that the rents, an incident of the land, should go with it. In the view we take, Stevens & Cureton have been paid in full for the land, and they have no further interest in it or its products. In the beginning they got the "Kee lot," and, as we suppose, the first note when it fell due, and then they transferred, in payment of their debts, the remaining notes. True, their assignees have still the legal title to the land, but they hold it as trustees for the payment of the notes still due, and, surely, they cannot claim the rents by any higher right. The notes having been transferred only as collateral to secure debts to the plaintiffs, respectively, the rights of plaintiffs, as herein determined, must, of course, cease as soon as their debts are paid.

The question of usury was properly abandoned.

The judgment of this court is that the judgment of the Circuit Court be affirmed and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 91

(Case No. 1094.)

TOWNSEND v. BROWN.

(April Term, 1881.)

[1. *Dower* ⇨49.]

A married woman signed, sealed and delivered, with her husband, in 1872, a quit-claim deed to a tract of land "in token of her renunciation and release of all right of dower in the

premises." *Held*, that she was not thereby barred of her dower in this land.

[Ed. Note.—Cited in Youmans v. Wagener & Co., 30 S. C. 305, 9 S. E. 106, 3 L. R. A. 447; Moon v. Bruce, 63 S. C. 130, 40 S. E. 1030; Campbell v. Harris Lithia Springs Co., 74 S. C. 285, 54 S. E. 378, 114 Am. St. Rep. 1001; Gainey v. Anderson, 87 S. C. 51, 55, 68 S. E. 888, 31 L. R. A. (N. S.) 323.

For other cases, see Dower, Cent. Dig. §§ 154–174; Dec. Dig. ⟸49.]

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[2. *Husband and Wife* ⟸113.]

*The purpose of Section 8, of Article XIV., of the Constitution of 1868, was to protect the property of a married woman from liability for her husband's debts, and to release it from his control, but not to confer new powers by a change of her legal status. This section, therefore, has no application to the wife's right of dower.

[Ed. Note.—Cited in Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 596, 40 Am. Rep. 705; Shelton v. Shelton, 20 S. C. 566; Bridgers v. Howell, 27 S. C. 429, 3 S. E. 790.

For other cases, see Husband and Wife, Cent. Dig. § 394; Dec. Dig. ⟸113.]

[3. *Acknowledgment* ⟸25.]

If the constitution had made a married woman sui juris in all respects, the legislature might still require her privy examination as evidence of her signature to a deed.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 133–148; Dec. Dig. ⟸25.]

[4. *Husband and Wife* ⟸57.]

The power given to a married woman by Section 2, of Chapter C., of the General Statutes, to execute all deeds, &c., in the same manner, &c., as if she were unmarried, relates only to her separate property.

[Ed. Note.—Cited in Gwynn v. Gwynn, 27 S. C. 533, 4 S. E. 229.

For other cases, see Husband and Wife, Cent. Dig. §§ 274, 284; Dec. Dig. ⟸57.]

[5. *Statutes* ⟸147.]

The act of 1795 (5 Stat. 256), and the act of 1870 (14 Stat. 325), having been both re-enacted in the General Statutes, (Chap. LXXXIII., §§ 3, 4, and Chap. C., § 2,) must be so construed as to make each of them effectual; and they have been so regarded by the general assembly, as is shown by subsequent legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 216; Dec. Dig. ⟸147.]

[6. *Acknowledgment* ⟸25.]

A privy examination of the wife is a condition precedent to an effectual renunciation of dower.

[Ed. Note.—Cited in Brown v. Pechman, 49 S. C. 548, 27 S. E. 520; McKenzie v. Sifford, 52 S. C. 108, 29 S. E. 388; Wilkins v. Baker, 77 S. C. 247, 57 S. E. 851; Gainey v. Anderson, 87 S. C. 54, 68 S. E. 888, 31 L. R. A. (N. S.) 323.

For other cases, see Acknowledgment, Cent. Dig. §§ 25, 136; Dec. Dig. ⟸25.]

[This case is also cited in Smith v. Oglesby, 33 S. C. 198, 11 S. E. 687, and distinguished therefrom, and cited and followed in McKenzie v. Sifford, 52 S. C. 104, 29 S. E. 388.]

Before Fraser, J., Barnwell, September, 1879.

The case is stated in the brief as H. F. Townsend against Simon Brown and others, In re M. M. Duncan, demandant, against Simon Brown, defendant. The only point of the case stated in the brief, or noticed in the Circuit decree, is the question of Mrs. Duncan's right to dower in a tract of land known as the Philip Walker tract, conveyed to Brown by J. G. W. Duncan for value in 1870. In 1872, J. Allen Duncan executed a deed wherein, after reciting the deed of J. G. W. Duncan, his father, and stating that it was made under the belief that his father was owner in fee of the land, (whereas he was only entitled to a life-estate, with remainder to J. A. Duncan,) he, in consideration of the premises and five dollars, remised, released and quit-claimed unto Simon Brown, his heirs and assigns, this same tract of land, then in Brown's possession. Mrs. Duncan's name appears only in the conclusion which is stated in the opinion of this court.

The Circuit decree was as follows:

It seems never to have been questioned that a woman, by an ante-nuptial contract, could bar herself of the right of dower, and the statutes prescribing the mode of release by a

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married *woman were passed merely to remove a disability growing out of her condition as a married woman. The general power of alienation conferred by the present constitution cannot be restricted to any one mode which may be prescribed by an act of the legislature, even if it should be held that such was the proper construction of the act on the subject of release of dower. If the words used were only an agreement to release dower, a very serious question might arise as to the constitutionality of the act which enlarges the powers of a married woman so as to make her a feme sole in all matters of contract. In the view which I take of the words used in the deed of her husband by Mrs. Duncan, they amount to a confirmation of his deed by a release of her right of dower, and are an alienation in the sense of the constitution, and she is thereby barred of her right of dower.

It is, therefore, ordered and adjudged that Mrs. Madeline M. Duncan is barred of her right of dower in "the Philip Walker tract," and that the other parties to the action have leave to apply for such further orders as may be necessary for the protection of their interests in the progress of the case for the adjustment of the rights of parties to the action.

From this decree, Mrs. Duncan appealed. Her exceptions are not stated.

Messrs. J. C. Davant and F. W. Fickling, for appellant.

Mr. John J. Maher, contra.

If the deed were ineffectual as a release, it could be supported as a bargain and sale under the statute of uses. 4 Kent 465; 6

S. C. 479; 6 N. Y. 222. But the words of the deed, and the possession of Brown, make the deed operative as a release. Shep. Touch. 319; 2 Bl. Com. 324; Jac. Dict. tit. Release. If not under disability of coverture, the form is effectual. 4 McC. 203. Dower right is only a chose, and, as such, assignable. 4 Rich. 517. And releasable. 14 Rich. Eq. 289. At common law, dower was barred by fine or

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recovery. Park Dow. 192; *2 Bl. Com. 348, 355; 5 Cruise Dig., tit. 35, §§ 7, 8, 9; 1 Macq. Husb. & W. 28. Her separate examination was required because she was under the power and authority of her husband, not for want of reason and discretion. 3 Atk. 695; 2 Kent 149. The private examination in this State took the place of fines. 3 Stat. 302; 7 Stat. 196, 233; 5 Id. 256; 14 Rich. Eq. 290. Under the law, prior to 1868, this deed would be ineffectual to bar dower; but not since the constitution of that year. That statutes in derogation of common law are to be construed strictly is a rule not applicable to a constitution. Sedgw. Stat. & Const. L., notes 267, 268; Cooley Const. Lim. 60. This rule is now applied with much discrimination, even in the construction of statutes, which are often remedial, and such are the statutes removing the disabilities of married women. Sedgw., note 271; 2 N. & McC. 147; 1 Bl. Com. 445; 6 Am. L. Rev. 57. A liberal construction obtained in Witsell v. Charleston, 7 S. C. 88. A literal interpretation would not remedy the evils which resulted in 1 Brev. 486; 2 N. & McC. 147; 5 Rich. Eq. 531; 9 Rich. Eq. 119. The constitutional provision conferred upon the woman absolute power over all her property, whether formerly subject to the husband's marital rights or not. The intention was to put married women on same footing with all other persons sui juris. Separate property was not used in its technical sense. She is now recognized as able to think and act for herself. A privy examination would be a badge of former inferiority. If she has power to dispose of property in possession, she has the same power as others to dispose of expectant and contingent interests, and even of an inchoate right of dower. 7 S. C. 88; Spears Eq. 49; 12 Rich. Eq. 376; 2 Jarm. 181; 9 Ind. 202; 21 Ill. 171; 10 S. C. 428; 12 S. C. 465; 2 Hill Ch. 564; 3 Paige 440; 13 Pet. 107; 2 Scrib. Dow. 8; Park Dow. 237; 3 Strobh. 81. These authorities show that the inchoate right of dower is property. But for the wife's disability, it would always have been alienable by release, and this disability was for her own protection against her husband's influence; but now she is sui juris.

The act of 1870, repealed by implication the act of 1795. The re-enactment of the

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two acts, in the General Statutes, *enables the wife to relinquish her dower under the act of 1795, before an officer, or to release it under the act of 1870 by formal deed.

October 3d, 1881. The opinion of the court was delivered by

McIVER, A. J. On the 4th of October, 1872, J. Allen Duncan made a quit-claim deed to respondent, Simon Brown, for a certain tract of land, which deed concluded as follows: "In testimony whereof, I, the said J. Allen Duncan, and my wife, Madeline M. Duncan, in token of her renunciation and release of all right of dower in the premises, hereunto set our hands and seals, the day and year hereunto written, to wit, 4th October, 1872." The deed was signed and sealed, and purports to have been delivered by Mr. and Mrs. Duncan in the presence of two witnesses, and was duly proved and recorded. After the death of J. Allen Duncan, his widow, the said Madeline M. Duncan, set up a claim for dower in the premises described in the deed. The Circuit judge held that under the provisions of the constitution of 1868, the execution of the deed by Mrs. Duncan was effectual to bar her of her dower, and from his judgment this appeal has been taken. So that the only question raised here is whether Mrs. Duncan is barred of her dower by reason of having executed the above-mentioned deed.

It is conceded that prior to the adoption of the present constitution the appellant would not have been barred of her dower, and the inquiry, therefore, is whether there is anything in the constitution of 1868, or any act passed in pursuance of its provisions, which will render the execution of said deed effectual to bar her of her dower. The portion of the constitution relied on for the purpose is Section 8, Article XIV., which is in the following words: "The real and personal property of a woman, held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried; provided, that no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors."

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*The leading object of the section just quoted appears to have been to relieve the property of the wife from liability for the husband's debts, and to release it from any control by the husband; for the first provision is to exempt the wife's property from levy and sale for the debts of the husband, and the second is to authorize the wife to dispose of her property without, or even against, the consent of the husband. The real purpose, therefore, does not appear to

have been to confer any new powers upon a married woman by changing her legal status, but simply to protect her property from liability for her husband's debts, and to release it even from the partial control of the husband by dispensing with the necessity which had previously existed of obtaining his assent and concurrence before her property could be disposed of. These seem to have been the sole purposes of the clause in question, and as they can be fully accomplished without, in any manner, affecting any of the other relations between husband and wife growing out of marriage, we think we are bound to confine the operation of this clause of the constitution to its declared and manifest objects. If it be so confined, then, it is obvious that the clause in no way applies to the wife's right of dower—a right which the law has always regarded as an object of watchful solicitude and jealous care—for it is not, and could not, in any way be made liable for the husband's debts, nor could it in any way be made subject to the marital rights of the husband, and thus render necessary his assent to and concurrence in any disposition of it. We think it clear, therefore, that the abovementioned section of the constitution was never designed to apply to the wife's right of dower, and that it cannot have the effect of rendering valid, as a renunciation of dower, the deed of October 4th, 1872.

But even if it should be conceded that the object and effect of this clause of the constitution was to make a married woman sui juris in all respects, we see no reason why the legislature might not require a privy examination of the wife as evidence of the fact that she had really signed the deed, just as it might require the deed of a corporation or a partnership to be executed with certain par-

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ticular formalities, as the only conclu*sive evidence of the fact that such deed was, in fact, the deed of the corporation or partnership.

It is contended, however, that if the constitution does not render the conveyance effectual as a renunciation of dower, the act of January 27th, 1870, (14 Stat. 325, incorporated in the Gen. Stat., Chap. C., p. 482,) does.

Without stopping now to consider whether this act, in so far as it purports to go beyond the constitution and confer upon married women other powers than those specially provided for in that instrument, can be regarded as constitutional—a question which has been made the subject of grave argument in another case now before us†—and without intending now to indicate any opinion upon that question, but assuming, for the present, the constitutionality of the act, we will proceed to examine the act with a view to ascertain whether it contains any provision which will give it the effect contended for. The particular section of the act relied upon for this purpose is the second, which is in the following words: "A married woman shall have power to bequeath, devise or convey her separate property in the same manner and to the same extent as if she were unmarried; and if, dying intestate, her property shall descend in the same manner as the law provides for the descent of the property of husbands; and all deeds, mortgages and legal instruments of whatever kind shall be executed by her in the same manner, and have the same legal force and effect as if she were unmarried." These last words of the section by which it is provided that all deeds, mortgages and legal instruments of whatever kind shall be executed by a married woman, in the same manner as if she were single, it is contended, dispenses with the necessity for the privy examination required, in case of a renunciation of dower, by the act of 1795, incorporated in Gen. Stat., Chap. 83, p. 429. To give such an effect to these words would violate fundamental rules of construction. It will be observed that the act of 1870, as originally passed, does not, in terms, repeal the provisions of the act of 1795 in reference to the mode by which a married wo-

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man could renounce her dower, *nor does it, in any way, refer to that act, but, on the contrary, its provisions seem to be confined to the kind of property therein spoken of—that is, such property as could be levied on and sold for the debts of the husband, from which it is declared exempted and is designated as the wife's "separate property." Then, in the second section, provision is made for the manner in which such property—that which had just been designated as the wife's "separate property"—may be disposed of. Hence, the proper reading of this section would be that "all deeds, mortgages and legal instruments of whatever kind," pertaining to the property just spoken of, "shall be executed in the same manner and have the same legal force and effect as if she were unmarried."

Again: after the passage of the act of 1870, it, as well as the act of 1795, by which the privy examination of the wife was required to render a renunciation of dower effectual, was incorporated in the General Statutes, and, therefore, by well-settled rules of construction, we must, if possible, so construe the provisions of each as to make them both effectual, and this can be done by giving to the act of 1870 the construction which we have placed upon it, by which both acts are given full force and effect in the sphere within which each was designed to operate.

It will not do to say, as has been said, that these two acts thus incorporated into the General Statutes may be harmonized by con-

† See Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 581.—Reporter.

struing them both as merely permissive, and that a married woman is not restricted to the mode of relinquishment provided for in either of these acts, but may, at her option, adopt either mode, and the one so adopted shall be effectual; for, besides the fact that such a construction would practically emasculate the act of 1795, and render its provisions wholly ineffectual and nugatory, it is sufficient to say that the provisions of the act of 1870 are mandatory—"shall be executed by her in the same manner," &c.—and could not, therefore, be disregarded with impunity.

There not only never has been any intimation of a design to repeal or annul the provisions of the act of 1795 in regard to the mode by which a married woman could release her right of dower, but exactly the contrary appears. In less than one year after the adoption of the General Statutes, the legislature, by the act of 29th January, 1873,

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(15 Stat. 324,) repealed those *sections of Chapter 83 of the General Statutes, providing a mode by which a married woman might convey any real estate in which she had an estate of inheritance, doubtless for the reason that the mode by which a married woman could convey her real estate was sufficiently provided for by the constitution and the act of 1870, but they left untouched those sections of the same chapter providing the mode by which a married woman might release her inchoate right of dower in lands of which her husband might be seized during coverture, thus plainly showing, not only that the legislature did not regard the provisions of the act of 1795, in reference to dower, as affected by the constitution, but, what is more important, exhibiting an unmistakable purpose not to repeal the provisions in reference to dower, and an intention that the provisions of the act of 1870 were not to apply in cases of renunciation of dower.

We see nothing in the constitution or in the act of 1870 which can have the effect of depriving a married woman of the safeguard which the law has, from time immemorial, thrown around her highly favored right of dower by requiring a privy examination as a condition precedent to an effectual renunciation of dower, and we are, therefore, of opinion that the conveyance executed by Mrs. Duncan cannot have the effect of barring her of her right to dower in the premises described in such conveyance.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

16 S. C. *100

*(Case No. 1095.)

STATE, ex relatione DETHERIDGE, v. GILREATH.

(April Term, 1881.)

[1. *Evidence* ⇐591.]

A party may introduce evidence to prove that a fact is not as one of his own witnesses has testified.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2440–2443; Dec. Dig. ⇐591.]

[2. *Appeal and Error* ⇐1056; *Evidence* ⇐591.]

But the court will not grant a new trial, because such evidence was excluded, if the evidence was immaterial; as, for instance, where its purpose was to show that a sheriff had not proffered to enforce an execution (which it was his clear duty to enforce), provided a bond of indemnity was given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4188; Dec. Dig. ⇐1056; Evidence, Cent. Dig. § 2440; Dec. Dig. ⇐591.]

[3. *Trial* ⇐285.]

Where it does not clearly appear to which of two matters the language of the charge to the jury is applicable, the language will be referred to that matter which would make the charge correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 698, 699; Dec. Dig. ⇐285.]

[4. *Trial* ⇐194.]

Whether the plaintiff has proved his case, is to be determined by the jury, not by the judge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 452; Dec. Dig. ⇐194.]

[5. *Appeal and Error* ⇐737.]

A general and indefinite exception will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3013; Dec. Dig. ⇐737.]

[6. *Sheriffs and Constables* ⇐161.]

A party is not entitled to recover damages from the sheriff for a failure to enforce his execution, where, three months after its entry, the execution was legally stayed, and the money was received in full during such stay and before the trial, the action having been commenced prior to the payment, but after the stay.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 387; Dec. Dig. ⇐161.]

Before Aldrich, J., Greenville, July, 1879.

Action by the State of South Carolina on the relation of A. Detheridge against Perry D. Gilreath, sheriff of Greenville county, and the sureties on his bond. The opinion states the case. Verdict was for defendants.

Mr. E. F. Stokes, for appellant.

Messrs. T. Q. Donaldson and W. H. Perry, contra.

October 3d, 1881. The opinion of the court was delivered by

McIVER, A. J. The action in this case, which was commenced on October 1st, 1878, was brought against the defendant, Gilreath, as sheriff, and the sureties on his official

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bond, to *recover damages for a breach of

official duty in failing and refusing to enforce an execution in favor of the plaintiff, Detheridge, against R. H. Earle.

For a proper understanding of the questions made by this appeal, it will be necessary to make a brief statement of facts gathered from the record in this case, and other records used in the argument here of other branches of the multiform proceedings which have been had in the case of Detheridge v. Earle.

On September 11th, 1873, A. Detheridge recovered a verdict against R. H. Earle for the sum of three hundred and seventy-four dollars and two cents, but for some reason, not disclosed by these proceedings, no judgment was entered upon this verdict until April 27th, 1878, when judgment was entered for the amount of the verdict as above stated, with interest from the date of the verdict, and also for five hundred and ninety dollars and ten cents costs, and an execution issued to enforce the same. On May 7th, 1878, notice was given that the defendant excepted to the adjustment of costs as entered in the judgment, and of a motion to re-adjust the same, and, also, of a motion to set aside the judgment as illegally entered. These motions were heard at July term, 1878, as well as a rule on the sheriff, for failing to enforce the above-mentioned execution. On July 30th, 1878, Judge Kershaw granted two orders, one setting aside the taxation of costs, directing a re-adjustment of the same, and ordering the execution stayed in the meantime, but refusing to set aside the judgment; the other discharging the rule on the sheriff upon the ground that, though the sheriff was in default, yet as an order had just been granted directing a re-adjustment of costs, no further proceedings should be had, but requiring the sheriff to pay ten dollars costs of the motion. The defendant gave notice of appeal from so much of the first-mentioned order as refused to set aside the judgment as illegally entered, but the plaintiff acquiescing in so much of that order as required a readjustment of the costs, proceeded to have the costs re-adjusted, and, as so re-adjusted, entered in the judgment, and on August 20th, 1878, issued a new execution to enforce the same. On November 6th, 1878, pending the defendant's appeal from the order of July 30th, 1878, he paid to the sheriff

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the full amount *of the execution, who entered satisfaction on the same, and, subsequently, to wit, on June 11th, 1879, paid this amount to the plaintiff's attorney.

At the trial of the case, the plaintiff's attorney examined the defendant, Gilreath, as a witness, and, in the course of his testimony, he stated that he had offered plaintiff's attorney to enforce the execution if the plaintiff would give him a bond of indemnity. The plaintiff's attorney then offered himself as a witness to prove that Gilreath never made any such offer to him, which testimony, upon objection, was ruled out, the Circuit judge holding that a party could not contradict his own witness, all of which was duly excepted to and constitutes the basis of appellant's first ground of appeal. This exception was well taken. The rule upon this subject is, that a party cannot discredit his own witness by impeaching his general character, or by proving that he has made statements inconsistent with those made by him while on the stand as a witness, but a party may introduce witnesses to prove that the fact is not as one of his witnesses may have testified, even although this may indirectly have the effect of bringing in question the credit of such witness. Perry v. Massey, 1 Bail. 32; Farr v. Thompson, Cheves 44; Bank v. Shier, 4 Rich. 240. But although this exception was well taken, it does not necessarily follow that the appellant is entitled to a new trial, for it is not sufficient to show error in the rulings below, but it must be an error in some material point. Susong v. Vaiden, 10 S. C. 247 [30 Am. Rep. 50]. We confess that we are unable to see how the fact that the sheriff had, or had not, offered to enforce the execution, provided a bond of indemnity was given him by the plaintiff, could affect the case. If his official duty required him to execute the mandate of the court, addressed to him in the form of this execution, his offer to perform such duty, provided the plaintiff would give him a bond of indemnity, would furnish no excuse for his refusal to perform such duty without such bond. The error, therefore, in excluding the testimony offered, was not material, and is not sufficient to entitle the plaintiff to a new trial.

The appellant also gave notice of sundry exceptions to the judge's charge, which will

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next be considered. The judge's *charge, it seems, was in writing, and so much of it as relates to the matters excepted to is in the following words: "It is the duty of the sheriff to obey the mandate of the writ, and he is liable for willful neglect, ignorance or an oppressive use of his office. The verdict in the case, in which this action is founded, was rendered April 11th, 1873, judgment and execution, September 27th, [a clerical error, should be April,] 1878. No proceedings were had to set aside the judgment, nor have they been instituted yet. I cannot go behind the record, and must presume that the execution has been properly issued. Is the sheriff liable in damages? He received notice of appeal, but declined to enforce the execution until the bond required by law was given. If the plaintiff had given the bond, the money would have been collected and paid up. The plaintiff's attorney receipted to the sheriff in his execution book for the debt and costs in full. Now, if you are satisfied that the sheriff has been guilty of laches, or has

arbitrarily refused to do what the law commanded him to do, he is liable. But if, in good faith, he said to Mr. Stokes [the plaintiff's attorney], 'I cannot levy and sell under the execution because an appeal is pending, unless you give the bond required by law,' and the plaintiff's attorney refused so to do, whose fault was it that the money was not collected? If you conclude that the sheriff is in fault, what is the measure of damages? What was the plaintiff entitled to recover from the sheriff? His debt, interest and costs. His attorney has receipted for that in full; of course, he cannot have interest on that amount. When the debt was paid, his cause of action was gone. But, as I have already said, if there was any willful neglect, and you can see that the plaintiff has thereby been injured, the sheriff is liable, and you can fix your damages upon any basis you may be able to find in the evidence before you, of which you are the sole judges."

The first error imputed to the Circuit judge in this charge, constituting the basis for the second ground of appeal, is "in instructing the jury that when the sheriff received notice of appeal from taxation of costs by defendant, in case of A. Detheridge against R. H. Earle, his hand was stayed, and that it was not required of him to judge

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of what was the ground of *appeal on its merits." A careful examination of the charge of the Circuit judge, as set out above, will show that he did not use the language imputed to him in this exception—"that when the sheriff received notice of appeal from taxation of costs, * * * his hand was stayed," &c. What he did say, was this: "He (the sheriff) received notice of appeal, but declined to enforce the execution until the bond required by law was given. * * But if, in good faith, he said to Mr. Stokes, 'I cannot levy and sell under the execution because an appeal is pending, unless you give the bond required by law,' and the plaintiff's attorney refused so to do, whose fault was it that the money was not collected?" Whether these remarks had reference to the notice of the motion to have the costs retaxed, improperly called an appeal from the taxation of costs, or to the notice of appeal from the order of July 30th, 1878, refusing to set aside the judgment, has not been made to appear, and we are, therefore, bound to refer them to the latter, and to construe the charge as meaning that after notice of appeal from the refusal to set aside the judgment, the plaintiff could not require a sale of defendant's property without giving the bond required by Section 360 of the code, as amended by the act of November 25th, 1873, (15 Stat. 501,) which provides that "after notice of appeal, the plaintiff shall not enforce the sale of property without giving an undertaking or bond to the defendant, with two good sureties in double the appraised value of the property, or double the amount of the judgment, conditioned to pay all damages which the defendant may sustain by reason of such sale, in case the judgment is reversed."

The next error complained of in the charge, constituting the basis of the third ground of appeal, is that the Circuit judge stated "that he did not see upon what grounds the jury could bring in a verdict for plaintiffs." We are unable to find that the judge made any such statement to the jury, and, therefore, this ground has no foundation upon which to rest.

The error assigned in the fourth ground of appeal is that the judge said to the jury "that he could not see how the jury could find a verdict against the defendants, as there was nothing upon which to base a verdict against the defendants." An exami-

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na*tion of the judge's charge, as recited above, not only fails to show that any such remark was made to the jury, but, on the contrary, it does show that all the facts were, as they should have been, left for the jury to pass upon. This ground, therefore, cannot be sustained.

The error complained of in the fifth ground of appeal is one of omission, and, although it does not appear in the "case" what the judge was requested to charge, yet, assuming that the request to charge was as stated in this ground of appeal—"that the plaintiffs having proved their case, and the defendants having offered no evidence in reply, were entitled to recover"—it is manifest that there was no error in refusing so to charge, as it would have required the judge to invade the province of the jury by instructing them what was proved in the case—that being a question exclusively for the jury.

The errors assigned in the sixth ground of appeal—"because his Honor erred throughout his whole charge, thereby causing the jury to bring in a verdict for the defendants, contrary to the law and the testimony"—are of too general and indefinite a character to be considered by this court.

It is quite manifest, from a consideration of the whole case, that the plaintiff failed to show that he was entitled to recover anything in this action, and, therefore, notwithstanding any immaterial error which may have occurred in the progress of the trial, the judgment below must stand. The object of the action was to recover damages from the sheriff and his sureties for failing and refusing to enforce an execution lodged with him for collection, and, to maintain the action, the plaintiff must not only show that there has been a breach of official duty upon the part of the sheriff, but, also, that he has sustained certain damages by reason of such default. The execution was originally entered in the sheriff's office on April 27th, 1878, and the sheriff could not have enforced it,

by a sale of property, before the first Monday in July, following. On May 7th, 1878, the defendant served the plaintiff with a notice of exception to the taxation of costs which had been inserted in the judgment upon which this execution was issued, and, also, with a notice of a motion to set aside said judgment as improperly entered. These

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*motions were heard at July Term, 1878, when the Circuit Court granted the motion to reform the taxation of costs, but refused the motion to set aside the judgment, and directed a stay of proceedings under the execution until the costs were re-adjusted. The plaintiff acquiesced in the order requiring a re-adjustment of the costs, and, having had the same re-adjusted, issued a new execution on August 20th, 1878, but the defendant appealed from the order refusing to set aside the judgment as illegally entered, which appeal was not heard until April Term, 1879, when it was dismissed by an opinion filed May 8th, 1879.

On the 1st October, 1878, this action was commenced on the sheriff's bond, in which the only breach assigned was the failure to enforce the said execution. On November 6th, 1878, the defendant, Earle, paid the full amount of the said execution to the sheriff, who entered satisfaction on the same, and on June 11th, 1879, this amount was paid to the plaintiff's attorney. The only default, therefore, of which the sheriff could, by any possibility, be said to have been guilty, was in not enforcing the execution between April 27th, 1878, and July 30th, 1878, and for this default, manifestly only technical, inasmuch as the exception to the taxation of costs, though not of itself sufficient to stay the execution, has proved to be well founded, the judge, who heard the rule, mulcted him in costs, but declined to make the rule absolute: for, by the order of July 30th, 1878, the execution was stayed until the costs were re-adjusted, and, by the notice of appeal from so much of that order as refused to set aside the judgment, the sheriff was prevented from enforcing the execution by a sale of the defendant's property, unless the plaintiff had given the bond required by Section 360 of the code, above cited. But, to enable the plaintiff to recover in this action, he must show not only a breach of the bond, but that he has been damaged thereby, and the measure of his damages for such a breach as that assigned would be the amount of the execution, and this the plaintiff had already voluntarily received. Granting, therefore, that the plaintiff in this case has shown a breach of the bond by the failure to enforce the execution between April 27th, 1878, and July 30th, 1878, he has utterly failed to show any damages

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which he has sustained *by reason of such default, and, therefore, has failed to show his right to recover anything from the defendants.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 107

(Case No. 1098.)

CAMPBELL v. MOON.

(April Term, 1881.)

[1. *Acknowledgment* ⇐19.]

A relinquishment of inheritance to land, by a married woman in 1860, was properly made before a magistrate of the district in which she resided, although the land lay in another district.

[Ed. Note.—Cited in Archer v. Ellison, 28 S. C. 246, 5 S. E. 713.

For other cases, see Acknowledgment, Cent Dig. § 120; Dec. Dig. ⇐19.]

[2. *Descent and Distribution* ⇐62.]

The deed, properly executed, with relinquishment endorsed, was recorded four years afterwards, in the life-time of both husband and wife. *Held*, that the record was in sufficient time to bar the wife's inheritance. Kottman v. Ayer, 1 Strobh. 553, approved and followed.

[Ed. Note.—Cited in Wingo v. Parker, 19 S. C. 16.

For other cases, see Descent and Distribution, Cent. Dig. § 186; Dec. Dig. ⇐62.]

[3. *Acknowledgment* ⇐37.]

The relinquishment was sufficient in form, notwithstanding the omission of the word "actually" from the clause "she did join," &c.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 206; Dec. Dig. ⇐37.]

[4. *Acknowledgment* ⇐37.]

The deed, properly executed, conveying the land to two persons, with relinquishment to only one of the grantees, but in all other respects regular, is sufficient to bar the claim of the surviving wife to recover the land.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 211; Dec. Dig. ⇐37.]

Before Kershaw, J., Newberry, November, 1880.

Action commenced October 1st, 1879, by Tabitha A. Campbell against Nancy Moon and John S. Moon, for the recovery of real property. The opinion states the case. The charge of the presiding judge is not stated in the brief.

Mr. J. J. Norton, for appellant.

Messrs. Suber & Caldwell, contra.

October 8th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action to recover a tract of land in Newberry county.

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The plaintiff, when a married woman, *owned the land, and she and her then husband, Robert E. Campbell, sold it to Peter Moon and B. F. Griffin, and on January 10th, 1860,

joined in a regular and formal conveyance to them by name, and eight days after, viz., on January 18th, Mrs. Campbell, residing in Laurens county, went before Henry O'Neall, a magistrate of that county, and executed, as her relinquishment of inheritance, the following paper, which was endorsed on the deed:

"State of South Carolina, Laurens district. —I, Henry O'Neall, one of the magistrates of the district aforesaid, do hereby certify unto all whom it may concern: T. A. Campbell, wife of the within-named R. E. Campbell, did, this day, personally appear before me, and, upon being privately and separately examined by me, did declare that she did, more than seven days previous, join in the execution, with her husband, of the foregoing deed of conveyance, and that she still does now freely and voluntarily, without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within-named Peter Moon, heirs and assigns forever, all her interest and estate, and also all her right and claim of inheritance and dower, of, in and to all and singular the premises within mentioned and released.

"T. F. A. Campbell.

"Given under my hand and seal this 18th day of January, A. D. 1860.

"Henry O'Neall, M. L. D. [L. S.]"

The purchasers went into possession. The deed, with relinquishment endorsed, was recorded in the office of the register of mesne conveyance for Newberry county, April 6th, 1864. The land was several times sold, and finally came into the possession of the defendants. After the death of her husband, Robert E., in 1875, his widow, Tabitha A. Campbell, brought this action for the land, and the question is whether, by the facts above set forth, Mrs. Campbell is barred of her title to the land.

The case came on to be heard before Judge

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Kershaw. Under *his rulings, the jury found for the defendants, and the plaintiff appeals to this court upon the following exceptions:

1. "Because his Honor erred in holding that the plaintiff's relinquishment of her inheritance in the land in controversy was valid and sufficient, although it was made to but one of the two grantees named in the deed wherein she had joined her husband, Robert E. Campbell, to wit, to Peter Moon, when it is submitted the relinquishment of her inheritance should have been made also to B. F. Griffin, the other grantee named in said deed.

2. "Because his Honor erred in holding that the said relinquishment was sufficient, though couched in words variant from the form prescribed in the act of assembly regulating the relinquishment of their inheritance by married women.

3. "Because his Honor erred in holding the said relinquishment valid and sufficient, although not recorded as required by law.

4. "Because his Honor erred in holding the said relinquishment of inheritance good and sufficient, although the same was taken before a magistrate, as was in proof, of Laurens district, when the land was located in Newberry district."

This transaction took place before the adoption of our present constitution, and must be determined by the law as it then existed.

The fourth exception makes the point that the relinquishment was made before an officer of Laurens, while the land lay in Newberry county. The act of 1795 (5 Stat. 257), provides that "a married woman may bar herself of her inheritance, provided she will go before some one of the judges or justices in the second clause of this act mentioned," which second section names the following officers: "Any judge of the Court of Common Pleas, or justice of the quorum, or any judge of the court of the county wherein she may reside, or the land may be." The husband and his wife, and the officer, O'Neall, all lived in Laurens county. It is true, the officer who took the relinquishment was not a justice of the quorum, but an officer then styled a "magistrate." But it must be remembered that the act of 1839 had conferred all the powers and authority before that

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*time given to justices of the quorum, upon justices of the peace or magistrates. "Every magistrate shall have civil and criminal jurisdiction throughout the judicial district in which he resides, and shall execute all the powers and duties heretofore lawfully exercised by a justice of the quorum." 11 Stat. 21. We think a magistrate of Laurens county could legally take the relinquishment in that county where the parties resided, although the land lay in Newberry.

The third exception makes the objection that the relinquishment was not valid for the reason that it was not recorded as required by law. It was executed January 18th, 1860, and was not recorded until April 6th, 1864, but at that time both the husband and wife were still alive. We do not propose to open again the question whether the relinquishment of a married woman was good between the parties, although it was not recorded in six months, or was utterly void. We regard that question as finally settled in this State. It was decided in the case of Hillegas v. Hartley, 1 Hill Eq. 106, that the failure to record a renunciation of inheritance within six months under the act, rendered it void; but the case has been expressly overruled by that of Kottman and Wife v. Ayer, 1 Strobh. 553, in the late Court of Errors, which, upon this point, decided that "if a wife join her husband in a conveyance of land, and renounce her inheritance according to the act of 1795, and the deed be re-

corded in the life-time of both husband and wife, though not within six months after the renunciation, it will effectually bar the wife's inheritance. We are satisfied to rest upon this case, both for its unanswerable reasoning and because it is authority binding upon us.

The second exception objects that the relinquishment, in form, was not in accordance with the act before cited, and was, therefore, null and void. The precise form of the renunciation was not prescribed by the act. It was enough if it was to the same "effect or to the purport" of the one set forth. Judge Evans, speaking for the Court of Errors, in the case of Kottman and Wife v. Ayer, supra, says: "I conclude, therefore, that the words 'positively and bona fide' can have no other application than as to the fact that the deed

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was executed at least seven *days before her examination. The act does not require that the words 'positively and bona fide' should be used, but that the certificate should be to the effect that the woman did declare," &c. In the case in which he was speaking the word "actually" was held to be equivalent to the words "positively and bona fide," and fulfilled the requirements of the act. In this case the words are: "Did declare that she did, more than seven days previous, join in the execution with her husband of the foregoing deed of conveyance, and that she still does now, freely and voluntarily, without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish," &c. Is there any real and substantial difference between declaring that "she did join" and that she "did actually join?" One expression may be supposed to be somewhat more emphatic than the other, but they both refer, as Judge Evans says, "to the fact that the deed was executed," &c. We do not think that the relinquishment was so defective in form as to make it void.

The first exception makes the point principally relied on—that the relinquishment was insufficient because it was to one of the grantees, Peter Moon, instead of being to both Peter Moon and B. F. Griffin. The conveyance was to both, but the relinquishment, endorsed on the back, was only to one of them. It will be noticed that the act makes no reference to the case of two grantees, but says: "In the premises mentioned in the release unto the grantee."—Either was "a grantee." The deed was the instrument by which the inheritance was conveyed, and the certificate was required only by way of authenticating, without the possibility of a doubt, as she was a married woman, the fact of its execution, and that it was done freely and voluntarily, without any compulsion, dread or fear of any one, meaning, especially, no doubt, her husband. That purpose was accomplished as fully by the relinquishment to one as it would have been if the name of the other grantee, also, had been inserted in the certificate. The omission to insert the other name was manifestly an accident in filling a blank, for there is in the relinquishment itself distinct reference to "the foregoing deed of conveyance," and to "the premises within mentioned and released." The appellant conveyed away all the estate she ever had. She

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conveyed to *two grantees, and, by accident, relinquished to one of them. Possibly some question might arise between the grantees as to the effect of such action, but we do not see how she can claim that on that account the whole conveyance, as to her, is absolutely void.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 112

(Case No. 1099.)

STRIBLING v. JOHNS.

(April Term, 1881.)

[1. *Appeal and Error* ⇐117.]

A refusal by the Circuit judge of a motion to extend the time, under the act of 1878, for preparing a case on appeal, so far as such refusal is a decision on questions of fact, is not appealable to this court, it being exclusively within his province to determine whether the cause shown was sufficient and reasonable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 805–812; Dec. Dig. ⇐ 117.]

[2. *Appeal and Error* ⇐564.]

No such extension of time was allowable, unless a motion therefor had been made before the expiration of thirty days after service of notice of appeal. Scurry v. Coleman, 14 S. C. 166, approved.

[Ed. Note.—Cited in Tribble v. Poore, 28 S. C. 570, 6 S. E. 577; Brown v. Easterling, 59 S. C. 479, 38 S. E. 118.

For other cases, see Appeal and Error, Cent. Dig. § 2503; Dec. Dig. ⇐564.]

Before Aldrich, J., at Chambers, September, 1879.

Action by John V. Stribling against James A. Johns, in Oconee county. The opinion states the case. The order appealed from was as follows:

This is a motion to extend the time in which to perfect an appeal.

Appeal is not a right; it is a privilege of which the party desiring to avail himself can take advantage by complying with certain conditions. The judgment of a court of competent jurisdiction is prima facie supposed to be correct. It is always, however, subject to review by the appellate tribunal. To entitle the party failing in the action to this review

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he must comply with *certain prerequisites

prescribed by the law and the rules of court. Nor can these be lightly regarded, for, it must be remembered, appeal operates to delay and hinder the prevailing party in the cause. In practice it too often happens that appeal is resorted to for the mere purpose of delay, a practice not to be encouraged.

While, therefore, every opportunity should be afforded to correct error, still, the rights of the successful suitor are to be considered. He should not be subjected to delay—perhaps the entire fruits of his successful litigation—unless the rules regulating the appeal have been complied with, or sufficient and satisfactory reasons shown why they have not been complied with. The affidavits, submitted to support the motion, show that the notice of appeal was served in time on the proper parties; that the defendant, Johns, supposed his attorney had perfected the appeal, and that he had "no intention of abandoning said appeal."

Mr. Norton states, in his affidavit, that he was too unwell to attend to business for several days after the court; that his law partner, Mr. Stribling, has been ill with typhoid fever for five weeks, and unable to attend to his business; that the change in the law as to appeals had escaped his notice; that he is satisfied the appeal would have been perfected, "but for his own and his partner's sickness, and that the plaintiff will not be injured by delay, as the appeal will be docketed as soon as if it had been perfected in the prescribed time."

The affidavit of defendant's attorney, Mr. Verner, negatives the statement of Mr. Norton. Without attempting to reconcile this conflict of statement, it is sufficient to say, that, in my judgment, the application comes too late. The party asking the extension, must, under the act and the rules, seek relief, if he be entitled thereto, from a justice of the Supreme Court. I may add, this legislation, as it appears to me, was intended to prevent appeals for mere delay, to which I have hereinbefore alluded.

Let the motion be dismissed, with ten dollars costs to the plaintiff.

Defendant appealed, upon the ground that "his Honor erred in the law applicable to the

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case, in holding that the application *came too late." Plaintiff moved to dismiss the appeal because the return in the appeal from Judge Aldrich's order at chambers had not been filed in time.

Mr. J. J. Norton, for appellant.

Messrs. Keith & Verner, contra.

October 8th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. It appears that the plaintiff recovered judgment against the defendant for $200, for backing water and overflowing his land, and entered judgment and execution for the verdict with $92 costs taxed by the clerk. After the execution had been paid, April 18th, 1879, the plaintiff's attorney moved to tax certain costs which had been omitted in the first taxation, and the clerk taxed $64.80 additional costs. The defendant made a motion to reverse the decision of the clerk in allowing the additional costs, before Judge Aldrich, who sustained the clerk's taxation and refused the motion. From this order notice of appeal was given within ten days, but the case was not prepared and served within the "thirty days" allowed for that purpose. On September 12th, 1879, nearly three months after the order appealed from was granted, a motion was made before Judge Aldrich, at chambers, for an extension of time within which to perfect this appeal. Upon this motion, affidavits and counter-affidavits were submitted. Judge Aldrich, without undertaking to decide between the conflicting statements of the affidavits, refused the application for the extension of time principally on the ground that it "came too late." The defendant appeals to this court, and the plaintiff moves to dismiss the appeal.

It does not appear that the items of costs taxed by the clerk were improper. The objection, it seems, was that the plaintiff was in default in not having them included in the first taxation. Judge Aldrich decided otherwise, and in perfecting his appeal from that order, the defendant, in his turn, fell into default. The judge refused to grant further time to perfect the appeal.

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*Was that refusal error of law reviewable on appeal to this court?

The second section of the act of 1878 (16 Stat. 698) provides as follows: "Within thirty days after such notice, the appellant, or his attorney, shall prepare a case or exceptions, and serve them, unless the judge before whom the cause was heard last, on ten days' notice to the opposite party, upon sufficient and reasonable cause shown, shall extend the time," &c.

It will be observed that the act gives the power to extend the time only to the judge "before whom the cause was last heard." It was exclusively within his province to decide whether the cause shown was "sufficient and reasonable." The case was not difficult to prepare, and could not require much time or labor. The defendant having failed to prepare and serve a case within the time prescribed, was in default, and his application was based, not upon any right upon his part that he had lost, but was addressed solely to the judicial discretion of that officer. So far as he decided the application upon the facts stated in the affidavits, his decision was final, and there can be no appeal. To say that a matter is in the discretion of the judge is but another way of saying that it is beyond control. It is analogous

to an order refusing a new trial on the facts. This court has no right, in cases of this kind, to consider any question except alleged errors of law.

In regard to the jurisdiction of the judge to hear the application after the expiration of the thirty days allowed, we concur with him that the act which grants the privilege to make the application contemplated that it should be done within the thirty days. The object, manifestly, was to prevent unnecessary delay in the prosecution of appeals. If the application for further time could be made three months after the appeal was taken, what could prevent its being done three years after? It could not be known certainly when an appeal was ended. The act clearly indicates that if, at the expiration of the time fixed, the appellant is in default, having neither perfected his appeal nor made application for further time to do so, his appeal should be considered waived. The last section declares that "when the appellant shall fail to perfect his appeal according to the

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provi*sions of either of the foregoing sections, his failure to do so shall amount to a waiver of his appeal." Rogers v. Nash, 12 S. C. 560; Scurry v. Coleman, 14 S. C. 166. We can add nothing to what was said by the court in the last case: "There was a failure in this case to perfect the appeal according to the provisions of the act, and the extension of time was not granted in the manner pointed out by the act. * * The provisions of the act are mandatory and must be enforced. The court has no right to consider the hardships of the case, but is bound to announce the law."

The judgment of this court is that the order of the Circuit judge be affirmed, and the appeal dismissed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 116

(Case No. 1100.)

DURANT v. PHILPOT.

(April Term, 1881.)

[1. *New Trial* ⇐114.]

After judgment rendered in an equity cause by a Circuit judge, another Circuit judge may grant a new trial on the ground of after-discovered evidence, where such evidence would probably tend to induce a conclusion different from that reached at the former hearing.

[Ed. Note.—Cited in Ex parte Knox, 17 S. C. 216; Boyd v. Munro, 32 S. C. 252, 10 S. E. 963; Sams v. Hoover, 33 S. C. 403, 12 S. E. 8; Turner's Motion, 39 S. C. 416, 17 S. E. 888; Covington v. Covington, 47 S. C. 272, 273, 25 S. E. 193.

For other cases, see New Trial, Cent. Dig. §§ 234–236; Dec. Dig. ⇐114.]

[2. *Appeal and Error* ⇐1015.]

A determination by the Circuit judge that defendant is not chargeable with insufficient diligence in discovering the new evidence in time for the former trial, is a finding of fact, which was sustained in this case on appeal.

[Ed. Note.—Cited in State v. Don Carlos, 38 S. C. 227, 16 S. E. 832; State v. Jones, 89 S. C. 52, 71 S. E. 291, Ann. Cas. 1912D, 1298.

For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. ⇐1015.]

[3. *New Trial* ⇐104.]

The evidence in this case, even if cumulative, being in writing, and directly applicable to the very point upon which the former decision turned, furnished proper ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 218; Dec. Dig. ⇐104.]

[4. *New Trial* ⇐105.]

In this State there is no rule that prevents the granting of a new trial on after-discovered evidence, the effect of which would be to impeach or contradict a witness examined at the former hearing.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 221; Dec. Dig. ⇐105.]

[5. *New Trial* ⇐55.]

A motion for new trial in an equity cause, made after decree filed and without the certificate of two counsel, or leave of the court, could not be sustained as a petition for rehearing, or as a bill of review; but such motion may be properly granted under the provisions of Chap. CV., § 2, of the General Statutes.

[Ed. Note.—Cited in Covington v. Covington, 47 S. C. 274, 25 S. E. 193; Ex parte Carolina National Bank, 56 S. C. 19, 33 S. E. 781; New York Life Ins. Co. v. Mobley, 90 S. C. 559, 73 S. E. 1032.

For other cases, see New Trial, Cent. Dig. § 109; Dec. Dig. ⇐55.]

[This case is also cited and followed in Covington v. Covington, 47 S. C. 263, 25 S. E. 193.]

Before Mackey, J., Pickens, September, 1880.

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*Motion by E. H. Lawrence and J. L. Gravely, in action by Olin L. Durant, Probate judge for Pickens county, against I. H. Philpot and these relators. The facts are substantially stated in the opinion of this court. The grounds of Judge Mackey's decision are given in his Circuit decree, which, after stating the facts of the case, and reaching the conclusion that the receipt was signed by W. G. Field, with full knowledge of its contents, proceeds as follows:

It being established by the receipt adduced herein that prior to the assignment of the mortgage in question, the original mortgagee did agree to assign the same to the defendant, E. H. Lawrence, upon the said E. H. Lawrence paying the balance due on the bond of I. H. Philpot, which the said mortgage was given to secure, I am next to inquire as to the value of such proof in its bearing upon the finding of fact as set forth in the decree of the Circuit judge. The well-settled rule in such case is, that the newly-discovered evidence should be of some material fact, ranking so high in the scale of proof as to enforce the conclusion that, had it been ad-

duced at the trial, it would have produced a different verdict or judgment. Bunn v. Hoyt, 3 Johns. 255.

It is necessary, therefore, to recur to the decree of the presiding judge (Hon. Thomas Thomson), in order to ascertain the facts deduced by him from the testimony, and which moulded his judgment adverse to the defendant.

I cite from the decree as follows:

"W. G. Field says: 'At the time the assignment was made I had been paid up in full, except $100: I took the Carlisle note as money, and the only thing due was the $100.'

"The payment of money, or receipt of a note accepted as money, discharged the debt, and, consequently, the mortgage. Writings or receipts are but evidences of the transaction. The mortgage had performed its duty and lost its lien on the land.

"Had the money been paid by E. H. Lawrence to W. G. Field, a presumption might be raised that it was for the use of the payer, and that he expected an interest in the mortgage. A party not a defendant, paying money upon an execution in the sheriff's office and stipulating at the time that the execution

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*should be kept open for his benefit, is allowed to explain the transaction, though the execution be returned satisfied.

"The money was in this case paid by the mortgagor, and no inference could be made that it was for the benefit of any one but himself. * * * W. G. Field was the owner of the mortgage. Whatever may have been the agreement between I. H. Philpot and E. H. Lawrence, W. G. Field was not a party to it. Yet, he was the most important party, and the first to be consulted if an assignment from him were desired. W. G. Field was under no obligation to assign to a stranger upon payment of the amount due."

The foregoing citations make it evident that the conclusion of the Circuit judge as to the mortgage "having been extinguished before its alleged assignment by Field to Lawrence, is based upon the testimony of Field, to the effect that the mortgagor, Philpot, paid his own money in satisfaction of the mortgage, and that he (Field) had no transaction or agreement with the said Lawrence in the premises." The Circuit judge manifestly upon this point adopted the finding of the referee, who reports: "That there never was any agreement by the said W. G. Field to assign the said mortgage, and he never heard anything said about assigning it until a few minutes before he did assign it, when the said Philpot made the request, and he immediately assigned it."

Assuming as a proved fact that the mortgagor paid his own money in liquidation of his bond, it followed that there was no resulting trust to the subsequent assignee of the mortgage, and that he could take no title to the land described in the complaint under foreclosure of such mortgage, even though the said assignee had acted, in perfect good faith as a creditor of the mortgagor, since the said mortgage, before its assignment, had ceased to be a legal entity, and had become as to the mortgagor as if it never had existed. As said by the Court of Appeals of Maryland, in a recent case involving this question, "The principle is well settled that payment of an encumbrance by one whose duty is to pay, extinguishes it." Boyd v. Parker & Co., 43 Md. 202. The decree for the plaintiff is based upon the application of that principle to the facts in

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testimony, but the newly-discovered evi*dence effectually negatives the only fact which rendered the principle at all applicable to the case.

I am now to consider whether the failure of the defendant to submit at the hearing of the cause the evidence which he now adduces as the ground of his motion, was the result of his own improvidence and want of due diligence. Upon the question as to what constitutes due diligence and the requisite proof of its exercise on the part of one moving for a new trial, on the ground of newly-discovered evidence, I have carefully considered the long line of authorities and the very able argument submitted by the learned counsel (W. E. Earle, Esq.,) on behalf of the plaintiff, and applying the test prescribed, I am satisfied that the defendant, E. H. Lawrence, is not chargeable with insufficient diligence.

It is true that it does not appear where or when he made diligent search or inquiry for the "receipt" which he now exhibits. But the sufficiency of his search or the extent of his inquiry cannot enter into the case, since it appears from the testimony that the receipt was never delivered to him in person, and he declares, in his affidavit, that he became aware of its existence too late to produce it at the trial. He could scarcely be expected to have made search for a paper, the very existence of which was unknown to him.

The language of the Supreme Court of the State of New York in granting a new trial, on the ground of newly-discovered evidence, in the case of Jackson v. Crosby, appears to me to embody the true rule that should govern the decision upon applications of this class. 12 Johns. 354. See, also, to the same effect, the opinion by Lord Mansfield in Fabrilius v. Cock, 3 Burr. 1771.

The objections that the defendant should have proceeded by summons and complaint herein, and not by petition and motion, and that the motion for a new trial should have been made during the term at which the cause was heard, and before the Circuit judge who rendered the decree, appear to be untenable, and were not insisted on by counsel for plaintiff.

It is sufficient to observe, as to the last ob-

jection, that it was not possible to give notice
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of the motion for a new trial during *the term, as the decision was reserved, and the decree was filed after the term had expired.

Nor, is it necessary that a motion for a new trial should be made before the judge who heard the cause. On this point, the Supreme Court says, in Elmore v. Scurry, 1 S. C. 139: "The power to grant new trials is vested in the Circuit Court, and is neither limited in terms to the judge who tried the case, nor to causes that have originated or been tried in the court as now constituted. It is an important power of a remedial nature, and ought not to be encumbered with limitations and conditions not in terms, or by necessary implication, imposed by legislative authority."

I am also satisfied that the correct form of procedure has been adopted herein.

It is, therefore, ordered that the judgment entered up in the above-entitled cause be vacated, and that a new trial be granted therein on payment of costs by the defendant, E. H. Lawrence.

The plaintiff appealed upon eight exceptions to this decree.

The first four are sufficiently stated in the opinion. The fifth and seventh were abandoned. The other two were as follows:

6. Because it is respectfully submitted that a new trial cannot be granted after final judgment where the trial is by the court.

8. Because the form of procedure adopted by the defendants, Lawrence and Gravely, in their efforts to obtain a rehearing, is neither recognized nor authorized by the laws of this State.

Messrs. Earle, Wells & Taylor, for appellants.

This being a case in chancery, errors of the Circuit judge, either of law or fact, may be corrected. 3 S. C. 531. In jury cases, motions for new trial need not be made before the judge who heard the cause. 1 S. C. 139. For error of law, appeal must be taken to this court. 14 S. C. 324. But in chancery cases, while a Circuit judge may grant a petition to institute proceedings in the nature of a bill of review, in a case heard by another Circuit judge, he cannot do what has been done here. Judge Mackey transposes the language of Judge Thomson's decree and ascribes to the latter language not used.
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There was *no evidence of due diligence to produce at the former trial this receipt, which must have been in the possession of some of the defendants. This is fatal to the application. 6 Rich. Eq. 364; 3 Id. 465; 16 Ves. 350; 2 Dan. Ch. Pr. 1638. The evidence is merely cumulative, and, therefore, not sufficient to gain a new trial. 1 Story (U. S.) 218, cited in 11 Rich. Eq. 52; 2 Paige 24; 3 Story (U. S.) 299, 311; 3 Rich. Eq. 536. Jackson v. Crosby and Fabrilius v. Cock, cited in the Circuit decree, do not fully sustain it. The evidence here would impeach a witness who testified at the first hearing; the motion should, therefore, be refused. 3 Johns. Ch. 124. The fifth and seventh grounds of appeal are not sustained by the brief. The mode adopted here has no sanction in this State. See 2 Dan. Ch. Pr. 1626; Bailey Eq. 284; 1 Hill Ch. 35; Mitf. Eq. Pl. 78, 81; 5 Rich. Eq. 422; 2 Har. & J. 230; Story Eq. Pl. § 634a. There should have been a petition for leave to file a complaint in the nature of a bill of review. 5 Mas. (U. S.) 303.

Mr. M. F. Ansel, contra.

October 12th, 1881. The opinion of the court was delivered by

McIVER, A. J. The object of this action was to subject a certain tract of land to the payment of judgments held by the plaintiff against the defendant, Philpot, and, for this purpose, to set aside a sale of the same, under a judgment of foreclosure, to the defendant, Lawrence, and a deed made by him to his co-defendant, Gravely.

The facts, out of which the controversy grew, are, in brief, as follows: The defendant, Philpot, bought a tract of land from one W. G. Field, paying part cash, and giving his note, secured by a mortgage of the premises, for the balance. The allegation on the part of the defendants is, that Philpot borrowed the money from Lawrence with which to pay the note, and paid it to Field, with the understanding that when the note was fully paid to Field, it and the mortgage should be assigned to Lawrence, as a security for the money advanced by him. Accordingly, when Field received the balance due him on the
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note, the *mortgage, with the note, was assigned by Field to Lawrence. An action was then brought by Lawrence, as assignee of the mortgage, to foreclose the same, under which Lawrence bid off the land, and, subsequently, conveyed the same to the defendant, Gravely. The plaintiff, on the other hand, contends that the arrangement for the transfer of the mortgage to Lawrence was fraudulent and designed to defeat the creditors of Philpot, some of whom had reduced their claims to judgment, and that there was no agreement on the part of Field to assign the mortgage before the debt, secured by it, was paid, and, consequently, when the note was paid by Philpot, the mortgage was satisfied, and the assignment of it was a nullity. The case was heard by Judge Thomson at March Term, 1880, and, on May 3d thereafter, his decision was filed, in which he held that the evidence showed that there was no agreement for the assignment of the mortgage before the debt, secured by it, was paid, and, therefore, that the assignment was a nullity, and that the purchaser under the suit for foreclo-

sure took nothing. He, therefore, ordered the land sold, and the proceeds disposed of as the court might thereafter order. Within ten days after this decision was filed, the defendants, Lawrence and Gravely, gave notice that, at the next term of the Court of Common Pleas, they would move for a new trial, upon the ground of newly-discovered evidence, and, also, filed a petition, accompanied with affidavits, setting forth fully the grounds of their motion. The newly-discovered evidence relied upon is in the form of a receipt, which reads as follows:

"Received of E. H. Lawrence four hundred dollars, to be credited on note I hold against I. H. Philpot. When the said Lawrence shall raise said note I agree to assign said mortgage to him.

(Signed) "W. G. Field,

"January 12th, 1876."

At the next term of the court the motion for a new trial was heard by Judge Mackey and granted, whereupon the plaintiff appealed on various grounds, which will be considered in their order:

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*1. Because "one Circuit judge has no authority to reverse and nullify the decision or decree of another Circuit judge, as was done by the order granting a new trial in this instance."

It is quite manifest that Judge Mackey, in granting the motion for a new trial, does not undertake to reverse or nullify the decision or decree of Judge Thomson. The latter rested his decision solely upon the ground that the evidence, as presented to him, satisfied his mind that there was no agreement to assign the mortgage until after the debt, secured by it, had been paid by the mortgagor, and, therefore, that the assignment was a nullity, there being then nothing to assign. Judge Mackey, without pretending to controvert or question the correctness of this conclusion of fact on the testimony before Judge Thomson, and without questioning the conclusion of law deduced therefrom —indeed, admitting the correctness of the law laid down, simply holds that the newly-discovered evidence would have a very important bearing upon the question of fact, which was made the basis of the former decision, and would, probably, tend to induce a different conclusion, and grants the motion for a new trial, in order that the parties may have the opportunity of introducing this newly-discovered evidence. He does not grant the motion because of any error committed by Judge Thomson, but solely because of the discovery, since the former trial, of certain evidence, which, in his judgment, was well calculated to influence the result and show that the former decision was erroneous; not because of any fault or error in the judge who rendered the former decision, but because of the absence of that full light which subsequent discoveries have enabled the parties to shed upon the questions of fact involved. This ground of appeal cannot, therefore, be sustained.

The second ground of appeal is based upon the allegation that there was no evidence whatever tending to show that the parties could not, by the use of due diligence, have discovered the new evidence in time for the former trial. There is no doubt that, in order to entitle a party to a new trial, upon the ground of subsequently-discovered evidence, he must show not only that the evidence has been discovered since the former trial, but that he could not, by the use of

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due diligence, have acquired *a knowledge of the fact in time to use it at the former trial. As is said by Lord Eldon, in Young v. Keightley, 16 Ves. 350, the question is not what the petitioner knew, but what, by using due diligence, he might have known. If, therefore, the Circuit judge had ignored or disgarded this rule, that would have been such an error of law as would furnish ground for the reversal of his judgment. But he seems distinctly to have recognized this rule, and to have found as matter of fact "that the defendant, Lawrence, is not chargeable with insufficient diligence." The question of diligence is one of fact, and, as it has been found by the Circuit judge against the appellant, we see no ground, under the well-established rule, to reverse that finding. Indeed, the showing here seems to be quite as strong as it was in the case of Ex parte Vandersmissen, 5 Rich. Eq. 519 [60 Am. Dec. 102], in which leave was granted to file a bill of review on the ground of newly-discovered evidence.

The third ground of appeal alleges error in granting the motion because the newly-discovered evidence was merely cumulative. It is not to be denied that appellant is sustained by expressions of opinion on the part of more than one chancellor in some of our reported cases, but we are not aware of any case in this State in which the abstract proposition has been involved and decided. We know of no case in which a new trial or a rehearing has been refused simply because the alleged newly-discovered evidence was merely cumulative. And when, as in this case, the newly-discovered evidence is in writing, and is so directly applicable to the very point upon which the decision at the former hearing turned, we think it would amount to a denial of justice to refuse the motion because the newly-discovered evidence may, in one sense, be regarded as cumulative. That there are cases in which a new trial has been granted on the ground of newly-discovered evidence which was merely cumulative, see Jackson v. Crosby, 12 Johns. 354. We may also remark that this evidence can scarcely be regarded as merely cumulative of that offered at the former hearing, for the real point in controversy then seemed to be

whether the arrangement between Lawrence and Philpot was bona fide or collusive, and designed to defeat the creditors of Philpot,

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and Philpot did *not undertake to testify positively that there was any agreement between himself and Field, that the mortgage was to be assigned to Lawrence. His language was: "Think I told Field, in the spring of 1876, that when the $800 was paid, wanted him to assign the mortgage; think I must have told him so." We do not think that this ground of appeal should be sustained.

The fourth ground of appeal is based upon the proposition that a new trial should not be granted on the ground of newly-discovered evidence, the effect of which is to impeach or contradict a witness examined at the former hearing. Whatever may be the rule elsewhere, it is quite certain that such is not the rule in this State, nor does it seem to be the rule in England. In Levingsworth ads. Fox, 2 Bay 520, a new trial was granted because evidence was discovered after the trial, showing that one Rountree, a witness who had testified at the former trial, was interested in the event of the suit, though he had stated, when examined on his voir dire, that he had no interest. In Durant v. Ashmore, 2 Rich. 184, a new trial was granted on the ground of after-discovered written evidence, which might have affected the credit of a witness examined at the former trial. So, in Fabrilius v. Cock, 3 Burr. 1771, a new trial was granted because evidence was discovered after the former trial, going to show the subornation of witnesses who testified at the first trial.

The fifth and seventh grounds of appeal having been abandoned, the only remaining question is as to the propriety of the mode of proceeding adopted in this case.

Under the practice of the former Court of Equity it might, perhaps, have been difficult to sustain the mode of proceeding adopted in this case. Under that practice, a petition for rehearing and a bill of review were sustainable on similar grounds, one of which was newly-discovered evidence (Hunt v. Smith, 3 Rich. Eq. 541); but a petition for rehearing was the proper mode of proceeding where the decree had not been signed and enrolled or filed, whereas, after the filing of the decree, the proper mode of proceeding would be by an application for leave to file a bill of review (Simpson v. Downs, 5 Rich. Eq. 425; Hinson v. Pickett, 2 Hill

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Eq. 353); and such *bill could not be filed without leave of the court. Simpson v. Smith or Watts, 6 Rich. Eq. 364 [62 Am. Dec. 392]. If, therefore, this should be regarded as a petition for rehearing, it is liable to two objections: First, because the decree had been filed, and, second, the petition is not certified by two counsel. Ex parte Terry, Rice Eq. 1; 3 Dan. Ch. Pr. 1623. On the other hand, if it be regarded as in the nature of a bill of review, no leave of the court to file it seems to have been obtained.

It seems to us, however, that since the abolition of the Court of Equity and the requirement of the constitution in Section 3, Article V., that justice shall be administered in a uniform mode of pleading, without distinction between law and equity, these modes of proceeding, by a petition for rehearing and by bill of review, have become inapplicable, and that now the same results can be obtained by motion under the provisions of Section 2, Chap. CV., Gen. Stat. 497. Hill v. Watson, 10 S. C. 277. See also remarks of Simpson, C. J., in State v. David, 14 S. C. 428. It is true that the section of the General Statutes just referred to has been repealed by the act of December 21st, 1880, 17 Stat. 341; but this act, by its express terms, does not apply to judgments then existing or to cases then in suit, and, therefore, does not affect this case. We think, therefore, that there is no valid objection to the mode of proceeding adopted in this case.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 126

(Case No. 1101.)

ALEXANDER v. ALEXANDER.

(April Term, 1881.)

[1. *Appeal and Error* ⇐339.]

Section 357 of the Code of Procedure was repealed by the act of December, 1878, which fixes the time within which every appeal to the Supreme Court must be taken; but such repeal did not affect cases where the right of appeal attached before this act went into operation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883–1887; Dec. Dig. ⇐ 339.]

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[2. *Appeal and Error* ⇐348.]

*Decree was filed November 22d, 1878, and more than three months afterwards, but before written notice of such filing, notice of appeal was given; on motion, the appeal was dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1900; Dec. Dig. ⇐348.]

Motion to dismiss appeal.

Susan B. Alexander, and another, against T. M. Alexander, administrator, and others. No papers have been furnished the reporter, except the opinion of this court.

October 17th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. The questions involved here arise upon a motion to dismiss the appeal in the above-entitled case.

On November 22d, 1878, a decree was pronounced by Judge Hudson, at chambers, in the above case, in favor of the plaintiff, respondent. The decree, on its face, purports to have been by consent of counsel on both sides. Judgment was entered, and the judgment roll filed on the same day of the decree in the clerk's office for Pickens county, the county of the action. On February 5th, 1880, over fourteen months after the judgment was perfected by filing the judgment roll, a notice of appeal was served on plaintiff's attorneys by other attorneys than those on the record for defendant, Sarah A. Alexander. This notice was endorsed by plaintiff's attorneys and returned.

Upon these facts the respondent now moves to dismiss the appeal on two grounds:

1. "Because the notice of appeal was not served within the time prescribed by the law.

2. "Because the decree was by consent, and is not, therefore, appealable."

At the time the decree of Judge Hudson was pronounced and the judgment entered, to wit, November 22d, 1878, the law regulating appeals as to time was contained in Section 357 of the code. That section provided "that appeals to the Supreme Court, under Subdivision 2, Section 11, of the code, must be taken within sixty days after written

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notice of the order shall *have been given to the party appealing. Every other appeal allowed by the second chapter of this title must be taken within three months after the judgment shall be perfected by filing the judgment roll." The decree or judgment appealed from in this case belonged to the second class above referred to, and the appealing party, therefore, had three months, and only three months, under Section 357 (supra) from the filing of the judgment roll, within which to appeal.

It is admitted that the notice was not given until after fourteen months had elapsed from that time. This, then, is fatal if Section 357 was applicable to the case. But the appellant contends that the appeal in this case is not governed by Section 357. She claims that Section 357 was repealed by the act of December, 1878, and this case is subject to the provisions of that act.

The act of 1878 provides "that in every appeal from an order, decree or judgment, or other matters from which an appeal may be taken to the Supreme Court, the appellant or his attorney shall, within ten days after written notice that such order, decree or judgment has been granted at chambers, give notice to the opposite party of his intention to appeal, * * * and upon his failure to do so, his appeal shall be regarded as waived." It is admitted that no written notice has ever been given to the appellant of the granting of the decree in question, so that if the act of 1878 (supra) does apply, then her claim that she is within time is well founded. The question, then, in the case is: Under which of these two acts, Section 357 of the code, or the act of December, 1878, does this appeal fall?

The act of 1878, by its terms (Section 5), was not to go into operation until February 1st, 1879, and by Section 6 of the act it is provided "that all acts, and parts of acts, inconsistent herewith are hereby repealed." 16 Stat. 699.

The respondent contends that Section 357 of the code, or at least so much of it as limits absolutely the time of appeal to three months, or to a certain class of cases, is not inconsistent with the act of 1878, and, therefore, that this portion of this section is still of force, which, not having been complied with by the appellant, the appeal must be

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dismissed. His position is, *that under Section 357 of the code, and previous to the passage of the act of December, 1878, a losing party was entitled to three months from the filing of the judgment roll within which to give his notice of appeal, in cases like that before the court, and that the act of December, 1878, has neither taken away nor extended this right absolutely, but that it still stands as to orders, decrees or judgments granted at chambers, except in cases where the successful party shall give written notice of the granting of such order, decree or judgment to the other side or his attorney, in which case the right to appeal is lost, unless, within ten days after such written notice, the appellant shall give notice of his intention to appeal. The argument is, that while the act of December, 1878, is inconsistent with the other provisions of Section 357 as to the sixty days allowed to orders, &c., and to so much as allowed three months to rulings, orders, decrees or judgments pronounced in open court, yet, as to the orders, decrees and judgments granted at chambers, the two may stand together, and that in such cases the time for appeal is still limited to three months from the filing of the judgment roll, unless the successful party shall give notice in writing to the other side, or by attorney, within that time of the filing of the decree, when the time will be curtailed and cut down to ten days thereafter. And the three months having elapsed in this case without any notice of the filing of the decree, the appeal has been waived without remedy.

This argument is ingenious, but we do not think it sound. We think that Section 357 of the code is inconsistent, in all of its provisions, with the act of December, 1878, and was, therefore, repealed from February 1st, 1879, the time when this act took effect. Section 357 gave the right of appeal from matters embraced under Subdivision 2 of Section 11 of the code for sixty days after written notice of the passage of the order. By the act of December, 1878, this time has been reduced to ten days. These two provisions are certainly inconsistent. In every

other appeal under this section three months were allowed from the filing of the judgment roll. This embraced rulings, orders, decrees and judgments pronounced in open

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court, as well as those *granted at chambers. In the act of December, 1878, the time for appealing from rulings, orders, decrees or judgments pronounced in open court is reduced to ten days after the rising of the court. In terms this is inconsistent with Section 357. As to such orders, decrees and judgments as are granted at chambers, it is provided in the act of 1878, that the appeal must be taken within ten days after written notice that such orders, decrees or judgments have been granted. Is this not inconsistent with the right which the losing party had unconditionally for three months after the filing of the judgment roll under Section 357 in such cases? A new event is fixed, to wit, written notice of the granting of the decree, which is to give currency to the time within which the appeal is to be taken or deemed waived, and a new time is specified, to wit, ten days, instead of three months. Even according to the construction contended for by appellant, the unconditional right of three months, which is allowed under Section 357, is taken away by the provision which authorizes the successful party to shorten this time by the notice provided in the act of 1878. Thus far, at least, the provisions of the two acts are inconsistent. This would leave but a small fragment of the Section 357 untouched. Can it be that the legislature intended to repeal all of this section, except this fragment? In our opinion it was the intention of the legislature, by the act of December, 1878, to place all appeals upon nearly the same plane as possible, and, having provided that all appeals from rulings, orders, decrees or judgments, made and pronounced in open court, should be taken by notice of intention, within ten days after the rising of the court, or deemed waived where the parties litigant or their attorneys must be supposed to have had notice, it made the same provision as to orders, decrees and judgments granted at chambers—substituting written notice of the filing of the decree in the place of the announcement in open court of those granted there.

In this view we think that Section 357 of the code, as a whole, is inconsistent with the act of December, 1878, and, therefore, falls under the repealing clause of that act.

But we do not see how this can help the appellant in this case. The repeal of Section 357 did not take place until February

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*1st, 1879, when the act of 1878 took effect. The judgment in this case was rendered and the judgment roll filed some two months before this, to wit, November 22d, 1878. This even before the act of 1878 was passed. At that time Section 357 of the code was of force. The right of the appellant to his appeal then attached, and was subject both as to the right and as to its limitations to this section. The legislature did not intend that the act of 1878 should apply to such cases. It was intended to apply to and govern in cases where judgments, &c., should be rendered after the act took effect. The fifth section, providing that the act should not take effect until the first of February after its passage, is an unusual section to be found in an act, and can be explained in no other way but as indicating an intention that the act should have no retroactive effect, but, on the contrary, should apply only to orders, decrees and judgments obtained after it went into operation, leaving the law, as it then stood, to govern in cases already having passed into judgment. This view is sustained by authority. See the case of Warren, Wallace & Co. v. Jones, 9 S. C. 292, in which McIver, A. J., delivered the opinion of the court; Ex parte Graham, 13 Rich. L. 277; Cooley Const. Lim. 370.

Section 357 of the code, then, being of force at the time the right of appeal attached in this case, it must stand or fall, as that section may determine, and, it being admitted that no notice of appeal was given by the appellant within the three months after the filing of the judgment roll required by that section, it follows that the appeal must be dismissed.

The objection to the appeal being fatal on the first ground, it will be unnecessary to consider the second.

It is ordered that the appeal be dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. *132

*(Case No. 1102.)

ELLEN v. ELLEN.

(April Term, 1881.)

[1. *Appeal and Error* ⇦216.]

The failure of the Circuit judge to charge the jury more strongly than in the language of the request, cannot be assigned as error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627–629, 630–641, 660, 662–676; Appeal and Error, Dec. Dig. ⇦216.]

[2. *Adverse Possession* ⇦43.]

A party in possession of land under an adverse claim, conveyed to his son in fee, before ten years had expired, reserving to himself, by the deed, the use for life, and continued in possession until his death, thus completing a ten years' possession. *Held*, that until an adverse claim has continued for ten years, it does not ripen into a right, and, therefore, the deed of such claimant, within that time, could convey no title.

[Ed. Note.—Cited in Garrett v. Weinberg, 48 S. C. 45, 26 S. E. 3; Burnett v. Crawford, 50 S. C. 167, 27 S. E. 645; Sutton v. Clark, 59 S. C. 454, 38 S. E. 150, 82 Am. St. Rep. 848; Epperson v. Stansill, 64 S. C. 488, 42 S. E.

426; Mitchell v. Hamilton, 98 S. C. 290, 292, 82 S. E. 426, 427.

For other cases, see Adverse Possession, Cent. Dig. § 218; Dec. Dig. ⟸43.]

[3. *Trusts* ⟸30.]

Nor could such a deed be sustained as a covenant to stand seised to uses.

[Ed. Note.—Cited in Steele v. Smith, 84 S. C. 468, 66 S. E. 200.

For other cases, see Trusts, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸30.]

[4. *Evidence* ⟸273.]

The question involved being adverse possession by plaintiff's grantor, the trial judge restricted the plaintiff to proof of his grantor's acts of ownership, excluding all declarations as far as possible; but in reply to full proof by defendant of the grantor's admissions of permissive possession, plaintiff was permitted to prove the grantor's declarations accompanying his occupancy, to show adverse claim. *Held*, that there was no error in these rulings.

[Ed. Note.—Cited in Metz v. Metz, 48 S. C. 485, 26 S. E. 787; Levi v. Gardner, 53 S. C. 32, 30 S. E. 617; Lewis v. Pope, 86 S. C. 295, 68 S. E. 683; Holden v. Cantrell, 100 S. C. 279, 84 S. E. 829.

For other cases, see Evidence, Cent. Dig. § 1115; Dec. Dig. ⟸273.]

[5. *Ejectment* ⟸90.]

Tax receipts, as evidence of payment of taxes, are admissible to show a claim of ownership, but they do not sustain such claim, where it is shown that the taxes were paid under a contract with the real owner.

[Ed. Note.—Cited in Langston v. Cothran, 78 S. C. 31, 58 S. E. 956.

For other cases, see Ejectment, Cent. Dig. § 268; Dec. Dig. ⟸90.]

[6. *Adverse Possession* ⟸104.]

[Cited in Sutton v. Clark, 59 S. C. 453, 38 S. E. 150, 82 Am. St. Rep. 848, to the point that the presumption of a grant gives title to land.]

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595–602; Dec. Dig. ⟸104.]

Before Hudson, J., Marion, April, 1880.

Action commenced in September, 1879, by John H. Ellen, by Caroline M. Ellen, his guardian ad litem, against William B. Ellen, for the recovery of land. Verdict being for plaintiff, defendant moved for a new trial upon the same grounds, substantially, as were taken in his exceptions to the order of the Circuit judge overruling the motion. This order clearly states the case, and was as follows:

This was an action by John H. Ellen, the youngest son and only child of David Ellen by a second wife, against an elder half-brother, a son by the first wife, to recover the possession of a tract of about one hundred acres of land, of which the plaintiff had been ousted by the defendant, and forcibly kept out.

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*David Ellen died at an advanced age in 1876, being about ninety years old.

The contest was a very bitter family quarrel, and gave rise to much testimony and a very animated contest in court. The land papers of old man David Ellen, as well as of W. B. Ellen, were lost and destroyed during the war by being carelessly buried during the passage of Gen. Sherman's forces through the country. Having not been recorded, much testimony was introduced to prove the existence and contents of deeds, and still more concerning the character of the very long possession of David Ellen of the territory in dispute—a fact which was conceded on both sides; the question being not as to the fact of his possession, but as to its character.

The plaintiff derived his title immediately from David Ellen, by deed, in 1871, in which the old man reserved a life-estate in the land to himself, and continued in possession up to his death, in 1876. This deed, coupled with possession of the land by his father for a period of about forty years anterior thereto, constituted the plaintiff's title. The defendant relied on an old grant to one Hyatt, a deed from Hyatt to Robert McKenzie, Sr., an alleged deed from said McKenzie to Zimri Ellen, which could not be produced, as it was alleged to be lost and had never been recorded, and the record copy of a deed from Z. Ellen to the defendant.

After a very tedious trial, lasting several days, and a very full argument of the case, the jury found a verdict for the plaintiff.

This motion is to set aside the verdict, and for a new trial upon the specified grounds.

The first ground rests in the misapprehension of counsel. I distinctly charged the jury that the existence of the alleged deed from R. McKenzie, Sr., to Zimri Ellen might be inferred by them from the testimony of Zimri Ellen, William B. Ellen, and the declarations of old man David Ellen; and it is a mistake in counsel when they say that the declarations of the old man, as testified to by witnesses, were withheld by me from the jury in my charge. These declarations were allowed to go to the jury as evidence against the plaintiff, his grantee.

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*2. Upon the second exception I have to remark, that I did instruct the jury, that if they believed from the testimony that the old man Ellen did hold, occupy and possess the land adversely to the defendant and the world, from 1865 to 1876, that a title would accrue to him as against the defendant, notwithstanding the fact that he, in 1871, made a deed of the land to the plaintiff, in which he reserved to himself a life-estate. That until the death of his father, in 1876, the plaintiff had neither the possession nor right of possession, but the undisputed continuance of the old man's possession until his death inured to the benefit of his title against the defendant, and to the remainderman would pass a title thus perfected, however imperfect it might have been in 1871.

In this I do not think there was error. The conveyance of itself could not break the possession unless the life-tenant had surrendered to the remainderman; so long as he

held possession adversely, still owning the life-estate, the possession would be for the benefit of that estate, and was still the old man's adverse possession (if the evidence showed it to be adverse); and the character of the possession was strictly left to the jury to determine.

3. On the main question in the case, to wit, the character of old man Ellen's possession, there was great conflict of testimony, and it was left to the jury to determine its weight and preponderance. On this question the battle was chiefly fought, and the jury having decided it in favor of the adverse possession of David Ellen, I do not think I should disturb the verdict.

4. The fourth exception questions the competency of declarations of David Ellen, deceased, as to the character of his possession, and his claim of title.

There was an earnest contest over the testimony on this point, and a strenuous effort on the part of the court to confine the contestants to the rule governing such evidence. In the evidence in chief for the plaintiff, he was confined to proof of acts of ownership alone; but frequently in bringing out this testimony, witnesses did, before they could be stopped, repeat declarations of David Ellen, accompanying his acts of ownership

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and posses*sion, amounting to a claim of the land. But the rule confining him to the naked acts of ownership without declarations was followed by him and enforced by the court as rigidly as possible.

The defendant, in developing his case, was given the unrestrained privilege of introducing against the plaintiff the declarations of David Ellen, while in possession, to qualify that possession, and to show it to be permissive and not adverse to the defendant. These ran through a long series of years, just as did the acts of ownership established by the plaintiff. When the plaintiff came to reply to this testimony, he was allowed to do so by additional proof of adverse possession, and assertions of title and claim of title accompanying and attending these acts of ownership, and during his actual possession, to show the same to be adverse to defendant and all others.

It is difficult to conceive how the character of a man's possession of land, whether in his own right or in right of another, whether adverse or permissive, could ever be proved unless it be by his acts and words accompanying such acts while in possession and occupancy. As explanatory of that possession, we think, as part of the res gestæ, they are as admissible for, as well as against, one claiming under and through the alleged adverse possession. Especially should such be admissible for the claimant in reply to alleged declarations of permissive possession; and it was only when the plaintiff came to reply that he was allowed to prove the declarations of David Ellen, accompanying possession and occupancy going to show it to be adverse and not permissive.

5. This ground is likewise based on a misapprehension. I allowed the plaintiff to prove that his father always, during his long possession, paid the taxes on the land, and for this purpose did allow tax receipts to be given in evidence of the fact of payment of taxes. On this point I told the jury that payment of taxes on land by one in possession was not evidence of title, but was a circumstance going to show a claim of ownership, but that it would amount to nothing if it were proved to have been done under contract with the real owner.

The first testimony, according to my recollection, as to payment of taxes by D. Ellen, came out (perhaps on cross-examination) while the defendant's witnesses were being examined.

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*Upon mature consideration, I am constrained to deny the motion for a new trial on all the grounds, and the same is dismissed with costs.

Plaintiff deed of August 18th, 1871, was as follows:

Know all men by these presents, that I, David Ellen, of the county and State aforesaid, for and in consideration of the natural love and affection which I have and bear for my son, John Henry Ellen, have given and granted, and by these presents do give and grant unto my said son, John Henry Ellen, all my real estate as well as personal. The personal consisting of * * * The real consisting of a tract or parcel of land in said county containing two hundred acres more or less, on which I reside, bounded by lands of * * * Together with all and singular the rights, members, hereditaments and appurtenances thereunto appertaining or in anywise incident; to have and to hold all and singular the said premises to the said John H. Ellen, his heirs and assigns forever. Nevertheless reserving to myself the use and occupation of the above-named premises and personal property during the term of my natural life.

In witness whereof, &c.

The case was brought to this court on five exceptions to the judge's rulings, and refusal to grant a new trial. The first two are stated in the opinion; the others were as follows:

3. The defendant excepts to the rulings of his Honor, the presiding judge, as to the fact of there being a conflict of testimony, whereas it is submitted that there was none, the witnesses for the plaintiff speaking of declarations of David Ellen at one time, and those for defendant of declarations at other times, and no one witness contradicted the other on these points; and it is insisted that the declarations of one in possession against his interest cannot be contradicted or re-

butted by declarations at another time, and hence the weight of competent evidence was all on one side, and such declarations being objected to, were incompetent, and should have been ruled out by his Honor.

4. The defendant further excepts to the ruling of his Honor in admitting the declarations of David Ellen, under whom plaintiff claims, under objections as to their competency, especially those testified to as to the

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exchange of land with Z. Ellen, *in the testimony of plaintiff in reply, as the same were not strictly in reply to defendant's evidence, and were inadmissible.

5. And for a further exception and ground, that his Honor admitted the statement of the county auditor to prove the payment of taxes by David Ellen on the lands in dispute, when the same was objected to as incompetent, and when the same was not evidence of title or admissible in evidence as proof of title or adverse possession.

The cause was heard in this court on December 17th, 1880. The court ordered a reargument, which was heard May 5th, 1881.

[For subsequent opinion, see 18 S. C. 489.]

Messrs. Johnson & Johnson, for appellants.

Both parties claim under Z. M. Ellen. Declarations of David Ellen were improperly introduced by plaintiff. 3 McC. 226, 227 in notes; 4 Id. 262; 9 Rich. 454; 15 Johns. 324; Bailey Eq. 492; 2 N. & McC. 596; 2 Bailey 461; 2 Rich. 176; 1 Spears 167; Dudley 178; 1 Greenl. Evid., § 109. The cases relied upon by respondent are exceptions to the general rule, and confined to questions of gift. Harp. 374; 1 Bailey 113; 6 Rich. 308; 1 Hill Ch. 13. Ten years' adverse possession gives no presumption of title; it only bars an action. 2 Stat. 584; 2 Bay 429; 2 Rich. 21; Cheves Eq. 57; 2 Hill 491; Cheves 200; 3 McC. 264. The deed is not a covenant to stand seised to uses. 12 S. C. 564; 1 Mill Con. R. 48; 3 Strobh. 24, 62; 5 Rich. 189; 2 Strobh. Eq. 373, 376; 1 Rich. 161, 170. If a covenant to stand seised to uses—to what uses? Only of such as he had at the time, not of after-acquired interests. 5 Rich. 7; 1 Hill 111. There is no legal estate reserved to the grantor, only a right to use and occupy.

Mr. W. W. Harllee, on same side.

Messrs. C. P. Townsend and W. W. Sellers, contra.

Admissions of David Ellen were properly submitted to the jury. 1 Greenl. Evid. 27,

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201–209; 8 Rich. 401; 13 Johns. *74; 3 Strobh. 501; 2 Mill Con. R. 80; 1 Bay 30; 1 McM. 447; 1 Hill 223. His declarations were good evidence in reply. 1 Greenl. Evid. 109, 110; 2 Hill 488; 2 Strobh. 143; 4 McC. 262; 2 Spears 610; 2 McC. 161; 3 Id. 222. The tax receipts were admissible in evidence. Dudley 178; 2 Hill 488. Ten years' adverse possession makes a good title. 1 Bay 375; 2 Id. 339, 474, 491; 1 N. & McC. 374; 1 Mill Con. R. 85; Rice 12; 2 Brev. 151, 155; 2 Hill 492; 2 Mill Con. R. 80; 6 Rich. 65; 9 Johns. 180; 18 Id. 42; Cheves 200. The deed is a covenant to stand seised to uses. 1 Rich. 161, 173; 4 McC. 201; 4 Desaus. 617, 14 Rich. Eq. 275. It was clearly David's intention to reserve to himself a life-estate. Whatever the construction of the deed, plaintiff's title is good. 3 McC. 411; Dudley 23; 2 Hill 442; 5 Rich. 8; 3 Houst. 369; 9 R. I. 528.

October 17th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This was an action to recover possession of a tract of land. The plaintiff, respondent, claimed through a deed from his father, David Ellen, executed in 1871, alleging that his father had been in the adverse possession of the land over ten years.

The appellant claimed by deed dated March 12th, 1861, from Zimri Ellen, a son of David, who, it was alleged, had received title from one Robert McKenzie, who derived title in 1804 from Israel Hyatt, a grantee of the State. The deed from Robert McKenzie to Zimri Ellen was not produced on the trial, having been lost during the passage of Sherman's army through the State, which involved the destruction of not only much valuable property, but the loss of many valuable papers. It was alleged, however, that David Ellen, through whom plaintiff claimed, during all the time that he was in possession, held possession subordinate to this deed, and in full recognition thereof. Consequently, appellant contends that the claim of respondent, through David Ellen on account of his supposed adverse possession, has no foundation.

The verdict was for the respondent, plain-

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tiff. The appellant, *defendant, appeals, assigning error in the charge of the judge, as appears in the following grounds:

First. He excepts to the charge, because the judge did not instruct the jury "that as to the deed of Robert McKenzie to Zimri Ellen, the admissions of David Ellen, under whom respondent claimed, were conclusive against him, not only as to its existence, but as to its contents."

The presiding judge, in his order refusing the motion for a new trial, uses the following language in reference to this ground:

"The first ground rests in a mistake of counsel. I distinctly charged the jury that the existence of the alleged deed from Robert McKenzie to Zimri Ellen might be inferred by them from the testimony of Zimri Ellen, William B. Ellen, and of the old man Ellen, and it is a mistake of counsel when they say that the declarations of the old man, as testified to by witnesses, were withheld from the jury in my charge. These declara-

tions were allowed to go to the jury as evidence against the plaintiff, his grantee."

It seems, then, that the judge did charge in accordance with the substance of this exception. He permitted the declarations of old man David Ellen, in reference to the deed, to go to the jury without restriction, and charged them that the alleged deed might be inferred from these declarations as well as from other testimony. If the appellant had desired that the effect of these declarations should have been more strongly put to the jury than was stated by the judge, he should have so requested, but, failing to do so, the omission of the judge to impress and intensify this point cannot now be assigned as error of law and be made a ground of appeal. Madsden v. Phœnix Ins. Co., 1 S. C. 24; Abrahams v. Kelly & Barrett, 2 S. C. 238.

The deed under which respondent claimed was executed in 1871, which, under our view of the case, was some four years before the statutory period of the adverse possession of David Ellen had expired. Upon this subject the judge instructed the jury: "That if they believed from the testimony that old man Ellen did hold, occupy and possess the land adversely to the defendant and the world

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from 1865 to 1876, that a title would *accrue to him as against the defendant, notwithstanding the fact that he, in 1871, made a deed of the land to the plaintiff, in which he reserved to himself a life-estate. That until the death of his father, in 1876, the plaintiff had neither the possession nor the right to possession, but the undisputed continuance of the old man's possession until his death inured to the benefit of his title against the defendant, and to the remainderman would pass a title thus perfected, however imperfect it might have been in 1871."

To this appellant excepted as follows: "Because the judge charged the jury that if David Ellen held the land adversely from December 8th, 1865, till June, 1876, when he died, that this adverse possession would give title to the land, notwithstanding he had conveyed the said land to the plaintiff in 1871." This presents an interesting question—one which involves the discussion of the theory of title to land when resting simply upon adverse possession as a foundation.

In this case, as it has been already stated, David Ellen, some four years before the statutory period of adverse possession—ten years—had expired, conveyed the land in dispute to the plaintiff, still holding possession, however, under the terms of his deed, until the ten years had expired, when he died.

Now the question is: Did his deed to plaintiff, under these circumstances, operate as a good conveyance, which entitles him to recover in this action? or, having been executed before the expiration of the ten years, did it convey any interest whatever, although he continued to hold adversely until the full statutory period ran out? The solution of this question will depend upon the further question: Does adverse possession give or create title which, by operation of law, is conferred upon a trespasser at the end of ten years? or is adverse possession for ten years simply the evidence of a title which the law presumes the party in possession of when he first entered?

There is no doubt that title to land growing out of long-continued possession—long enough to presume a grant, deed or other muniment of title—attaches at the beginning of possession on the presumption of law that a deed was executed at that time which has since been lost. Wadsworthville Poor School

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v. *McCully, 11 Rich. 426; 1 Greenl. Evid. 23, § 17. So, too, as to those rights which arise by prescription. The law presumes a grant or deed in favor of the party claiming the right when he first began to enjoy it. 2 Greenl. Evid. 992.

Now, does the title, by adverse possession, rest upon this doctrine? If so, the deed of David Ellen to the plaintiff, although executed before the statutory period of ten years expired, would be a good deed; his continuing to hold for the ten years affording the evidence that when he entered he entered with title, which had subsequently been lost. I was disposd at first to take this view of the subject, and to believe that this doctrine applied as well to adverse possession as to titles arising by presumption of grant or prescription. This seemed to me to be most philosophic and more in harmony with the rights of the parties in such cases than any other; but upon the re-argument of this case, when special attention was directed to this point, it seems clear, upon the authority of the decided cases in this State, that the true doctrine is the other way. According to these decisions, an adverse possessor is a trespasser from the beginning to the end. His possession begins in trespass, and so continues until it ripens into a right at the end of the statutory period of ten years. During this time he has nothing that he can convey; nor can his possession be tacked with that of his grantee so as to defeat the title of the true owner.

He who claims under the presumption of a grant, it is true, is entitled to stand on the same ground as if he produced the grant. Such a case, however, is wholly unlike a title under the Statute of Limitations. McLeod v. Rogers & Gardner, 2 Rich. 21; see, also, King v. Smith, Rice 12; Williams v. McAliley, Cheves 200. The Statute of Limitations does not rest upon the presumption of a previous deed. It simply operates as a bar to the plaintiff's action; and, as a general rule, no one can interpose this bar except such as may have held for the period prescribed by the statute. Under the authorities settling this doctrine, in the opinion of the court,

David Ellen's deed to plaintiff having been executed before the statutory period expired, and before his trespass had ripened into a

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right, conveyed *no title. The second exception of appellant is, therefore, sustained.

Neither is there any ground to hold that this deed can stand as a covenant to stand seized. In the first place, as we have just seen, David Ellen had no title himself at the time he executed this deed. He was not seized, and, if he had been, his deed conveyed the fee to his grantee at the moment of its execution, reserving only a usufruct to himself for life, which would negative the idea of a covenant to stand seized. Cribb v. Rogers, 12 S. C. 564 [32 Am. Rep. 511]; Jenkins v. Jenkins, 1 Mill Con. R. 48; see, also, Singleton v. Bremar, 4 McC. 15 [17 Am. Dec. 699].

The third and fourth exceptions question the competency of certain declarations of David Ellen while he was in possession, sustaining his title to the land. It is a general rule that declarations of persons in possession of land explanatory of the character of their possession will be admitted when in disparagement of their title as original evidence; and Mr. Greenleaf says: "That there can be no reason why every declaration accompanying the act of possession, whether in disparagement of the claimant's title or otherwise qualifying his possession, if made in good faith, should not be received as part of the res gestæ, leaving its effect to be governed by other rules of evidence." 1 Greenl. Evid., § 109.

In Turpin v. Brannon, 3 McC. 261, such declarations were admitted. In Martin v. Simpson, 4 McC. 262, a case of trespass to try title, such declarations were admitted on the ground that the character of every act must be determined by the circumstances attending it. The words and actions of the actor constitute a part of the thing done, and is necessary to its explanation, said the court. The same doctrine is held in several other cases in our own State not necessary now to be referred to.

The presiding judge below says that the plaintiff was confined to proof of acts of ownership; but, frequently, in bringing out the testimony, witnesses did, before they could be stopped, repeat declarations of David Ellen accompanying his acts of ownership and possession amounting to a claim of the land. But the rule of confining him to the naked acts of ownership, without declarations, was followed by him and enforced

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by the court as rigidly *as possible. We see no error as to the rulings of the judge in this respect.

There seems to be some misapprehension as to the fifth exception. The plaintiff, respondent, was allowed to prove that his father paid taxes, and the tax receipts were admitted, but the judge says: "That he explained to the jury that these were admitted as circumstances going to show claim of ownership which would, however, amount to nothing if it were proved to have been done under contract with the real owner." Under these circumstances we do not see that the judge erred in his rulings as to this matter.

Although we have sustained the presiding judge as to several of the exceptions of the appellant, yet one of the main grounds involved in the case, and that upon which the verdict, no doubt, in a great measure turned, is that presented in the second exception. In this we think the judge was in error, and this will necessitate a reversal of the judgment below.

It is, therefore, the judgment of this court that the judgment of the Circuit Court be reversed and the case be remanded.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 143

(Case No. 1103.)

GRAY v. WALKER.

(April Term, 1881.)

[1. *Mechanics' Liens* ⇨107.]

Where a builder contracts to erect a building, he furnishing all the necessary labor and materials to that end, a laborer employed by him to do a portion of the work has no mechanics' lien on the building erected under such contract.

[Ed. Note.—Cited in Builders' Supply Co. v. North Augusta Elec. & Imp. Co., 71 S. C. 376, 51 S. E. 231.

For other cases, see Mechanics' Liens, Cent. Dig. § 139; Dec. Dig. ⇨107.]

[2. *Mechanics' Liens* ⇨61.]

Mere knowledge by the agent of the owner that such laborer was so working does not amount to that consent which, under the act, would entitle a laborer to a lien on the building.

[Ed. Note.—Cited in Geddes v. Bowden, 19 S. C. 7, 8; Builders' Supply Co. v. North Augusta Elec. & Imp. Co., 71 S. C. 374, 384, 51 S. E. 231; Metz v. Critcher, 83 S. C. 405, 407, 409, 65 S. E. 394.

For other cases, see Mechanics' Liens, Cent. Dig. § 77; Dec. Dig. ⇨61.]

Before Wallace, J., Spartanburg, March, 1880.

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*Petition by Albert Gray against E. C. Walker, to enforce mechanics' lien, filed June 25th, 1879.

To the statement of facts in the opinion of this court, the following extracts from the testimony may be properly added:

W. E. Walker testified for plaintiff: Am husband for defendant: Hughes authorized me to look after the building; if I had seen building going on wrong I should have notified Hughes; think I called attention of Gray to

plastering off in large room, and asked him to replaster it; I spoke to Gray just as I would to any other employé of Howerton.

Albert Gray recalled: W. E. Walker was about the house a good deal while I was at work on it; looked over the work going on; spoke to me about plastering; knew I was there at work; never heard of any objection to my working there, nor ever received any notice that I could not have lien on work for my pay; Hughes was there once or twice; saw me at work.

This is all the testimony bearing on the question of consent or acknowledge. Neither Hughes nor Mrs. Walker were examined.

Messrs. Duncan & Cleveland, for appellant. cited Phil. Mech. L. §§ 40, 45, 112, 113 and notes; 13 S. C. 87.

Messrs. Wofford & Jennings, contra, cited 6 Stat. 32; Gen. Stat. Ch. CXX., §§ 7, 8, 19; Phil. Mech. L. § 52; 8 Allen 543.

October 17th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. There is but one question in this case, to wit: Whether the respondent is entitled to the mechanics' lien, which he is here attempting to set up and enforce against the defendant, appellant.

The facts of the case are as follows: The appellant owned a lot of land in the town of Spartanburg, upon which her father, as a gift to his daughter, had determined to have erected for her use a small dwelling-house. To this end a contract was made by the defendant and her father, W. H. Hughes, with one Howerton, who was to furnish all the materials and build the house. After this contract was made with Howerton, he (How-

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erton) *contracted with the respondent for certain plastering and brick work to be done by him. For this work Howerton agreed to pay respondent fifty dollars.

The house was completed in due time, and Howerton was paid off in full, according to the contract. Shortly after this, and within the time specified in the act, the respondent, not having been paid in full for his work by Howerton, filed in the clerk's office for Spartanburg county a statement of the balance which he claimed to be due him, which, after allowing all credits, he alleged amounted to $30.85. The proceeding below was a petition to enforce this claim under the act in reference to liens of this character. Gen. Stat. 550.

The case below was referred to a referee, who reported substantially as stated above. He also reported that on several occasions during the progress of the work, Hughes, the father of defendant, saw the respondent at work on the house and made no objection, but there was no evidence before him showing any consent of defendant or that she ever knew or saw him at work.

Upon these facts the referee found as matter of law that the petitioner was not entitled to establish a lien on the building and land of defendant, and he recommended that defendant have judgment for her costs. Exceptions were duly taken. Upon the hearing Judge Wallace passed an order overruling this report, adjudging that the petitioner was entitled to recover from the defendant the sum of $30.70, with his costs; also, that he had a lien on the land and building, which he ordered to be sold by the sheriff, the proceeds first to be applied to the satisfaction of the debt, costs and sheriff's fees, and, if any balance, this to be paid to defendant. The defendant has appealed, claiming that his Honor erred in not sustaining the conclusions of law and fact as reported by the referee.

There seems to be no controversy as to the facts. It is agreed that Howerton was the party with whom alone the defendant contracted, and that this contract was an entire contract, embracing not only the building of the house, but the furnishing of all materials —all to be done for a specified sum. It is also agreed that upon the completion of the house Howerton was fully paid. It is further agreed that respondent was employed by

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Howerton; *that Howerton paid him in part, leaving $30.70 due; that Hughes saw him at work and made no objection; but there was no evidence that defendant ever saw or knew that he had done any work on the house. The question then before the court is whether the facts of the case bring it under any of the provisions of the act of 1869, (14 Stat. 220, Gen. Stat. 550,) creating what is generally known as the mechanics' lien.

This act embraces in its terms two classes of persons who may, under certain circumstances, become entitled to the lien therein provided for: First, persons who furnish and perform labor on the building; and, second, those who furnish material actually used in the structure. The first section of the act defines the conditions upon which this lien may attach as to these parties. It provides that for any debt due for labor performed or furnished, or for materials furnished and actually used in erecting the building, by virtue of an agreement with or by consent of the owner or of any person having authority from or rightfully acting for such owner in procuring or furnishing such labor or materials, there shall be a lien both on the structure and the land upon which it is situated, to the extent of the interest of the owner.

The petitioner here belongs to the first class—those who furnish or perform labor. To entitle him, then, to the lien which he claims, it must appear that he performed the work by virtue of an agreement with or by the consent of the appellant, either personally or through some one having authority from her or rightfully acting for her in furnishing this labor. Has this been shown?

There is, certainly, nothing in the facts which show that the respondent did this work by virtue of any express agreement with the defendant; on the contrary, the evidence is that the only express contract which defendant made was with Howerton, and this covered the entire building, including the erection and all materials. Did the defendant consent to plaintiff doing the work? There is no evidence of any express consent, either personally or through any authorized agent. It is true that Hughes, her father, who had agreed to pay for the building, and who, no doubt, gave some attention to its erection, did, on several occasions, while the work was

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in *progress, see respondent doing the work which he now seeks to shelter under this act. Does this amount to a consent by "one having authority from or rightfully acting for the owner in furnishing this labor," such as is contemplated in the act of 1869? We think not. It may be that Hughes had authority to act for defendant, but this is doubtful, at least as to all matters occurring after the contract with Howerton. Howerton had contracted to furnish all labor and materials. These things, then, had passed out of the hands of both the defendant and Hughes, and had been delivered over to Howerton. After this the defendant had no right to contract for either labor or materials with another, and having no such power herself, she could not delegate it to an agent. Hughes, therefore, could not have consented as one authorized to furnish labor for defendant.

Let it be admitted, however, that Hughes had authority, and could rightfully act for defendant in furnishing labor in such way that his consent would bind the defendant. Did he consent?

The contract with the respondent was made by Howerton. Neither the defendant nor Hughes seem to have been consulted. There is no evidence that either one of them knew anything of the character of the work to be done by respondent, or the price to be paid, or anything whatever of the terms of his contract. Now, does the bare knowledge of Hughes that respondent was employed on the house amount to a consent by the defendant, in the sense of the act, which will impose a lien upon her property and subject it to the stringent provisions therein declared? Consent, here, we think, implies something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has the right to forbid. Here Howerton had contracted to build this house, furnishing all labor and material. He was under no obligation to consult with or obtain the consent of defendant as to his employés.

In our opinion the facts do not show such consent on the part of defendant as entitles the respondent to the lien which he seeks to establish, either by her own act or by that of

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one authorized *from, or rightfully acting for, her in procuring the labor in question, and, therefore, the lien has not been established. See the case of Murray v. Earle, 13 S. C. 87. True, that case did not turn upon the point involved here, but the question was discussed by Mr. Justice McIver, who delivered the opinion of the court, and the views presented by him there are pertinent here.

It is the judgment of this court that the judgment of the Circuit Court be reversed and the case be remanded.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 148

(Case No. 1104.)

HOWARD v. WOFFORD.

(April Term, 1881.)

[1. *Wills* ⇐820.]

A testator, by his will, which was without any marks of punctation, devised to his grandchildren "the tract of land that their mother now lives on * * * also at the death of my wife the tract of land that I have willed to my wife when they arrive at the age of twenty-one years they to have all the rents or other profits arising on the same after retaining a support for my sister-in-law H. to be paid her during the minority of my said grandchildren and it is my will if one of my said grandchildren dies before attaining to the age of twenty-one years the survivor is to have all If they both should die not being twenty-one years old my will is then that my executor sell the same" &c. *Held*, that the support of H. was a charge upon the tract of land which the grandchildren received at the death of testator's wife, but not upon the other tract.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2119; Dec. Dig. ⇐820.]

[2. *Action* ⇐50.]

Where A., by will, charged a support for his sister, H., on lands, the rents of which were received, or should have been received, by his executor, B., and after B.'s death, by B.'s executors as executors of A., a single action by H. cannot be maintained at law against the executors of B. for the moneys received by B., and against the same persons as executors of A., for the moneys received by them after B.'s death. And a general judgment against the same persons as executors of B., and as executors of A., cannot be sustained.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 524; Dec. Dig. ⇐50.]

[3. *Trial* ⇐194.]

There being, in the case, some evidence of an agreement, a charge by the Circuit judge that he had "heard no evidence of an agreement which would operate as an estoppel to the plaintiff," was calculated to withdraw from the jury a question of fact, and, therefore, violated Article IV., § 26, of the constitution.

[Ed. Note.—Cited in State v. Norton, 28 S. C. 577, 6 S. E. 820; Norris v. Clinkscales, 47 S. C. 513, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. § 450; Dec. Dig. ⇐194.]

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[4. *Wills* ⇨826.]

*The tract of land chargeable with H.'s support being under the control of the executors, they, and not the devisees, were the proper parties defendant to this action.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2134; Dec. Dig. ⇨826.]

Before Thomson, J., Spartanburg, October, 1879.

Action by Sallie Howard against John W. Wofford and others. The opinion makes as full a statement of the pleadings as can be gathered from the brief, except that the demand for judgment in the complaint was "against the defendants for the said sum of two hundred and eighty-one dollars, and costs." In other particulars, the opinion sufficiently states the case.

Messrs. Wofford & Jennings and J. S. R. Thomson, for appellants.

Messrs. S. T. McCravy and Bobo & Carlisle, contra.

October 17th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This case has grown out of the will of S. W. Tucker, late of Spartanburg county. The plaintiff, respondent, claims to be entitled to a support under the second and third clauses of this will, and this action has been instituted to obtain this support.

These clauses are as follows:

"Item 2 I give devise and Bequeath to my Beloved wife Laodicia Tucker the lower part of my plantation the part that I now Live on including the house and other building which part contains Three Hundred and Twelve acres to have for her own use during her natural Life also one negro man Jo and one negro woman Rachel and one negro man Jack also one negro woman and her child Tom during her natural life also one wagon and Harness and four mules she to choose them also my riding carriage also my Buggy and Harness also all my household and kitching furniture also all my cows hogs sheep and all my Books also all my Farming tools and gearing also my horse Charley and one years provisions also the interest that

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may *accrue on Twenty five Hundred dollars worth of Confederate State Bonds the same to be paid her six months after my death and hence annually during her natural life every six months as it may fall due.

"Item 3 I give devise & bequeath to my Grand Children Children of Dr. F. M. Tucker dect the tract of land that their Mother now lives on containing Two hundred & fifty one acres To wit Laodicia Tucker & J. Nesbit Tucker also at the death of my wife the tract of land that I have willed to my wife when they arrive at the age of Twenty one years they to have all the rents or other profits arising on the same after retaining a Support for my Sister in law Sally Howard to be paid hir during the minority of my said grand children & it is my will if one of my said grand children dies before attaining to the age of Twenty one years the survivor is to have all. If they both should die not being twenty one years old my will is then that my executor sell the same & the proceeds to be divided amongst my legal heirs it is my will that they are not to have any part of the residue of my estate as I regard my lands as their full share of my estate with what I have heretofore given their Father."

S. W. Tucker died in 1871, his will bearing date in 1863. Harvey Wofford was appointed executor, who qualified in 1871 and died in 1877, leaving a will, in which the defendants were appointed executors, all of whom qualified, thereby becoming, by operation of law, the executors of the will of S. W. Tucker. The plaintiff was the sister-in-law of S. W. Tucker, and, we infer, lived in his family until his death. After the death of S. W. Tucker, she lived with, and was supported by, his widow, on the land in which she had a life-estate, until the death of said widow in January, 1875. This action was instituted by her in October, 1878, claiming the support allowed her in the third clause of the will above.

The caption of the complaint was as follows: "Sallie Howard, plaintiff, against J. W. Wofford, Joseph L. Wofford and Benjamin Wofford, Jr., defendants, executors of the will of Harvey Wofford, deceased, who was executor of the will of Samuel W. Tucker, deceased."

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*The caption of the summons was against these defendants as individuals, without the addition of the term "executor." The plaintiff claimed support from January, 1875, to the beginning of this action, at the rate of one hundred dollars per annum.

The answer alleged an agreement by plaintiff with one H. J. Kinard, and their testator, Harvey Wofford, by which plaintiff was to look to Kinard for her support—Kinard having rented the land chargeable with her support. It further alleged payment by Kinard, which, with the taxes, amounted to some sixty or seventy dollars per annum.

It was testified on the trial that plaintiff's support was worth one hundred dollars per annum, and that the annual rent of each of the tracts of land was worth that sum.

During the progress of the trial, on motion of plaintiff's counsel, the summons was amended so as to conform to the complaint, and the complaint was amended so as to allege a cause of action against the defendants as executors of the last will and testament of Samuel W. Tucker, deceased, by virtue of their office as executors of the will

of Harvey Wofford, who was executor of the first testator.

The appellants requested the judge to charge that only the tract of land first mentioned in S. W. Tucker's will, that devised to his wife for life, was chargeable with plaintiff's support, and that the devisees, and not the executors of S. W. Tucker, were liable to plaintiff.

His Honor declined to charge as thus requested. He instructed the jury that, under the will of S. W. Tucker, both tracts were chargeable with plaintiff's support, and that the executors of S. W. Tucker were liable to the extent of the rents and profits of both tracts.

He further charged that he had heard no agreement made by the plaintiff which would estop her from recovering.

The jury returned a verdict of two hundred dollars for the plaintiff. After verdict the judge passed the following order:

"Ordered, that the plaintiff be allowed to amend her summons and complaint so that the summons shall state the cause of action to be against the defendants as executors

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of the last will *and testament of Harvey Wofford, deceased, who was the executor of the last will and testament of Samuel W. Tucker, deceased, and so that the complaint shall contain allegations against the said defendants as executors of the said Harvey Wofford, deceased, as also against them as executors of the last will and testament of Samuel W. Tucker, deceased, by virtue of their office as executors of the executor of the said Samuel W. Tucker, who was the first testator, and that the prayer of the complaint be amended so as to conform to the allegations of the amended complaint."

Upon this order and verdict, judgment was entered against the defendants as executors of the will of Harvey Wofford, deceased, and, also, as executors of the will of Samuel W. Tucker, for the full amount of the verdict. The appellants' exceptions question the correctness of the judge's charge as to both tracts of land being chargeable with the plaintiff's support, and as to the amendments whereby the action was allowed to proceed against both estates, and judgment entered up against both: also, that part of the charge in which the judge stated to the jury that he had heard no evidence of an agreement which would operate as an estoppel against the plaintiff.

Whether both tracts of land mentioned in S. W. Tucker's will are chargeable with plaintiff's support is a question of intention, and depends upon the construction which shall be given to the two clauses thereof herein above. The will bears internal evidence that it was written by the testator himself. It is badly punctuated, inartistically drawn, and, certainly, not free from doubt as to its proper interpretation.

In our opinion, however, the judge was in error in charging that both the tracts of land were chargeable with plaintiff's support. We think that the testator intended to confine this support to the tract first mentioned —that devised to his wife for life. The other tract had been in the possession of his son, Dr. F. M. Tucker, during his life, and, at the time of the execution of the will and at the death of the testator, was still in the possession of the widow of Dr. Tucker, the mother of the two grandchildren, Laodicia and J. Nesbit. These two grand-

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children, we must *suppose, were especially the objects of the testator's bounty. They were much nearer to him in blood than the plaintiff, and it is hardly to be supposed that he intended to charge the entire estate devised to them with her support. She was living with him at the time of his death, and as he gave the tract of land upon which he lived to his wife during her life, no doubt he supposed that his wife would afford the plaintiff a support during her life, and when this life-estate fell in he intended that this tract should continue to support the plaintiff during the minority of his grandchildren.

It seems that the widow of the testator, during her life, up to 1875, when she died, did support the plaintiff. The plaintiff's claim commences at that date.

This, it appears, was the construction upon which the parties interested acted up to that time, and is in accordance with what we think is the true intent of the will. Any other construction, or, at least, that claimed by the respondent and charged by the judge, would result in depriving the daughter-in-law, the widow of his son, Dr. Tucker, and her two children, the testator's grandchildren, of all support during the minority of these two children for the benefit of his sister-in-law. This is unnatural, and we do not think that the testator could have intended this.

Next, as to the amendments permitted by the judge. It is difficult to determine from the statements in the brief whether the action at the beginning was against the defendants as individuals, or the estate of Harvey Wofford, or against the estate of S. W. Tucker.

The judge, however, by his order after the verdict, allowed it to stand as an action against both estates, and judgment was entered up against both, having, during the trial, allowed an amendment, so that the summons should conform to the complaint, and so that the "complaint should allege the cause of action to be against the defendants as executors of the last will and testament of S. W. Tucker, deceased."

If the respondent had any claim against the estate of Harvey Wofford it was because he, during his executorship from 1875 to 1877, when he died, had received the rents

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and profits of the *land chargeable with her support, or should have received them, and had failed to apply them as the will directed, and had also failed to account for these rents to the executors of S. W. Tucker, thereby committing a devastavit. This would probably have made the estate of Harvey Wofford liable to her as for so much money had and received to her use, but Harvey Wofford's estate could in no event be made liable for the support to which plaintiff was entitled after his death and after his executorship ceased. This action was begun in 1878, a year after the death of Harvey Wofford. The plaintiff recovered support up to the commencement of the action.

If she had a claim against the estate of S. W. Tucker, after the death of Harvey Wofford, running from 1875 to 1878, the commencement of the action, it must have been because the subsequent executors had received from the estate of Harvey Wofford the amounts which he had received during his life-time as belonging to plaintiff, and had failed to pay it over to her, or because after they had become executors they had failed to pay over to her the annual support accruing after that time. Both of these estates could not be liable for these claims at the same time.

They depend upon different facts, and require different defenses, and, yet, under the amendments allowed, they were united in one action, and each estate was held responsible. The code, in "furtherance of justice," is exceedingly liberal as to amendments, and in Section 196 very wide latitude is allowed on this subject, both before and after judgment. Irregularities, defects, mistakes as to the names of parties, in the statement of the cause of action, in the pleadings, in the evidence, or otherwise affecting the action really instituted, may generally be cured by amendments; but two actions against different parties and founded upon different facts and for different causes cannot be incorporated into one and be allowed to proceed together and result in a general judgment against both parties. This, is seems, has been the effect of the amendments in the case, and we think that the judge erred in the order which he passed after verdict.

The last exception assigns error to the

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judge, in that he *charged the jury that he had heard no evidence of an agreement which would estop the plaintiff from recovering. Whether any agreement had been made between the parties, as alleged in the answer, was a question of fact for the jury. The legal construction of such agreement, if made, would have been a question of law for the judge.

It does not fully appear whether the judge, in this instance, intended to say that the agreement proved was, in law, no estoppel, or that there was no evidence proving any agreement.

His language, as stated in the brief, was, "that he had heard no evidence of an agreement which would operate as an estoppel to the plaintiff."

This was, however, in his charge to the jury, and whatever may have been his precise meaning it was calculated to withdraw from them the question of fact as to the existence of any agreement at all between the parties, and to that extent it had the effect of a charge upon the facts of the case, which the constitution forbids. Article IV., Section 26.

We see no error in the judge in declining to charge, as requested by the appellant, that the devisees and not the executors were responsible. The tract of land chargeable with plaintiff's support was under the control of the executors until the majority of the grandchildren, and it was their duty, as executors, to see to the application of the rents and profits.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 155

(Case No. 1105.)

BOUKNIGHT v. BROWN.

(April Term, 1881.)

[1. *Appeal and Error* ⇐273; *Reference* ⇐100.]

Exceptions to a judgment are not in proper form, where they only refer back to points taken in exceptions to the referee's report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1621; Dec. Dig. ⇐273; Reference, Cent. Dig. § 160; Dec. Dig. ⇐100.]

[2. *Reference* ⇐101.]

If a referee, to whom are referred all the issues, fails to report his facts found and conclusions of law separately, the proper remedy is to move that the report be remanded for correction.

[Ed. Note.—Cited in Briggs v. Briggs, 24 S. C. 380.

For other cases, see Reference, Cent. Dig. § 175; Dec. Dig. ⇐101.]

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[3. *Evidence* ⇐332.]

*Under the first section of the act of 1865 (13 Stat. 345), statements in a bill between two tenants in common are admissible in evidence against others not parties to such bill, to show that certain former proceedings, in part destroyed during the war, made disposition of the property here in dispute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237–1246; Dec. Dig. ⇐332.]

[4. *Appeal and Error* ⇐209.]

In an action brought by certain persons claiming, as devisees, under a will, which treated certain children named as illegitimate, no question was made before the referee, or Circuit judge, as to the fact of illegitimacy, and they so found. *Held*, that it was too late, in this court, to raise the point that the illegitimacy was not proven.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290–1298, 1300, 1303; Dec. Dig. ⇐209.]

[5. *Wills* ⇐683.]

A testator devised one-fourth of his estate to his illegitimate children, a part to a legitimate son, and the residue to three friends, in "the confident hope," &c., that they would permit his illegitimate children to have the use of such property, the part to S., a daughter, to be conveyed to trustees for her use during her life, and after her death, in trust for such children as she may leave alive. If this expression of a wish to his three friends made such devise void, the residue was to pass to the three friends absolutely; and if efforts were made to impeach any part of his will, the property devised to the legitimate son was to vest absolutely in the three friends. Afterwards, there was filed, in the Court of Equity, a bill, which was lost during the war, but decretal and final orders, writ of partition, return of commissioners (one of whom was one of the three friends), and other papers in the cause, were preserved, and they sufficiently indicated that the action was instituted to confirm certain arrangements between the several parties, made because of the desire on the part of the legitimate son to set aside the excessive provisions for the illegitimate children, with the probable consent of the three friends of testator. By this arrangement, certain land, other than that devised to S. and her children, was vested in S. and her husband, and their heirs, they being ordered to pay sums of money to other parties to that cause. *Held*, that the children of S., afterwards born, could not, after the death of S., claim this land from S.'s vendees, as it was not that which was devised to them in remainder, nor was it impressed with the trusts and remainders charged upon the devise to them, but was a purchase by S. for valuable consideration.

[Ed. Note.—Cited in De Leon v. Barrett, 22 S. C. 422.

For other cases, see Wills, Cent. Dig. § 1603; Dec. Dig. ⇐683.]

[6. *Wills* ⇐792.]

Held, further, that the devise to the friends in the "confident hope," &c., was intended, by the testator, as a trust for the benefit of his illegitimate children, and was, therefore, void under the act of 1795. 5 Stat. 271.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2050; Dec. Dig. ⇐792.]

[7. *Wills* ⇐852.]

And the devise to the children of S., if a valid limitation, was a contingent remainder, which must fall with the destruction of the precedent estate given to S. Hull v. Hull, 2 Strobh. Eq. 192, explained.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2168; Dec. Dig. ⇐852.]

[This case is also cited in McCreary v. Coggeshall, 74 S. C. 49, 53 S. E. 978, 7 L. R. A. (N. S.) 433, as to the distinction between contingent remainders and executory devises.]

Before Wallace, J., Richland, July, 1879.

Action by Caleb Bouknight and Sarah W. Poole against John P. Brown.

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*The exceptions to the referee's report, the Circuit decree, and the opinion of this court constitute a sufficient statement of the case.

The exceptions were as follows:

The plaintiffs except to the report of Francis W. Fickling, referee herein—

1. In that the said report does not contain a statement of the facts found and the conclusions of law separately.

2. In that the referee admitted in evidence the record of the suit in equity, Nathaniel Bynum v. John Gray Bynum.

3. In that said report finds that the proceedings by William Bynum were instituted for the purpose of setting aside the will of Drury Bynum, on account of the third clause thereof, and that the will was set aside by a court of competent jurisdiction.

4. In this, that the report finds:

a. That Drury Bynum, by conditional devise to his executors, defeated his gift for the benefit of the issue of his illegitimate daughter.

b. And that this gift was a contingent remainder, and fell with the precedent particular estate in Sarah upon which it is found to have depended.

c. That the gift to Sarah was void.

d. That the Statute of Limitation is a bar to the action.

e. That the legal estate remains in the trustees.

5. In this that the report orders and adjudges the complaint to be dismissed, and the costs and disbursements to be paid by plaintiffs.

The Circuit decree was as follows:

As regards the plaintiffs' first exception to the report of the referee, it is proper to say that the report was filed in the early part of the year 1878, and sets out facts and matters of law with sufficient distinctness to convey clearly what the findings of fact and law by the referee are.

The plaintiffs' second exception is also overruled. Section 13, Gen. Stat. 346.

The third exception relates to the finding by the referee that the will of Drury Bynum was set aside.

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*There is no doubt that the will of Drury Bynum was a valid instrument as to all persons except his legitimate son, William Bynum. It was competent for him to avoid it. Hull v. Hull, 2 Strobh. Eq. 192; Breithaupt v. Bauskett, 1 Rich. Eq. 465. How was this to be done? He is put to his election, either to take under the will, or to avoid the will. When his election is made, his right accrues and vests. Ch. Harper says, in Breithaupt v. Bauskett, "I will not say but that, by possibility, if the will had contained no provision for the wife, or only an illusory one, there might be ground to conclude that she had elected, during her life-time, to take against

the will, and that her representatives came, not for the purpose of avoiding it, but to enforce rights already vested by her election;" of course, any positive act of election would be stronger evidence of election than the possible effect of the provisions of the will upon the mind of the wife. Then, if Wm. Bynum elected to avoid the will, his right to avoid it accrued, and, if contested, would be enforced by the court. The bringing a bill to set aside the will would be one mode of indicating an election; but not the only one. It is clearly deducible from the evidence that he did elect to avoid the will. It appears from that part of the record of the case of Wm. Bynum et al. v. James Bynum and others, which we have, that by the consent and acquiescence of all the parties in interest, who were living at the time, an arrangement was made by which the estate of Drury Bynum was divided without reference to the provisions of his will. This agreement amounted to an election, by Wm. Bynum, to avoid the will, and a recognition by those whose rights, under the will, were adverse to his, of his right to avoid it, or of its actual avoidance as to all the parties who were sui juris. And this suit of William Bynum et al. v. James Bynum et al. could have been brought for no other purpose than to bind those who were not sui juris, and not in esse, by the election of William Bynum to avoid the will. The court, in that case, after instituting inquiry according to its customary methods, pronounces a decree which necessarily implies an avoidance of the will, this avoidance made up by the acts of the parties and the decree of the court. All the parties before the court are concluded

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by that decree. Are the plaintiffs *in this action—the representatives of R. C. Shiver and Sarah W. Evans—concluded also? R. C. Shiver and Sarah W. were not in esse at the time of the decree. They were the children of Sarah Shiver, unborn at the time of the decree, to whom an estate was limited over after the death of Sarah Shiver, by the will. They were contingent remaindermen. If the will was in operation at the time they were born, the estate opened and their interest became vested. But the will, by acts of parties and decree of the court, was absolutely set aside and avoided, and the rights of contingent remaindermen under it barred. In support of this view, it will not be necessary to do more than to refer to the opinion of Ch. Dunkin, concurred in by Harper, O'Neall and Wardlaw, in Van Lew v. Parr, in which this point is elaborately discussed. In that opinion, on page 346 of 2 Rich. Eq., the following language is used: "Unless this court had authority to dispose of the fee-simple of the estate for the payment of debts, it is quite clear that it could not be reached. If it had the authority, not having the contingent remaindermen before the court, the validity of the title, executed by the officer of the court, is not open to objection. But if the court can make a good title for the payment of debts, if it has authority in any case to dispose of the fee, not having those in remainder before it, the exercise of that authority in cases of partition, or for the change of property, becomes a question of discretion, and not of jurisdiction." In this a case of partition, the court has exercised its discretion, and has expressly disposed of the fee, and the remaindermen are barred.

According to the conclusions of this decree, the complainants have no right of action, and the remaining questions raised by the decree need not be discussed. The complaint is dismissed, with costs for defendant.

Messrs. W. S. Monteith and Youmans, Attorney-General, for appellant.

Mr. J. D. Pope, contra.

October 20th, 1881. The opinion of the court was delivered by

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*McGOWAN, A. J. This was an action for the possession of a tract of land lying in Richland county, latterly known as the "Shiver Place," and ten thousand dollars damages, besides rents and profits to the amount of fifteen thousand dollars.

Drury Bynum, owning a large estate, consisting of several tracts of land, slaves, &c., died about January, 1837, leaving no widow and only one legitimate son, William Bynum. He left a will, by which he disposed of his property as follows:

By the first clause he gave to his four children, Nathaniel, Sarah, James and John Gray, "whom he had begotten by Sally Bryson," one-fourth part of the clear value of his estate.

By the second clause he gave to his son, William [who was legitimate], his mill tract of land; confirmed certain gifts previously made to him, to be in lieu and bar of all claim said William might have against him on any account whatever.

By the third clause he disposed as follows: "I give, devise and bequeath the whole of the rest and residue of my estate, real and personal, to my friends, John Scott, William Weston and Wade Hampton, Sr., for life, and the survivor of them, his heirs, executors, administrators or assigns, in fee-simple, absolutely and forever. It is my wish that my said friends shall hold the property thus devised to them free from all trust whatever. Nevertheless, I have devised and bequeathed the same to them, in the confident expectation and hope that they will permit my children by Sally Bryson, to wit: Nathaniel, Sarah, James and Gray, for whom I am under a sacred obligation to provide, to have the use of the whole of the estate, real and personal, absolutely and forever, in the manner following: that is to say, that my friends

will permit the said James and Gray to have, &c., * * * The balance of my swamp and bluff lands I wish to be divided equally among my children, Nathaniel and Sarah. And it is my earnest hope and expectation that my friends, John Scott, William Weston and Wade Hampton, Sr., will permit the balance of my lands to be equally divided between Nathaniel and Sarah, my children by Sally Bryson. * * * And it is my hope and confident expectation that my said friends will carry into effect these my wishes, by conveyances proper to that end, after my death, and, especially, in relation to my

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daughter, *Sarah, aforesaid, that they would convey to some person in trust for her, during her life, all that portion of said rest and residue of my estate, real and personal, which I have devised above, that she should enjoy for her sole and separate use, free from the debts, contracts and control of any husband she may marry, and after her death in trust for such children as she may leave alive, and the descendants of any that may be dead at such period, they taking among them their parents' share; but if" (here providing for the event of Sarah dying without issue.)

By the fourth clause he declared that if the foregoing provision was void, he gave the whole residuum of his estate to John Scott, William Weston and Wade Hampton, Sr., for life, and to the survivor forever, without any expression of his wishes, hopes or expectations.

By the fifth clause he directed that if any attempt should be made "to impair his will or any part thereof," the second clause of his will should be void, and the property therein given to his son William should also go to John Scott, William Weston and Wade Hampton, Sr., their heirs and assigns forever. And these same gentlemen were nominated executors of the will.

The will was proved, but the gentlemen named as executors never qualified or accepted the devises given or trusts imposed, and they are all now dead.

It appears that soon after the death of his father, the legitimate son, William Bynum, filed a bill in equity against all the illegitimate children entitled William Bynum et al. v. James Bynum and others, "for settlement and partition." The pleadings in the cause have been lost or destroyed, and the precise scope of the bill cannot be known, except so far as it may be gathered from certain orders in the case, which, in some way, have escaped the fate of the general record and are in existence. By these orders, copies of which can be found in the case, it appears that the children, legitimate and illegitimate, all of whom were of age except James and Gray, entered into an agreement to disregard the will entirely, and have a new division of the whole estate upon certain settled terms. Certain property was allotted to William, the legitimate son, and the remainder to the four illegitimate children. To con-

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firm and ratify this *agreement, division and assignment appears to have been the object of the bill. September 25th, 1837, Chancellor Harper granted an order of reference to inquire "whether it would be to the interest of the minors, James Bynum and John Gray Bynum, to ratify and confirm the said agreement and deed of assignment set forth in complainants' said Exhibit D. and E., together with the partition contained in Exhibit A. and B., purporting to have been made in conformity to said agreement and deed of assignment," &c.

The commissioner reported favorably, and on November 7th, 1837, Chancellor DeSaussure confirmed the report, ordered that the property contained in Exhibit A. and B., be vested in William Bynum, his heirs and assigns forever; "and further ordered that the remaining estate, real and personal, be vested in the said Nathaniel Bynum, Sarah Shiver, James Bynum and John Gray Bynum, upon their payment to the said William Bynum, the said bond of six thousand and sixty-three dollars, that the said estate, real and personal, herein vested in them, do stand pledged for the payment thereof according to the condition of the said bond, and that they also pay the said Sarah Bryson the said annual annuity of $350," &c. He further ordered that "a writ of partition should issue to make partition of the remaining estate, real and personal, equally between Nathaniel Bynum, Sarah Shiver, James Bynum and John Gray Bynum. All of which is in pursuance of the agreement of the parties, and to carry the same into effect." &c.

The commissioner reported that the property assigned as aforesaid to the four illegitimate children, consisted of 110 slaves, horses, mules, &c., and 3,133 acres of land, valued at the aggregate price of $63,774.50. The commissioner allotted all the lands to the two children who were then of age, Nathaniel and Sarah, and recommended that they should pay to the other two children half the value of the lands in money, viz., $11,356.-25. This return was confirmed by Chancellor David Johnson, January 12th, 1838, who ordered that the lands allotted in said return to Nathaniel Bynum and Sarah Shiver and William Shiver, her husband, be vested in them and their heirs as tenants in common

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forever, &c. It was further ordered *that the two plantations on Towe's creek, now in the respective possession and cultivation of Nathaniel Bynum and William Shiver, being a part of the foregoing premises, &c., * * "be and stand pledged for the payment of the said two sums of $5,678.12 to the said James Bynum and John Gray Bynum, with interest," &c.

It does not appear when or how Mrs. Shiver and her brother Nathaniel made division of their joint estate in these lands, but it does appear that they paid their brother for their interest in the same.

Some time prior to April, 1842, Sarah and her husband, William Shiver, sold and conveyed the land in dispute, since known as the "Shiver Place," to Richard Singleton, trustee, for the price of $14,450. Singleton paid the purchase-money, took conveyance of Shiver and wife, went into possession, and he, or those claiming under him, have been in possession ever since—a period of nearly forty years.

In 1844, Nathaniel Bynum, who had become the guardian of his infant brother, John Gray, filed a bill connected with his guardianship, which, among other things, contained the following recital: "That his father, Drury Bynum, departed this life January 15th, 1837, leaving a large estate, both real and personal, and also leaving his last will and testament, disposing of the same among his five children—that is to say, your orator, Nathaniel Bynum, William Bynum and Sarah Bynum, adults, and James Bynum and John Bynum, minors, which last will and testament, however, was by agreement of all parties interested therein set aside and abandoned, and proceedings for partition of the said estate were instituted in the Court of Equity for Richland district, in pursuance of said agreement on September —, 1837, in which proceeding the said William Bynum and others were the complainants, and James Bynum and others were the defendants," &c.

Sarah Shiver died January 9th, 1850, leaving two children surviving her, Robert C. Shiver and Sarah W. Shiver, both born after the proceedings in partition. Robert C. died, leaving Caleb Bouknight his sole executor and devisee, and Sarah W. intermarried with one Poole, and they are the plaintiffs who

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*brought this action March 5th, 1875, to recover the tract of land described. The answer denies every allegation in the complaint, and pleads the Statute of Limitations.

F. W. Fickling, Esq., was appointed special referee "to hear and determine all the issues of law and of fact." He decided all the issues of law for the defendant, and recommended that the complaint be dismissed. Judge Wallace confirmed the report, and the plaintiffs appeal to this court upon the following exceptions:

1. To his Honor's ruling in the first exception made to the referee's report.

2. To his Honor's ruling on the second exception to the referee's report.

3. To his Honor's ruling as to the third, fourth and fifth exceptions to the referee's report.

4. Because all the exceptions to the referee's report should have been sustained.

These exceptions are not in the best form. They do not state the matter objected to, but refer to other exceptions to the report of the referee, which tends to confusion and makes it necessary to go back through the record to find out what points those exceptions made. "Exceptions should point out the particulars in which the errors complained of consist." †

As we understand it, the first exception intended to make the point that the referee's report did "not contain a statement of the facts found and conclusions of law separately." Section 296 of the code declares that "they [referees] must state the facts found and the conclusions of law separately." The object of this requirement is to promote clearness and prevent confusion. If the Circuit judge had considered it necessary, he might have required the report put in form, but he did not. The remedy in such case is to move that the proceedings be referred back for correction. Waite's An. Code 498. The report does not, in the usual way, state the facts and the law under different heads, but we concur with the judge that they are stated "separately" and with unusual clearness and ability. See Joplin v. Carrier, 11 S. C. 329; State ex rel. Cathcart v. Columbia, 12 Id. 393.

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*The second exception objects to the judge's ruling in that "the record of the suit in equity, Nathaniel Bynum v. John Gray Bynum, was admitted in evidence." The statements of this bill were admissible under the first section of the act of 1865, "to provide a mode by which to perpetuate testimony," &c., (13 Stat. 345,) which, among other things, declares that "statements in the record of any suit in any of the courts, produced from the proper place of custody, although such statements be in cases not between the parties to the suit in which the evidence is offered, or those under whom they claim, shall be admissible for the consideration of the court or jury," &c. The statement was merely in corroboration of what may be fairly gathered from the fragments preserved of the case of William Bynum et al. v. James Bynum et al.

The other exceptions make the question of title. No exception was taken below to the report finding that Nathaniel Bynum, Sarah Bynum, James Bynum and John Bynum were the illegitimate children of Drury Bynum "by Sally Bryson," but it has been seriously argued here, that there is no proof of such illegitimacy. That is the most important fact of the case. The will itself, in its terms and in its whole structure, affords at least prima facie evidence of the fact, which has never been denied. It was taken to be shown before the referee and the Circuit judge. The referee reported it as a fact, and the Circuit judge concurred with him without objection.

† See rule No. 5 of the Supreme Court, as amended since the filing of this opinion.—REPORTER.

At that time the matter could have been conclusively settled in a moment. It is now too late to raise the question for the first time. We are judicially satisfied of the fact.

The plaintiffs claim as the children of Sarah Shiver, remaindermen under the third clause of Drury Bynum's will, which, as they insist, is legal and binding in all its parts. There is no other limitation in the will except that claimed to exist in that clause. Even assuming the plaintiffs' view of the case, there are difficulties in the way of their recovery. The action is to recover the possession of a particular tract of land; and before that can be done, it is necessary, not only that they should show legal title, but also that their title connects with and covers the particular land sued for, the "locus in quo."

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*Now, all the land that the testator, in the third clause of his will, "hoped" would be conveyed in trust to Sarah with limitation over, was "the balance of the swamp and bluff lands," to be equally divided between Nathaniel and Sarah. It has not been shown that the Shiver place sued for is any part of the "swamp or bluff lands." On the contrary, the referee reports "it was asserted by the defendant, and not denied by the plaintiffs, but as I understood admitted, that the lands in dispute in this action are not the lands assigned to Sarah in testator's will," &c. This would seem to be conclusive against the plaintiffs, without going into the question of title.

But they urge that, although the Shiver tract is no part of the lands indicated in the will, with limitation over to them, there was a proceeding in equity to divide these lands among the parties, and in doing so the lands got mixed, and the Shiver place was assigned to Sarah in lieu of "swamp or bluff lands," and that thereupon the trusts claimed in the third clause attached upon the land received in lieu of those given by that clause. To sustain this view it is necessary that the partition should have been under and by authority of that clause, and in subordination to it. That is not supported by the proceedings in partition. We look in vain for an order to sell and re-invest, or to make an exchange upon the same trusts. It cannot fairly be claimed that these proceedings were intended to carry out the provisions of the third clause of the will.

There are other facts in the record which show that the Shiver tract is not in the place of any lands intended for Sarah under the will. The lands assigned in the partition to Sarah, including the Shiver place, were in part of her interest in the fourth of the estate given by the first clause of the will without limitation; also in part for her proportion of the bond of $6,063 to William in the division with him, and of the annuity of $300 to "Sally Bryson," and still further in part for $5,678.12, which she was to pay to James and John in the second partition between her and her brother; so that the evidence does not show that the Shiver place was assigned to Sarah in lieu of lands intended for her in the will. The exact contrary is true. The proceedings in equity were inconsistent with the

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*existence of the third clause and manifestly intended to supersede it. The referee says on this point: "It is, in fact, manifest, that in the partition no regard was had to the will inasmuch as the entire lands were allotted to Nathaniel and Sarah, including the lands assigned James and John Gray in the will." The plaintiffs, therefore, cannot receive aid from the partition proceedings to make out a case under the third clause of the will, when those proceedings were inconsistent with that clause and antagonistic to it. They cannot hold under that proceeding and against it at the same time. So many elements entered as consideration into that partition, under which the Shiver tract was assigned to Sarah, that it cannot be affirmed with truth that said land was simply substituted for that indicated in the will for her. It was to a large, possibly to the whole, extent purchased for valuable consideration by Sarah, and by the order of court assigned to her and her heirs forever.

If there was no difficulty as to the identity of the land, how would the matter stand? The defendant insists that the whole third clause of the will, including the alleged limitation in it, was illegal and void, and no rights growing out of it can be recognized and enforced by the courts. The act of 1795 declares void any gift or provision beyond one-fourth of a man's estate in favor of a woman with whom he lives in adultery, or of his illegitimate child or children, he having a wife or lawful children of his own living. The gift is rendered void by the act only to the extent of the excess. The testator had already given one-fourth of his estate to his illegitimate children by the first clause of his will, and, therefore, any interest intended to be given to them by the third clause was in violation of the law and void. It is true that the terms of that clause were to John Scott, William Weston and Wade Hampton, Sr., but coupled with the "confident hope and expectation" that they would permit his children "by Sally Bryson" to enjoy it in the manner indicated. Considering the words of the act, which are "by deed of gift, legacy, devise, or by any other ways or means whatever," we cannot doubt that it was the intention of the testator to create a trust for the benefit of his illegitimate children, notwithstanding his disclaimer of such intention. It

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is true that *the provision was good against all the world but the legitimate son, William, and good against him until he elected to have it declared void, which was his exclusive personal privilege. Breithaupt v. Bauskett, 1

Rich. Eq. 466; Ford v. McElray, Id. 474; Hull v. Hull, 2 Strobh. Eq. 174; Taylor v. McRa, 3 Rich. Eq. 96. Did William Bynum elect to exercise this exclusive privilege and have the third clause declared void? He certainly did, soon after his father's death, file a bill in the Court of Equity in regard to the estate. Unfortunately the record of that case is lost, but some orders made in it have been preserved, from which we have a general idea of the proceeding. It appears that all the children, legitimate and illegitimate, agreed to divide the property in a manner entirely different from the division made by the will. That this agreement was ratified and confirmed by the court, and under its orders partition made to carry out the judgment of confirmation. In the fragments we have, it does not appear expressly that William sought to have the third clause declared void, but can it be doubted that he did so? He could have had the third clause set aside at a word. It was his interest to have it done and the new division adopted, by which he got largely more than was given to him by the will. The new arrangement could not be confirmed without the destruction of the third clause as being inconsistent with it. The agreement was confirmed by the court, which, doubtless, acted on the assumption that the third clause was avoided, and William received property under it, which itself was an election against the third clause. Under these circumstances, can it be doubted that he elected to set aside the third clause? Neither his conduct nor that of the court is intelligible upon any other assumption, but all is harmonious and consistent with the existence of that fact. It is said that his interest was against such election, as the effect would be to give the whole estate to Scott, Weston and Hampton, except the fourth given by the first clause. That is true, but we have no doubt these gentlemen allowed the children to make their own arrangements. Instead of setting up title for themselves, they generously and honorably facilitated a judicious family settlement. We think it improbable that William would have filed a bill for pur-

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poses inconsistent with *the third clause without making the claim to set it aside, which was absolutely necessary to sustain those very proceedings. It is adjudged that William Bynum elected to vacate the third clause of his father's will; that it was declared void and the property of the testator divided among his children according to an agreement made by them and ratified by the court. That was more than a "consent decree." it was not less a judgment of the court because it was in accordance with the wishes of the parties. The court took care of the rights of the minors, and ordered references for information, &c., &c. The successive orders of different chancellors were in the terms usual in judgments. "It is ordered and decreed," &c.

But it is ingeniously argued that, though the third clause was made void as to Sarah, it was good in so far as it made provision for her children, and that as to unborn children neither the parties nor the court could bar their rights. It is true that the act does not, in express terms reach to the interest of children of illegitimates, but it would seem a strange result if the devise, dead as to the first generation, should revive as to the second. That would certainly, to some extent, defeat the purpose of the act. In the case of Bradley v. Lowry, Speers Eq. 1 [39 Am. Dec. 142], it was held that the act is remedial and should be construed so as to suppress the mischief contemplated by it. In that case a father had given property to the husband of his natural daughter, and it was held to be a benefit conferred on the daughter within the meaning of the act, because the evident design was to confer a benefit on her through her husband in evasion of the statute. The case of Hull v. Hull, 2 Strobh. Eq. 192, was relied on to sustain the proposition that any interest given to the children of Sarah did not fall within the inhibition of the statute. That case was different from this. There, the gift was to Zulina, the illegitimate daughter, for life, with limitation over to her issue. The life-estate to Zulina was not declared void, for it was a part of the fourth of the estate, which was legal, but in estimating the value of her interest the question arose whether she was to be charged with the value of an absolute estate or only of a life-estate. It was held that she should be charged only with the value of the life-estate,

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*and from that it is sought to draw the inference that in all cases of gifts to the children of illegitimates, the destruction of the estate of the first taken leaves untouched the limitation over. In these broad and sweeping terms we do not think the proposition can be maintained. In the case of Hull, the judgment of the court was pronounced in very guarded terms: "That interests of the children of a bastard daughter, who take as purchasers (under the will of their grandfather), distinctly from their mother, and not through her or in connection with her, shall not be regarded as a gift to her" within the inhibition of the act of 1795. In the case before us the devise to the mother was declared void, and if the third clause gave a good limitation over to the unborn children, it was a contingent remainder, in which the interests of the tenant for life and the remaindermen were not "unconnected," but were parts of the same estate. A remainder is what is left of an entire estate after the preceding part of the same estate has been disposed of. But if the interest of the remaindermen was so "unconnected" with the freehold in the mother as to place it beyond the reach of the

avoiding act, the Court of Equity had the power to partition the property, and in doing so to bar the remaindermen.

"When property is devised to tenants for life, with contingent remainders to persons not in esse, the Court of Equity has the power, for the purpose of partition, on the application of the tenants for life before the coming into existence of the remaindermen, to order a sale of the fee and thereby bar the remaindermen." Van Lew v. Parr, 2 Rich. Eq. 322; Bofil v. Fisher, 3 Rich. Eq. 1 [55 Am. Dec. 627]. It will be observed that as soon as the devise was made void by the election of William, the will itself expressly revoked the third clause and substituted therefor the fourth clause, which had no limitation. Besides, by the ordinary rules of construction, the limitation over could not be enforced after the life-estate had been declared void. If the future interest is so limited that it can take effect as a remainder, it cannot be an executory limitation. 2 Minor Inst. 369; Fearne Rem. 385. A contingent remainder may be destroyed at common law by fine or recovery, by merger of the particular estate, or by any displacement thereof, and this is the great and essential

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*difference between a contingent remainder and executory devise. "It is agreed that when a preceding freehold has once vested, no subsequent accident will make a contingent remainder inure as an executory devise, its character as a remainder having been then finally established." Fearne Rem. 525–6; 2 Washb. Real Prop. 348.

This will at the death of the testator was good, and Sarah's life-estate vested under it, but when William elected to invalidate it the life-estate of Sarah was destroyed, and that destruction included the contingent interest of the unborn children. As tersely stated by the referee, "the gift to the issue of the illegitimate daughter was contingent, and fell with the precedent particular estate, upon which it depended." The gift to Sarah being void, the gift to her unborn issue who survived her was also void.

This being an action at law, the costs, of course, follow the result.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 171

(Case No. 1106.)

ROBERTS v. JOHNS.

(April Term, 1881.)

[1. *Executors and Administrators* ⇐513.]

An administrator indebted to the estate to the amount of $1,365, by a pastdue sale note, for negroes purchased, obtained order from the Probate judge in November, 1869, to sell, for cash, all the choses in action of the estate, and, after posting at public places a notice of such sale, sold over seven thousand dollars of assets for less than sixty dollars, he being the purchaser, directly or indirectly, of nearly all the notes, including his own. Soon, thereafter, the administrator obtained his discharge from the Probate judge on an ex parte application, properly published, but not otherwise served, and paid to a distributee, resident in Georgia, upon her receipt delivered by her husband, the amount due her as appeared by the final return, and as ordered in the final discharge. Afterwards, the administrator realized a considerable amount on the notes purchased by him. This distributee had made several visits

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to the administrator—had received *some of these notes for collection, and, failing to realize anything, had urged a sale of them, but she had no notice of the sale, and was not fully informed of its details when she signed the receipt. *Held*, that the conduct of the administrator operated as a fraud upon the rights of the distributee, and that she was entitled to have the accounting re-opened.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2289; Dec. Dig. ⇐513.]

[2. *Limitation of Actions* ⇐102.]

Intestate died in 1863; administration was granted in 1865; assets were sold in December, 1869, and final discharge obtained in March, 1870; action was instituted in September, 1875. *Held*, that the Statute of Limitations did not commence to run in the administrator's favor until his final discharge, and that, therefore, this action was not barred.

[Ed. Note.—Cited in Roberts v. Johns, 24 S. C. 586; Fricks v. Lewis, 26 S. C. 240, 1 S. E. 884.

For other cases, see Limitation of Actions, Cent. Dig. §§ 494–505; Dec. Dig. ⇐102.]

[3. *Executors and Administrators* ⇐515.]

As the receipt was obtained by the administrator by the exercise of tact, while the distributee was ignorant of important facts and not fully informed of her legal rights, it does not estop the distributee, and must be disregarded as a settlement.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2293–2296; Dec. Dig. ⇐515.]

[4. *Executors and Administrators* ⇐471.]

The act of 1869 (14 Stat. 263; Gen. Stat. Ch. XXIV., § 4), is an additional prerequisite to the discharge of an administrator, but does not dispense with the other formalities necessary to a final accounting required by previous law. The letters dismissory in this case, therefore, had not the force of a final judgment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2018–2024; Dec. Dig. ⇐471.]

[This case is also cited in Montgomery v. Cloud, 27 S. C. 192, 3 S. E. 196, as to the distinction between the bar of the statute of limitations and presumption of payment from lapse of time.]

Before Pressley, J., Oconee, October, 1879.

Hon. J. H. Hudson, judge of the Fourth Circuit, sat at the hearing of this appeal, in the place of Associate Justice McGowan, who had been of counsel in the case.

Action by M. J. Roberts and W. O. Johns, as administrators of John B. Johns, deceased, and by Lila B. Johns against James A. Johns,

administrator of James Johns, deceased, and Samuel H. Johns. On demurrer, it was held that Lila B. Johns was improperly joined. See Roberts v. Johns, 10 S. C. 101. The opinion states the case.

The Circuit decree was as follows:

James Johns died intestate in 1863, and the defendant, James A. Johns, is his administrator. On February 13th, 1865, he sold the personal estate, including slaves, on credit, the price payable in gold, and he himself purchased some of the slaves, giving his note for same, amounting to $1,365. This and other notes remained unpaid, when our new constitution was adopted in 1868, and then, by reason of the provision concerning notes for the purchase-money of slaves, and

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the homestead law, it was *supposed that said notes could not be collected. Plaintiff is administratrix of John B. Johns, who was a distributee of James Johns, deceased. She removed to Georgia in 1865, and has ever since resided there, making occasional visits to this State. During a visit in 1869, she urged a settlement of said estate, and the defendant, James A. Johns, offered to divide the notes. That not being done, he delivered some of them to her for collection. She failed to collect any and returned them, then urging that the notes be sold and the estate divided. This request was repeated by letter after she went home to Georgia. In November, 1869, the administrator applied to the judge of Probate for leave, which was granted, to sell said notes. There is some uncertainty about the dates. The order for sale seems to direct it to be made in November, but it was not made until December 17th, 1869. At that sale, the administrator, for a mere nominal sum, purchased his own note of $1,365. Most of the other notes were purchased by Sloan Dickson, who afterwards sold them to said administrator at the same price, but there is no evidence of any previous collusion or understanding between them; the proof is to the contrary of that. The administrator has made profit by collections on the notes so purchased. After the sale, his account was filed in the Probate office. Plaintiff was duly informed thereof, and of the balance due to her by said account out of proceeds of said sale. She signed a receipt in Georgia for said balance, and sent it by her husband to this State. He examined the accounts, inquired into the matters, and on April 19th, 1870, received the said balance, and delivered plaintiff's said receipt to the administrator. The balance so paid by him has been fixed by a decree of the Probate judge, made on March 7th, 1870, on the ex parte application of the administrator for a final discharge. The referee reports that said discharge was obtained without fraud, but is irregular and void.

The date of the commencement of this suit does not appear in any paper before me. The report says it was less than six years after March 7th, 1870, and defendant's first pleading or demurrer was served on November 13th, 1875. I assume that the case commenced more than five years after March 7th, 1870. The complaint alleges fraud in the

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sale of said assets, and the referee *finds that there was no fraud therein. I concur with him. There is no allegation as to when the alleged fraud was first discovered, or that plaintiff was ignorant of it, when she received payment of the balance found due to her by the said decree. The administrator claims the benefit of said payment and settlement, and pleads the Statute of Limitations.

As to the claims of the defendant, S. H. Johns, the facts are, that he knew of the said sale and the said decree of March 7th, 1870, and by it a balance was found due by him to the administrator, who sued for that balance before a trial justice, and obtained judgment, which S. H. Johns paid without appeal.

My judgment as to S. H. Johns is, that his failure to raise before the trial justice the question of fraud raised in this case, and his payment of the balance found due by him in that case, forever bars him from litigating again any issue which would have been proper in that case. He, therefore, can recover nothing in this case.

As to the plaintiff, my judgment is, that her settlement in April, 1870, is binding upon her. She cannot now claim that the sale of the assets was without authority of law and void, because she previously assented to and requested it. Nor can she claim that said settlement was made upon the erroneous supposition that the provisions of the constitution, concerning the purchase-money of slaves, and the homestead, made the said notes worthless. That was a mistake of law or rather ignorance of law, and she preferred the sacrifice, rather than risk the expense of having the notes sued.

On the plea of the Statute of Limitations, the plaintiff claims that she is not a resident of this State, and that the running of the statute does not begin until the said decree of March 7th, 1870. I hold that the statute began to run when the act was done which she avers to be fraudulent, to wit, the sale of the assets, which was on December 17th, 1869. I fix this date, because of there being neither allegation nor proof fixing a subsequent date when the supposed fraud was discovered by the plaintiff. The sole cause of action is the supposed fraudulent sale; it therefore occurred at the time of the sale. At that time the Statute of Limitations, as

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settled by the case of Lavasseur *v. Ligniez, 1 Strobh. 328, allowed five years to a nonresident, and this having been commenced more than five years after either date fixed

by me or the referee, the statute is a complete bar to plaintiff's claim, if even the confused state of law when said settlement was made, would justify me in setting it aside.

It is, therefore, adjudged and decreed, that the complaint be dismissed, each party to pay his own or her own costs, and each to pay one-third of the costs of the referee and the officers of the court.

From this decree the plaintiff appealed on the following exceptions:

1. That it was error to hold that the claim of plaintiffs against the defendant for an account was barred by the Statute of Limitations, which does not run in favor of an administrator trustee against the distributees of the estate he represents, until such trustee does some act which imports to be a termination of his trust, and the pretended sale of the choses in December, 1869, was not such an act, nor under any view was such an act done until the pretended settlement on March 7th, 1870, counting from which time the plaintiffs would not be barred.

2. That as the plaintiff, M. J. Roberts, resided beyond the limits of this State, and was ignorant of the actings of the administrator and the condition and value of the estate of defendant's intestate, except from such information as she derived from the defendant administrator, no act in the course of administration, whether fraudulent or not, assented to or not, which inured solely to the benefit of the administrator trustee, at the expense of the distributees, could give currency to the Statute of Limitations, and certainly not before the effort at settlement in the Probate office, March 7th, 1870, from which date the plaintiff was not barred.

3. That it was error to strain the law to give the administrator, the protection of the Statute of Limitations from the hour of his own private fraud in the administration of the estate unknown to plaintiffs, and which, not done in a public office, and done without authority of law, it was not the duty of plaintiffs to know. The statute does not run in

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favor of a *trustee from the hour of his committing an act of fraud to his own advantage, if not done in a public office in throwing off his trust.

4. That under the facts, as found by the referee, and not controverted by the judge, showing that the sale of the notes and purchase of them by the administrator, out of which he made profit, and the pretended settlement and discharge were irregular, illegal and void, which was a series of acts of personal wrong and of injurious consequence to the plaintiffs and those whom they represent, it was error of law to hold that the plaintiffs were estopped by the receipt which the plaintiff, M. J. Roberts, signed, which receipt was prepared by the defendant, J. A. Johns, administrator trustee, and based on the fraudulent settlement of March 7th, 1870, which was founded on an ex parte settlement between defendants, J. A. and S. H. Johns, and the illegal sale of the notes and purchase of them by said administrator, and thus prepared was forwarded to the plaintiff, a married woman living in Georgia, and signed by her in entire ignorance of the facts of the case, except such information as she derived from the administrator, who, under the decree of Judge Pressley, if sustained, pockets his intestate's personal estate to the exclusion of other distributees.

5. Because it was error to sustain the report of the referee that there was no fraud, when the sale of a large debt due by the administrator to the estate of his intestate for a nominal sum, was a fraud in law, if not in fact; and the sale of other notes, some of which were on parties owning good real estate, and the consideration of which was not negroes, for a nominal sum, on a day different from that specified in the order of sale, without appraisement and without authority of law, and but few bidders being present, was a fraud in law, if not of fact. From sale of these notes the administrator has collected several hundred dollars, and will realize much more.

6. Because it was error to hold that the Statute of Limitations began to run from the sale of the notes in December, 1869, and that plaintiffs were barred certainly in four years, or, as non-residents, in five years from that

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date, when the statute *did not run until March 7th, 1870; and six years from that date had not elapsed before suit brought.

7. Because the effect of the decree is to hold that the administrator, whom the referee finds was a purchaser at his own sale of a large amount of the notes sold, at a mere nominal price, can make profit out of his trusts to the injury of his cestuis que trust, which is error.

8. Because the sale of the choses in action was upon a day and at a place other than that specified in the order of sale; and the notes were thus sold without appraisement and without authority of law. The law authorizing such sale was not passed until January 14th, 1870; the sale having been made on the 17th day of December, 1869, the sale is therefore void.

9. Because the decree is erroneous and unjust, and will have the effect, if not reversed, of covering an unbroken series of illegal, injurious and fraudulent acts perpetrated by a trustee for his own advantage, and the confiscation of the estate which it was his duty to protect.

10. Because the decree is in other respects contrary to the law, the evidence and justice of the case.

[For subsequent opinion, see 24 S. C. 580.]

Messrs. Keith & Verner and R. A. Thompson, for appellant.

Mr. J. J. Norton, contra.

There was no fraud in the sale of the notes. This court will not disturb the concurrent findings of referee and Circuit judge. 11 S. C. 155, 548; 13 Id. 37. Presumption is that administrator and Probate judge did their duty. 7 Rich. 511. The sale was valid. 13 Rich. Eq. 299; 9 Id. 221; Gen. Stat., Ch. XCIV., § 4. Plaintiff has waived her right, if any, by accepting the price. 3 Wait Ac. & Def. 473. The defendant has been effectually discharged. Id. 157, 460. The Probate Court had jurisdiction. Const., Art. IV., § 1; Gen. Stat., Ch. XXIV., § 4; 14 S. C. 211. It is a proceeding in rem (3 Redf. Wills 412) and conclusive upon all persons. 2 Greenl. Evid., § 672; 9 Rich. 131. If not, publication was sufficient service. 14 Stat. 263; 1 N. & McC. 326; 6 Rich. Eq. 114;

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Potter's Dwar. *484. The presumption is that all proceedings necessary to a discharge were done. 2 Speers 82; Dill. Mun. Corp., §§ 471, 643. Plaintiff became a party by acting on the judgment. 1 Tidd 513. She is bound by her husband's acts. 8 S. C. 245; 1 Willard Ex. 389; Rich. Eq. 59. The judgment of the Probate Court is conclusive. 1 Hill Ch. *21; 3 Strobh. Eq. 51; 4 Geo. 516; 2 Rich. Eq. 63. No other court will set aside the judgment. 7 Rich. 32; Bailey Eq. 330; 9 S. C. 80; 2 Id. 442. Plaintiff is bound by her receipt. 3 Wait Ac. & Def. 471, 473, 479; 1 Hill Ch. 128, 307; 2 McC. 321. M. J. Roberts could not sue without her husband. 8 S. C. 245. And, therefore, W. O. Johns could not be added by amendment. 2 Till. & Shear. 1046; Wait An. Code, 335, notes a., f., n. and s. The action is barred. The fraud, if any, was in the sale. 10 S. C. 106; 9 Id. 450; 2 Story Eq. 1521; 4 Rich. 39; 2 Bailey 11, 51, 544. She was entitled to only five years. 1 Strobh. 328; 4 S. C. 257; 12 S. C. 42. Cause of action was not changed by the attempt to throw off the trust, but was point from which statute began to run. 3 Rich. 448; 14 Rich. Eq. 212; Rice 319; 4 McC. 423.

November 11th, 1881. The opinion of the court was delivered by

HUDSON, A. A. J. In 1865, James A. Johns received letters of administration on the personal estate of James Johns, who died intestate in 1863, leaving as his heirs-at-law, his three sons, Samuel H. Johns, James A. Johns and John B. Johns. In 1864, John B. Johns died intestate, leaving as his heirs-at-law, his widow, M. Jane Johns, and infant daughter, Lila B. Johns. In 1865, this widow became administratrix of his estate, and subsequently W. O. Johns joined her in the administration, to wit, in June, 1878, and has been joined as party plaintiff since the institution of this action, which was begun September 27th, A. D. 1875. In 1866, M. Jane Johns intermarried with John Roberts. Lila B. Johns was at first joined as party plaintiff, but on demurrer the complaint was dismissed as to her on the ground that she was an improper party.

The purpose of the action is to compel

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James A. Johns to *account to the plaintiffs for his administration of the estate of James Johns, and various acts of maladministration are specifically alleged against him.

These are all denied by him, and he further claims that he has long since fully administered the personal estate; rendered his final account to the Probate Court; was, by that court, finally discharged in due course of law, and holds the receipt, in full, of M. Jane Roberts for the distributive share of her deceased intestate. This receipt is urged in bar of this action, and the Statute of Limitations is also interposed as a defense.

The cause was referred to S. P. Dendy, Esq., as special referee, who found, among other facts, that on February 13th, A. D. 1865, James A. Johns, as administrator, sold, by order of the ordinary of Pickens (then embracing Oconee) district, all the personal estate of James Johns, including negro slaves, on a credit of twelve months, for gold or its equivalent, for the sum $3,862.29, of which $2,665 were for negroes; and of these negro slaves the administrator purchased to the amount of $1,365, and seems to have (like other purchasers) given his note on the usual terms, made payable, we presume, to himself, as we find him in possession of it along with the other sales notes.

Early in November, A. D. 1869, James A. Johns applied to the Probate judge of Oconee for leave to sell the choses in action belonging to the estate of James Johns, and among them these sales notes, none of which seem to have been collected, nor even put in suit. He was allowed, on fifteen days' posted notice, to sell at or near a place called Bachelors' Retreat. After posting, and without advertising in a newspaper (that mode being specially dispensed with), the sale was made at McWhorter's store, in Bachelors' Retreat, in the presence of a very small number of people, but seems to have been made on December 17th instead of November, as was ordered. There is some confusion and uncertainty about these two dates.

At this very quiet sale, the administrator purchased, for fifty cents, the note of $1,365 against himself, and a number of others at the sum, in the aggregate, of $1.67. Sloan Dickson, a friend of the administrator, purchased the balance of the notes for $55.75, and soon thereafter turned them over at said

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price to *the administrator, who thus became the owner of notes calling for over $7,000 for the pitiful sum of less than $60. Sloan Dickson retained one note, but which one, and for what amount, the referee is unable to report. Prompt return of this sale

of choses in action was made to the judge of Probate during the month of December, 1869, and a new annual return of accounts was filed, modified by the striking results of this sale.

On November 2d, A. D. 1869, the administrator, James A. Johns, published in the Keowee Courier, a weekly paper, published in the town of Walhalla, that on December 1st then next ensuing, he would apply to the judge of Probate of the county of Oconee for his final discharge. The application, however, was not made until March 7th, 1870, but no other notice than the above was published. On this application, the judge of Probate, without special citation of the parties in interest, who had no notice other than by the aforesaid publication, proceeded to examine the administration accounts of James A. Johns and adjust the same. He decreed that he be finally discharged upon the payment to M. Jane Roberts, then sole administratrix of the personal estate of John B. Johns, deceased, the sum of $179.08, as the balance, less advancements, decreed to be due to the estate of the said John B. Johns. On April 19th following, the payment was made and a receipt taken over the signatures of M. Jane Roberts and her husband, John Roberts. On March 7th, when the accounts were audited by the judge of Probate as aforesaid, he granted to James A. Johns his final discharge.

Mrs. M. Jane Johns had removed to the State of Georgia in 1865, and in 1866 she intermarried with John Roberts. She has resided in Georgia since 1865, but made several visits to South Carolina, and whilst here talked much with her brother-in-law, James A. Johns, about his administration and the condition of the estate. He represented to her the difficulty of collecting the notes, and on more than one occasion offered to divide them with her. He went so far as to place some of them in her hands for collection, but failing in her efforts to induce the makers to pay, she returned them to him. After her return to Georgia she wrote to James A. Johns, urging a settlement, and suggested a sale of the notes. The homestead exemp-

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tion *and the supposed invalidity of contracts for the purchase of negro slaves were among the difficulties assigned by the administrator as impeding the collection of the notes, and, perhaps, rendering them worthless. Suits, however, were not instituted by him to enforce payment.

It was after the receipt of her letter that the administrator sold the assets and obtained his discharge as aforesaid.

In the testimony reported by the referee it appears that since the sale of these assets and their purchase by the administrator he has realized a considerable amount of money from collections thereof—perhaps ten times the amount which he paid for these notes—and has a fair prospect of realizing still greater amounts.

As matter of fact, the referee finds further that the administrator, James A. Johns, was not guilty of fraud in procuring his final discharge, but that the proceedings were irregular and do not estop her.

He concludes, as matters of law, that the Statute of Limitations began to run from March 7th, 1870, when the final discharge was rendered, and that, having six years to run, the plaintiff is not barred, she having commenced her action September 27th, 1875; that the letters dismissory cannot act as an estoppel within the period fixed by the statute against allegations of fraud and mistake, and that the same are void for irregularity in procuring the final decree and discharge; that the defendant, Samuel H. Johns, is concluded by the arbitration and settlement with the administrator; that the sale of the choses in action, December 17th, 1869, whilst not fraudulent, was irregular, without authority of law and void, and, finally, that the administrator, James A. Johns, is liable to account to the plaintiffs, M. Jane Roberts and W. O. Johns, for the share of John B. Johns, deceased, in the personal estate of his father, James Johns.

On reviewing this judgment of the referee, the Circuit judge, agreeing with him in his findings of fact, overrules the referee in his conclusions of law. He holds with the referee that S. H. Johns is bound by the settlement made by him with the administrator upon an arbitration had between them, and duly accepted and carried out. As S. H.

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Johns does not appeal, this *judgment of the court below must stand as to him, and excludes him from further claim to an accounting.

As to Mrs. M. Jane Roberts, the Circuit judge holds that she is bound by the settlement of April, 1870, when she acknowledged to have received payment in full of the share of the personal estate of James Johns to which her deceased husband, John B. Johns, was entitled. He says that "she cannot now claim that the sale of the assets was without authority of law and void, because she previously assented to and requested it." He further holds that the Statute of Limitations began to run against her, not from the date of the alleged final discharge of the administrator, nor from the date of the receipt which she gave him, but from December 17th, A. D. 1869, when the assets were sold by him; this being, as he says, the only fraudulent act alleged by her against him.

For these reasons the complaint is dismissed. From this judgment the appeal of the plaintiffs brings the cause to this court.

The Circuit judge does not pretend to vindicate the conduct of the administrator, James A. Johns, nor to uphold his settlement with M. Jane Roberts as fair and just.

This cannot be successfully done. The facts as stated above, if they do not shock our sense of fair dealing and good faith, certainly do show a maladministration and mismanagement of a high trust at variance with the fundamental rules of law by which a fiduciary must be controlled in the performance of duty. And whilst both referee and judge concur in exonerating James A. Johns from fraud in his administration, it is evident from the testimony that it is charity to the administrator to discharge him from actual or positive fraud. But from the charge of that constructive fraud arising from neglect of duty and mismanagement of his trust, he cannot escape. Whether intentionally or not, he has, under the pretended forms of judicial proceedings, so administered his trust as to derive very great profit to himself and to inflict serious injury upon the estate of John B. Johns. Under no circumstances will the law sanction this, but will readily grant relief to the losing party, unless that party has, by imprudent conduct,

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willfully closed the doors of justice, *or is shut out by severe but necessary rules of law of a technical character. Taking the most indulgent view of the conduct of this administration in the light of the then surrounding circumstances, we are unable to discover facts justifying the extraordinary course of this administrator. The sale of the choses in action of the estate, a large part of which consisted of sales notes in the hands of the administrator, and one of them evidencing a large purchase made by himself at his own sale, and which at maturity became cash in his hands by operation of law, was certainly a most extraordinary method of administering assets. It was sanctioned by no statute, and neither the alleged requests and suggestion of Mrs. Roberts, nor the order of the Probate Court, can, under the peculiar circumstances of this case, be set up as a justification of the event, nor be interposed as a bar to the plaintiffs' demand for an accounting.

The application for the order of sale was ex parte and furnishes no such protection to him at whose instance alone it was procured as will shield him from the claim of those who were not parties to it to have its good faith investigated. He was at that time clearly chargeable with the $1,365 and interest—the amount of his purchase of negro slaves at his own sale—and no request of Mrs. Roberts to sell the notes, nor order of the Probate judge, can be construed to authorize or to contemplate the sale of this debt.

So far as this administration is concerned, it is manifest that, in the opinion of the administrator at least, it was to his personal advantage that contracts for the sale of negro slaves should be deemed invalid. He had an interest and a motive, therefore, not to urge other purchasers to pay such claims, and to this motive may be referred his utter failure to use diligence in striving to enforce payment by suits. Nor can his apparent frankness in placing some of these claims in the hands of Mrs. Roberts for collection be advanced in his defense when we consider that she was without authority to collect, and her foreseen failure in her efforts to do so was well calculated to elicit from her a request to sell, or, in any manner available, to realize whatever might be from them.

In the eye of the law this administration

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was conducted in a *manner for which good faith finds no apology; and because of its profitable eventuation to the administrator and inequitable result to the plaintiffs, coupled with the abuse of confidence legally reposed betwixt persons standing in a fiduciary relation, the accounting must be opened in behalf of the plaintiffs, unless Mrs. Roberts is, as the Circuit judge has decided, estopped by her own conduct or concluded by the judgment of a court of competent jurisdiction or barred by the Statute of Limitations. In our opinion she is not so estopped, concluded nor barred.

The Statute of Limitations did not begin to run against the plaintiffs' right to an accounting until the administrator had done some positive act manifesting a clear intention to terminate his trust. This was never done until March 7th, 1870, when he obtained from the Court of Probate his final discharge, and within the statutory period from that date this action was begun, as is admitted by counsel for both plaintiffs and defendant.

It is error to hold that the statute began to run from the date of the alleged fraudulent sale of notes. That was but a single act of administration, and how the administrator himself would deal with it, and what position in regard thereto any of the parties in interest would take, could not be certainly known, nor need be made known until the attempted putting off the trust. Then, and not till then, are parties in interest presumed to have knowledge of the claim of the administrator as to any and all items of his account and special acts of administration. Any other rule would subject cestuis que trust to serious hazards in suffering administrations to progress to maturity before demanding a general and full accounting.

We are likewise of opinion that Mrs. Roberts is not concluded by her receipt of April 19th, 1870. A receipt and release are always open to explanation and impeachable for fraud or mistake.

This receipt, covering the share due to the estate of John B. Johns, as ascertained in the ex parte accounting of March 7th, 1870, was prepared by the administrator and forwarded to Mrs. Roberts at her home in Georgia. She was greatly in need of money, and had, for some time, been importuning James A. Johns for a settlement. She sent

her husband with the receipt, signed by her and him, to Walhalla. On his arrival there,

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*James A. Johns furnished him with $5 to employ a lawyer to examine the accounts. Some examination was made, and the money received, and the receipt delivered.

Upon a careful review of the testimony, we do not think that this settlement, so disadvantageous to the plaintiffs, and so favorable to the administrator, James A. Johns, was made upon a fair disclosure of the facts, nor can we avoid the conclusion that much tact was exercised by the administrator in effecting a settlement known by him to be profitable to himself at the expense of his cestui que trust, whom he well knew to be ignorant of important facts and not informed of her full legal rights.

To put aside such a settlement, it is not necessary that there should be actual fraud or intended wrong where the parties occupy a fiduciary relation. The advantage reaped by the trustee at the expense of an uninformed beneficiary is sufficient ground to justify the opening of the accounts. Under the circumstances of this case, this receipt is not an estoppel, and must be disregarded as a settlement.

But it is urged that the final discharge by the Court of Probate, after the required statutory notice, has the force of a final judgment of a court of competent jurisdiction, and, unappealed from, is binding upon the plaintiff, M. Jane Roberts. She resided in the State of Georgia, and it is not pretended that she was cited, or in any other way, actually or constructively, notified to appear and show cause, except by this publication.

The language of the act is as follows: "It shall not be lawful for any of the judges of Probate in this State to grant a final discharge to any executor or executrix, administrator or administratrix, trustee, guardian or committee, without he, she or they first giving notice in some county newspaper, (if there should be no newspaper published in the county, then in some public journal having the greatest circulation therein,) for the space of at least one month, that on a day certain, he, she or they will apply to the judge of Probate of the county wherein his, her or their bond is filed, for a final discharge." Gen. Stat., Ch. XXIV., § 4.

It is contended by the defendant's counsel that this notice is all the citation of parties

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in interest necessary to be given, and *that thereafter a final discharge granted upon an account stated has the force and effect of a final judgment, and is binding on all parties interested.

This is not the construction proper to be given to this act. Such an interpretation would evidently lead to mischief, whereas the purpose of the act is to guard against hasty and premature discharges from the serious office of a trustee.

The act makes this publication of notice a condition precedent to such discharge, but in no way dispenses with the important proceedings on final accounting required by law before this act. It does not dispense with any formalities previously required, but prescribes this one in addition to existing prerequisites. Persons, to be bound by the judgment of the Probate Court upon the final accounts of a fiduciary, must be made parties thereto by proper proceedings and established forms of citation or summons. At the end of such proceedings, a final discharge is still not to be granted by this court of limited jurisdiction unless this prescribed notice, by publication, shall be or shall have been given. That legislation would be open to grave objection which should provide that any persons, but especially infants, lunatics and non-residents, may be made parties to an action in a court, and bound by its judgment, by the simple publication for one month of a notice in a newspaper requiring them to appear and show cause. Yet this act makes no exception in favor of infants, lunatics, parties under disabilities and non-residents.

An act will not be so construed as to increase rather than correct an evil intended to be remedied, unless the words of the act, in plain language, or by necessary implication, exclude a more reasonable interpretation. There is no such difficulty here, because the words of this act, their implication, as well as the mischief to be remedied, all concur in leading to the construction we have given it. The law here is evidently intended as an additional protection to cestuis que trust, instead of a deprivation of the protection they already enjoyed against trustees, under well-considered acts of legislation, and under the wise rules by which the practice of our courts were and are and ought to be regulated.

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*We conclude, therefore, that these proceedings in the Probate Court, by which James A. Johns sued out his final discharge, do not bind Mrs. M. Jane Roberts, who was not made a party thereto by sufficient legal process. And for the reasons above given, we hold that by reason of nothing which appears in the brief and argument is she estopped or barred of her right to demand of James A. Johns an account of his actings and doings as administrator of the personal estate of the intestate, James Johns. The plaintiffs are entitled to demand and receive of him the unpaid balance of the share of said estate due to their intestate, John B. Johns.

It is not intended, however, that this judgment shall do more than determine the liability of the defendant, James A. Johns, to account to the plaintiffs. The principles by

which the details of that accounting are to be governed are all left open for adjudication by the court below in passing upon the itemized account.

The judgment of the Circuit Court is reversed, and the cause remanded to that court for such orders and proceedings as may be necessary to carry into effect this judgment.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 187

(Case No. 1108.)

STATE v. JOHNSON.

(April Term, 1881.)

[1. *Weapons* ⇐10.]

One indicted under the act of 1880 (17 Stat. 447), for carrying a pistol concealed about his person, has the right, on demand, to have the jury explicitly instructed that it was necessary to a conviction that the State should prove that the pistol was concealed about his person.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 9; Dec. Dig. ⇐10.]

[2. *Statutes* ⇐241.]

A penal statute must be strictly construed, but not so as to defeat the obvious intent of the legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. ⇐241.]

[3. *Weapons* ⇐10.]

The offense is complete under this statute if the prohibited weapon is so concealed as to be generally hidden from ordinary observation.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 9; Dec. Dig. ⇐10.]

[4. *Weapons* ⇐3.]

The purpose of the act is to prohibit, as far as consistent with the citizen's right to bear arms, the carrying of deadly weapons, with a view to prevent acts of violence and bloodshed.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 3; Dec. Dig. ⇐3.]

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*Before Aldrich, J., Edgefield, March, 1881.

Indictment against Hughes Johnson for carrying a pistol concealed about his person on January 30th, 1881. The defendant was convicted and sentenced to imprisonment in the penitentiary at hard labor for six months.

Mr. J. C. Sheppard, for appellant.

Mr. Solicitor Bonham, contra.

November 15th, 1881. The opinion of the court was delivered by

McIVER, A. J. This was an indictment under the act of December 24th, 1880, (17 Stat. 447,) entitled "An act to provide a punishment for carrying any deadly weapon concealed about the person." In the first section the act declares "that any person carrying a pistol * * * concealed about his person shall be guilty of a misdemeanor," &c. The charge in this case was that the defendant "carried concealed about his person a certain deadly weapon, to wit, a pistol." One of the witnesses testified that the defendant "had his pistol under his coat, but I saw it," while other witnesses testified that the pistol was carried in the waistband of his pantaloons. "The handle was sticking out so that any one could see it." "Anybody could see it who could see him." The report of the Circuit judge is very brief, and is in the following words: "It was argued that if the weapon could be seen it was not concealed. The proof was that the defendant had a pistol in his waistband, the butt sticking out in part. I charged the jury that the purpose of the legislature was to prevent this pernicious habit; that when one had a weapon on his person which could be seen in his pocket or in his waistband, he came within the meaning of the act, otherwise there could be no conviction under the law, for whenever a weapon was seen that would be an end of the case. It was for the jury to say if the defendant had a concealed weapon on his person in the meaning of the act. They found a verdict of guilty. I was asked to charge that the weapon 'must be concealed about the person,' and charged as I have here reported."

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*The defendant appeals on two grounds: First—Because there was error in charging "that the purpose of the legislature was to prevent this pernicious habit; that when one had a weapon on his person which could be seen in his pocket or waistband, he came within the meaning of the act." Second—"Because his Honor erred in refusing to charge, as requested by defendant's counsel, that in order to convict the defendant it was necessary for the State to prove that the weapon charged in the indictment was concealed about his person."

It will be observed that to constitute the offense charged it is necessary to show not only that the defendant carried about his person a weapon of the kind mentioned in the statute, but such weapon must be "concealed about his person." Hence, we think that the Circuit judge erred in declining, or, at least, omitting to charge as requested. It may be, and doubtless is, the fact that the Circuit judge considered that he had sufficiently covered this point by the charge which he gave, but in this we cannot agree with him, for we think that the defendant had a right to have the jury explicitly instructed upon this point, as the fact of carrying a weapon concealed about the person constitutes the gist of the offence, inasmuch as merely carrying the weapon constitutes no violation of the statute, unless it is concealed about the person.

Whether the first ground of appeal can be sustained depends upon the construction

which should be given to the word "concealed," as used in the statute. It is contended in the argument here that unless the weapon is entirely concealed from observation there is no violation of the law, and that when it is only partially concealed the statute is not violated. It is very true that the rule is that penal statutes must be construed strictly, but they are not to be so strictly construed as to defeat the obvious intention of the legislature. United States v. Wiltberger, 5 Wheat. 95 [5 L. Ed. 37]; American Fur Co. v. United States, 2 Pet. 367 [7 L. Ed. 450]; United States v. Morris, 14 Pet. 475 [10 L. Ed. 543]. Now, in this case, if the word "concealed" should be construed to mean entirely or completely hidden from observation, then the manifest object of the legislature would be defeated, and the statute would, to a great extent, at least, be nugatory. For if

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a person could not be con*victed unless the proof showed that the weapon was entirely and completely concealed, then it is difficult to perceive how in any case the act could be made effective, unless the person charged should furnish evidence against himself. It seems to us clear, therefore, that such cannot be the proper construction, but, on the other hand, that the true construction is that if the weapon is so concealed as to be hidden from ordinary observation, even though it may not be entirely concealed and might be seen on closer examination, the offense is complete, and that it is for the jury to determine from all the evidence whether the weapon is so concealed. Again, if the weapon is so carried as not to be at all times exposed to the ordinary observation of the bystanders, the offense would be complete, even though at times it might be exposed to such observation. For example, if the weapon is carried under the coat, not exposed to view except when the coat is removed or thrown back by the wind or other cause, this would be a concealment in the sense of the statute.

This being a recent statute, we are without the aid of authority here as to its proper construction, and the authorities elsewhere being cases construing special statutes, the terms of which are, perhaps, different from ours, do not throw much light upon the proper construction of our statute. We have, however, collected three cases which appear to be somewhat analogous to the case under consideration, in two of which the view which we have presented seems to have been adopted, while in the other an adverse view appears to have been taken.

In Sutton v. The State, 12 Fla. 135, the evidence was that the butt of the pistol was seen sticking out of the pants, sometimes covered by the coat, and the court held that the carrying of arms on the person, partially concealed, was a violation of the statute, which provides that "it shall not be lawful for any person in this State to carry arms of any kind secretly on or about their persons * * * provided that this law shall not be so construed as to prevent any person from carrying arms openly outside of all their clothes."

In Jones v. The State, 51 Ala. 16, it was held that to constitute concealment it is sufficient if the weapon be hidden from ordinary observation, although it may be seen on clos-

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er examina*tion. In this case, however, a new trial was granted because the Circuit judge refused to charge the jury that they must acquit the defendant unless they were convinced, from all the evidence, that he did carry the pistol concealed about his person.

In Stockdale v. The State, 32 Ga. 225, a case cited and much relied upon by the appellant, it was held that where one carried a pistol in such a way as, though partially concealed, yet with enough of it to be seen to enable any one to see and know that it was a pistol, he could not be convicted under the act, the provisions of which are not stated in the case. The court argued that it was impossible for one to have and bear about his person a pistol without having some part of the weapon concealed from view; for even if he held it in his hand a part of the weapon would be hidden from view by the hand, and if, therefore, partial concealment should be held sufficient to constitute the offense, the practical result would be to prohibit the carrying of weapons at all, which manifestly was not the object of the legislature. This, however, seems to us to be an extreme view, and one which does not recommend itself for our adoption. The court goes on to say that the object of the (Georgia) act was "to compel persons who carried these weapons to so wear them about their persons that others who might come in contact with them might see that they were armed and dangerous persons, who were to be avoided in consequence." We, however, cannot regard this as the object of our act, but, on the contrary, we think that the purpose was, as far as may be consistent with the right of the citizen to bear arms, absolutely to prohibit the carrying of deadly weapons, with a view to prevent acts of violence and bloodshed, which are too apt to be committed by persons under excitement when they have at hand such effectual means of perpetrating such acts.

We think that portion of the charge excepted to by the first ground of appeal cannot be sustained without the qualification hereinbefore indicated, for, under such an instruction as that, a person might be convicted who carried a weapon in such a way that it could be readily seen by the ordinary bystander. So, too, as we have said, we think the defendant had a right to have the jury explicitly instructed that they could not con-

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vict unless the *weapon was concealed about the person, to which, of course, should be added an instruction as to the proper construction of the term "concealed" as used in

the act, and that, taking the charge and the refusal or omission to charge as requested together, there is at least ground to apprehend that the jury may have been misled.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 192

(Case No. 1109.)

FITZSIMONS v. GUANAHANI COMPANY.

(April Term, 1881.)

[1. *Courts* ⇐8.]

The courts of this State will enforce a contract made in another State under a statute of that State, according to the terms of such statute, if its requirements have been complied with.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. ⇐8.]

[2. *Courts* ⇐8.]

But an inspector of phosphates, in Georgia, cannot recover, for an inspection made in this State, the fees allowed by a Georgia statute; nor an equivalent sum, where the complaint bases its right to a recovery wholly on the Georgia statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 18; Dec. Dig. ⇐8.]

[3. *Trial* ⇐194.]

The judge said to the jury: "I suppose it would take me ten years of hard study to qualify myself to perform the duties required of an inspector of phosphates." This was only an illustration of the principle by which the compensation, to be allowed in cases of skilled labor, should be determined, and did not violate Article IV., § 26, of the constitution.

[Ed. Note.—Cited in Rembert v. Railroad Co., 31 S. C. 312, 9 S. E. 968; Bowen v. Carolina, C. G. & C. R. Co., 34 S. C. 236, 13 S. E. 421; Norris v. Clinkscales, 47 S. C. 519, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. § 441; Dec. Dig. ⇐194.]

[4. *Contracts* ⇐346.]

[Cited in Birlant v. Cleckley, 48 S. C. 306, 26 S. E. 600; Edward & Walter v. Enterprise Bank, 87 S. C. 85, 68 S. E. 961; Bowen v. Johnson, 87 S. C. 251, 69 S. E. 294; Hursey v. Surles, 91 S. C. 290, 74 S. E. 618, to the point that on a complaint setting up an express contract there cannot be a recovery on a quantum meruit.]

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718–1751; Dec. Dig. ⇐346.]

[This case is also cited in Dunsford v. Brown, 19 S. C. 567, as to amendment of pleadings after trial begun.]

Before Thomson, J., Beaufort, November, 1880.

Action commenced June 6th, 1877, for the recovery of $750 for the inspection of phosphates at Port Royal, in 1875 and 1876. According to the proof, $40.35 for inspection, and $25 for the chemist, of Georgia, had been paid to the plaintiff. There was no proof whatever, in the case, of the value of plaintiff's services. The testimony was directed

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to the number of tons *inspected, the contract between the plaintiff and defendant, as to whether plaintiff was to be paid for the number of tons inspected, or only for the number sold in Georgia, how much was shipped to Georgia, and the custom of Augusta merchants in paying for guano inspected outside of their own State. Other matters are stated in the opinion.

The exceptions, quoting the language of the requests to charge, and the charge to the jury, allege errors in the particulars considered in the opinion.

[For subsequent opinion, see 21 S. C. 599.]

Mr. William Elliott, for appellant.

Messrs. W. J. Verdier and J. D. Pope, contra.

November 15th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This is an action by O. P. Fitzsimons, plaintiff, respondent, claiming of defendant, appellant, the sum of $750 for services rendered in the inspection of 1,500 tons of fertilizers for defendant.

The complaint alleges that plaintiff was an inspector of fertilizers for the county of Richmond, in the State of Georgia, duly appointed and qualified under the laws of that State. That he was employed by defendant to proceed to Port Royal, in this State, to inspect and analyze a quantity of fertilizers at that place, which defendant expected and desired to sell and distribute in the State of Georgia. That he complied with request of defendant, and did inspect and analyze some 1,500 tons of Guanahani guano for defendant. That the compensation provided by the laws of Georgia to be paid inspectors for the service rendered was fifty cents per ton, which defendant promised to pay. That no part had been paid, and he demanded judgment on that basis.

The answer admitted that plaintiff did, at the request of defendant, proceed to Port Royal to inspect certain fertilizers which they desired to distribute in the State of Georgia, but it denied that 1,500 tons had been inspected. It also admitted that, under the laws of Georgia, the compensation allow-

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ed in*spectors was fifty cents per ton, but it denied that defendant had agreed to pay this sum to plaintiff, except as to so much as should actually be shipped and sold in Georgia; and it claimed that only eighty and one-seventh tons had been thus shipped and sold, for which the plaintiff had been paid in full.

Upon the trial, Judge Thomson presiding, the defendant requested the judge to charge:

1. "That, under the laws of Georgia, an

inspector of phosphates cannot inspect fertilizers, intended for sale and distribution in that State, at any place outside of that State, and that plaintiff cannot recover in this action if said fertilizers were inspected outside of the State of Georgia.

2. "That, under the laws of Georgia, each bag, barrel or other package of fertilizers intended for sale or distribution in Georgia must be stamped with the brand of the inspector, and that unless the jury find in this case that the fertilizers were so branded, they cannot find for plaintiff."

His Honor charged the jury as follows:

"As regards the defendant's requests to charge, I charge you that all that is law, but that there was nothing to prevent defendant from employing the plaintiff to come here and perform the service. Of course, when Mr. Fitzsimons came here, he did not come under the laws of Georgia. If you find that the plaintiff was employed by the defendant to perform this service, then you must consider, in this case, what would be reasonable compensation for the plaintiff; and you are not to determine the compensation upon any ordinary standard. In some cases compensation is based upon the actual labor performed, as in case of a day's labor. In other cases, for instance, in cases of surgeons and lawyers, compensation is based upon the amount of skill and the time spent in acquiring the profession. I suppose it would take me ten years of hard study to qualify myself to perform the duties required of an inspector of phosphates."

The jury found for the plaintiff for $750. A motion was made for new trial, on the judge's minutes, on the ground of excessive damages. The judge entered an order: That a remittitur of $65.75 be entered on the verdict, the amount paid by the defendant, within ten days, or a new trial be granted. The

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*remittitur was entered by plaintiff and judgment was entered up for $684.25 and costs.

The defendant has appealed, alleging error in the judge's charge as above, after ruling as requested, and also because the judge charged on matters of fact by saying to the jury: "Gentlemen, I suppose it would take me ten years of hard study to qualify myself to perform the duties required of the plaintiff."

Under an act of the State of Georgia providing for inspection of fertilizers, inspectors duly appointed and qualified are allowed fifty cents per ton for all fertilizers inspected and analyzed, &c., by them, provided the services are rendered within the territorial limits of the State. When thus rendered, the act itself raises a contract between the employer and the inspector, that the employer shall pay fifty cents per ton in cash on every ton so inspected and analyzed.

This act in itself has no force in South Carolina upon a contract made here, but upon a contract made in the State of Georgia, and attempted to be enforced here because of the residence of defendant in this State, our courts would assume jurisdiction, and, upon the principle that in the construction of contracts the lex loci contractus governs, would enforce the contract, according to the terms and meaning of the act of Georgia, under which it was made. But in such case it should appear that the requirements of the act have been complied with on the part of the plaintiff.

Now, the plaintiff, in his complaint, bases his right to sue on the ground that he is an inspector in the county of Richmond, in the State of Georgia, duly appointed and qualified, and he states his compensation of the amount allowed inspectors by that act, to wit, fifty cents per ton, and he introduces no other testimony as to the value of his services. The action, then, has been instituted under the statute of the State of Georgia. But, as we have already said, this statute applies only to services rendered by inspectors within the limits of the State; it has no application to services performed outside of the State.

It being admitted, then, in this case that the plaintiff's claim is founded entirely upon inspection and analysis made at Port Royal in South Carolina, it follows, necessarily,

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that the statute *of Georgia has no application to it either in this State or in Georgia, and the judge below properly charged the jury that plaintiff could not recover by virtue of the statute of Georgia.

The judge, however, also charged that there was nothing to prevent the defendant from employing the plaintiff to come here and perform the services rendered, saying to the jury: "Of course, when Mr. Fitzsimons came here he did not come under the laws of Georgia."

There can be no doubt but that the defendant had the right to employ Mr. Fitzsimons or any one else to inspect his fertilizers either at Port Royal or at any other place, and in such case, if no special contract was made between the parties as to compensation, that matter would be governed by the character and value of the services rendered, to be determined by the jury on the facts proved, and the amount of skill displayed and the time spent by the inspector in fitting himself for such work would enter largely into that question.

The propositions of law then laid down by the judge we think were entirely correct in the abstract, and would have been correct here if this action had been founded upon a quantum meruit. But the action was not founded upon a claim of that kind; it was brought on a special contract alleged to have arisen under the provisions of the statute of Georgia referred to. This being so, the ef-

fect of the judge's charge was to change the nature of the action, during the progress of the trial, from an action on a special contract, which the pleadings prescribed and which the parties had met to have adjudicated, to an action on a quantum meruit, which did not appear in the pleadings and which, therefore, was calculated to take the defendant by surprise.

Under the liberal provisions of the code as to amendments, it may be that all this might have been done on motion, by leave of the court, either before or after verdict, if, in the judgment of the court, the facts proved had warranted such an amendment; but there should have been a motion to that effect so as to have given the defendant an opportunity to be on hand, especially in this case, where, from the statements in the brief, it appears that no testimony whatever was

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offered as to the value *of plaintiff's services, as to his skill, or of the time which he had spent in preparing himself to perform the duties of an inspector.

As far as we can see, the jury must have applied the statute of Georgia in measuring plaintiff's compensation. No other testimony appears in the case on that subject, and they must have relied upon this act.

We think it was error on the part of the judge thus, in the midst of the conflict, to change the whole character of the action from the cause upon which it was originally established, to a new basis not appearing in the pleadings, and without opportunity on the part of defendant to meet and resist it. The first exception of appellant is therefore sustained.

The second exception, as to the charge of the judge upon the facts, cannot be sustained. We find nothing obnoxious to Article IV., Section 26, of the constitution in what he said to the jury upon the facts.

His statement "that it would take him ten years' hard study to qualify himself to perform the duties required of the plaintiff" does not appear to have been charged upon the facts in the sense of the inhibition of the constitution. There was no intimation in this as to what had been proved; but what he said was intended rather to illustrate the principle of law which he had laid down: That the measure of compensation which should be applied to a case of this sort was different from an ordinary case of claim for daily labor. We see no error in this.

This case, however, must be sent back upon the first ground.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case be remanded.

McIVER and McGOWAN, A. J.'s, concurred.

16 S. C. *198

*(Case No. 1111.)

BOLT v. DAWKINS.

(April Term, 1881.)

[1. *Limitation of Actions* ⇐6.]

Where the right of action accrued before the adoption of the Code of Procedure, the Statute of Limitations then of force governs the case.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 28; Dec. Dig. ⇐6.]

[2. *Limitation of Actions* ⇐83.]

Where the right of action accrued during the life-time of the debtor, the currency of the Statute of Limitations, as to such demand, is not suspended after his death, during the time when there is no administration upon his estate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 426; Dec. Dig. ⇐83.]

[3. *Limitation of Actions* ⇐105.]

Admissions and promises of intestate's heirs, who, without letters of administration, were managing his estate, do not continue or revive the indebtedness of the intestate; and a judgment obtained against such persons, as executors de son tort, cannot have the effect of arresting the operation of the Statute of Limitations.

[Ed. Note.—Cited in Gibson v. Lowndes, 28 S. C. 300, 5 S. E. 727; Foggette v. Gaffney, 33 S. C. 311, 12 S. E. 260; Redfearn v. Craig, 57 S. C. 544, 35 S. E. 1024; Divine v. Miller, 70 S. C. 228, 49 S. E. 479, 106 Am. St. Rep. 743.

For other cases, see Executors and Administrators, Cent. Dig. § 1762; Limitation of Actions, Dec. Dig. ⇐105.]

[4. *Executors and Administrators* ⇐340.]

Where the administrator brings an action for the sale of the real estate of his intestate in aid of assets, the personalty being inconsiderable, the court will sustain his plea of the Statute of Limitations to a claim barred thereby, notwithstanding the heirs-at-law have admitted the claim to be justly due and oppose the interposition of the plea. The Court of Equity is bound to apply the bar of the statute to a legal demand in the same manner as a Court of Equity would apply it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1429; Dec. Dig. ⇐340.]

[5. *Limitation of Actions* ⇐143.]

If the administrator, in his complaint, after the bar of the statute was complete, had, in the most unqualified manner, acknowledged a debt of his intestate and promised to pay it, such admission and promise would not revive the original debt, or create a new debt against the estate, nor would they estop the administrator from afterwards pleading the statute as a bar.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 578–583, 587; Dec. Dig. ⇐143; Executors and Administrators, Cent. Dig. § 750.]

[6. *Executors and Administrators* ⇐340.]

The administrator is the proper person to interpose this plea, and it matters not if creditors and distributees have not joined with him in such defense.

[Ed. Note.—Cited in Roberts v. Smith, 21 S. C. 462; McKinlay v. Gaddy, 26 S. C. 579, 2 S. E. 497.

For other cases, see Executors and Administrators, Cent. Dig. § 1429; Dec. Dig. ⇐340.]

[7. *Payment* ⟸24.]

Whether one security operates as payment of another is a question of fact dependent upon the intention of the parties.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 28, 29; Dec. Dig. ⟸24.]

[8. *Bills and Notes* ⟸430.]

A promissory note was received in exchange for a sealed note, past due, of larger amount, and the latter was canceled and surrendered to the maker, and, it being found among his papers after his death, was delivered by his son to the payee. *Held*, that the sealed note was not a subsisting obligation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1251–1256; Dec. Dig. ⟸430.]

[9. *Bills and Notes* ⟸430.]

Where a note for an amount less than the sum due is received in payment of a debt after maturity, the debt is extinguished.

[Ed. Note.—Cited in Pinson v. Puckett, 35 S. C. 186, 14 S. E. 393; Riggs v. Home Mut. Fire Protection Ass'n of South Carolina, 61 S. C. 457, 30 S. E. 614.

For other cases, see Bills and Notes, Cent. Dig. §§ 1251–1256; Dec. Dig. ⟸430.]

[10. *Bills and Notes* ⟸430.]

A promissory note may extinguish a higher security, as, for instance, a sealed note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1254; Dec. Dig. ⟸430.]

[11. *Payment* ⟸24.]

[Cited in Witte v. Weinberg, 37 S. C. 591, 17 S. E. 681, to the point that it is a question of intention whether one security is taken in satisfaction of another.]

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 28, 29; Dec. Dig. ⟸24.]

[This case is also cited in Leitner v. Metz, 32 S. C. 387, 10 S. E. 1082, and Chester, etc., R. Co. v. Marshall, 40 S. C. 63, 18 S. E. 247, as to the rights acquired by administrator regarding matters pending at death of intestate.]

Before Wallace, J., Union, April, 1880.

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*Action by Charles Bolt, as administrator of the estate of Joshua P. Dawkins, deceased, against Sarah A. Dawkins (widow), B. F. Dawkins and Nannie E. Tench (children), and Sarah A. Stringfellow and others, creditors of Joshua P. Dawkins' estate. The action was commenced January 10th, 1878, and was in the nature of a bill for sale of land in aid of assets, the personalty received by the administrator not exceeding $200. The complaint alleged "that the indebtedness of said estate is very large; that the personal estate is wholly insufficient to satisfy the same, and that it will be necessary to sell the lands in order to pay and discharge the debts." And again, "That the defendants * * * and Sarah A. Stringfellow * * * are creditors of said intestate, and there are none others."

An order was passed directing the sale of the intestate's lands, and appointing Joseph F. Gist, referee, to call in creditors, and take proof of claims. The lands were sold in January, 1879, for $12,535, exclusive of one tract sold at private sale, by order of the court, for $5,500, on credit, secured by bond and mortgage.

The referee, by his report, filed April 14th, 1880, disallowed the claim of James B. Dawkins (as having been fully paid), the claim of Mrs. Stringfellow and of one other (because barred by the Statute of Limitations). The note held by Mrs. Stringfellow was made in Florida, where both she and J. B. Dawkins resided. The facts connected with these two claims are fully stated in the opinion. The only claims against the estate, allowed by the referee, were those of Lyons, administrator, for $301.57, assignees of Choice for $2,782, and S. F. Dawkins for $435.48, making the aggregate indebtedness of the estate on April 14th, 1880, $3,519.05.

During the progress of the reference, the following paper was filed with the referee:

Charles Bolt, adm'r, v. Sarah Dawkins and others.

I, Sarah A. Stringfellow, a defendant in the above-stated case, do hereby authorize and empower Messrs. Steedman and Rawls, my attorneys herein, to file with the record, and to enter upon the proceedings, my consent and agreement that all claims that may herein be established against the estate of

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Joshua P. Daw*kins, deceased, whether simple contract or specialty debts, and all expenses of administration, and all costs in this case, shall take precedence in the marshaling of said estate, and in the administration thereof, of the claim against said estate presented in my favor, viz., promissory note of J. P. Dawkins in favor of J. B. Dawkins for $5,200, transferred to and now owned and held by me, and the judgment thereon obtained by me against John W. Tench and B. F. Dawkins, as executors of J. P. Dawkins, deceased, so that no part of said estate shall be applied to the payment of said claim until all other demands against the said estate shall have been fully satisfied.

April 4th, 1879. Sarah A. Stringfellow.

I also consent to the above.

James B. Dawkins.

By virtue of the within authority, we do hereby enter consent of Mrs. S. A. Stringfellow that the debts of and demands against the estate of J. P. Dawkins, deceased, within referred to, shall take precedence in the administration of said estate over the demand and debt set up by me.

Steedman & Rawls,
Attorneys for Mrs. Stringfellow.

April 7th, 1880. There were several judgments proven against B. F. Dawkins, Mrs. Tench and Mrs. S. A. Dawkins, who were distributees of the intestate, upon their personal indebtedness.

Upon the note held by Mrs. Stringfellow, there was a payment of $1,000 on January

7th, 1875, "by sight draft of Tench and Dawkins on L. D. Mowry & Son." This draft was paid, and Tench testified that Mr. L. D. Mowry knew that it was a payment on this note. Mrs. Stringfellow obtained judgment by default on this note in October, 1877, against John W. Tench and B. F. Dawkins, as executors of J. P. Dawkins, deceased.

Assignees of William Choice and S. F. Dawkins, and the judgment creditors of the distributees desired the statute to be pleaded to Mrs. Stringfellow's claim; Lyons, administrator, and the distributees, did not so desire. Other facts are stated in the opinion.

The Circuit decree was as follows:

This proceeding is instituted by the plaintiff for the purpose of having the land of J. P. Dawkins sold in aid of assets to

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*pay debts. By an order of court, creditors of J. P. Dawkins were called on to prove their demands, and Mrs. Stringfellow offers as proof of her debt the judgment obtained by her against Tench and Dawkins. Is this proof against the administrator here? After some hesitation it has been held in this State that judgments against administrators would bind the lands of intestates, but not that a judgment against an executor de son tort would so bind. On the contrary, such executors are held to be mere trespassers, as there can be no privity between such trespassers and subsequent personal representatives; nor are heirs in any way affected by a judgment against executors de son tort; nor is the estate itself bound by such a judgment beyond the assets that went into the hands of such executors. He is a trespasser, and the measure of his liability is the assets that went into his hands if he properly pleads to the action. If he does not plead at all to the action, the judgment is against assets in his hands, and for the balance against him personally. The fact that Tench and B. F. Dawkins were in possession of the land cannot alter or enlarge the effect of the judgment. Tench was husband of one of the heirs; B. F. Dawkins was himself one of the heirs, and Mrs. S. A. Dawkins the other heir. These were all in possession of the land, and rightfully and legally so; and their possession will be referred, of course, to their legal right. In no sense, therefore, did they hold the land as executors de son tort. A judgment against them as such, therefore, could not bind the land. I am of the opinion, therefore, that Mrs. Stringfellow's judgment cannot rank as a judgment against any part of the estate of J. P. Dawkins, except what Tench and Dawkins took into their possession wrongfully, and is not proof of Mrs. Stringfellow's claim in this action. To the note upon which the judgment is founded the plaintiff interposes the plea of the Statute of Limitations. As to the right of the administrator to interpose the plea I think there can be no doubt. He is the personal representative of the maker, and as to the right to plead the statute, he stands in his place. A case might occur in which the court would compel him to plead the statute, but it is hardly possible to conceive a case in which the court would strike out such a plea, or prevent its

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interposition, or dis*regard it when there were facts to support it. The note is dated February 1st, 1870, and is payable one day after date.

This action was commenced in 1877, more than seven years after the maturity of the note, and more than sufficient to bar the right of action on the note if the statute was running all that time. The maker died on August 8th, 1870. Certainly the holder had his right of action after the maturity of the note and before the death of the maker. The statute then began to run before the death of the maker. It can be collected from several of our cases that when the right to sue was perfect the currency of the statute is not arrested by the death of the maker. Where the right to sue is not perfect before the death of the maker, the statute does not begin to run until there is somebody to sue. Nicks v. Martindale, Harp. 135 [18 Am. Dec. 647]; McCollough v. Speed, 3 McCord 455; Moses v. Jones, 2 Nott & M. 259. Some of the heirs promised to pay the note within the time necessary to save the bar of the statute, and a payment was made on the note by Tench and Dawkins. For the same reasons that the judgment against Tench and Dawkins does not bind the estate, a payment upon the note by them would not prevent the running of the statute in favor of the estate. Neither would a promise by Tench and Dawkins have any more effect than the payment of a part of the debt. The promise of an heir to pay the debt of the ancestor is a promise to pay the debt of another, for in this case it is not the debt of the heir. Under certain circumstances, property of the ancestor in the hands of the heir can be made available to pay the debt of the ancestor, but it is still the debt of the ancestor to which the administrator has the legal right to plead the statute, and such plea cannot be defeated by proof of the promise of the heir to pay the debt. It might be that the heir himself, if the promise was made upon sufficient consideration, would be bound, but not the personal representative of the estate.

I am constrained, therefore, to hold that Mrs. Stringfellow's claim against the estate is barred.

James B. Dawkins held a sealed note on J. P. Dawkins for $8,100, and dated October 11th, 1869, payable one day after date. The note transferred by J. B. Dawkins to Mrs.

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String*fellow, previously referred to, was given for this note. The Stringfellow note was for $5,200. It is claimed by James B.

Dawkins that the sealed note for $8,100 is not extinguished by the promissory note of $5,200.

It is a familiar rule that a note is not paid by the acceptance of a smaller sum than the amount due upon the note in payment. The rule does not apply to cases where something other than money is received in satisfaction. In such cases the effect of the transaction is to be determined by the intention of the parties. In this case a promissory negotiable note was given and received for a sealed note, at the instance and request of the holder. The larger and sealed note was delivered to obligor—the words "canceled by another note, J. B. Dawkins," written across its face, with lines of cancellation across the face and signature. The negotiable note transferred by J. B. Dawkins to Mrs. Stringfellow as a collateral is now held by her. A letter is produced in evidence from J. B. Dawkins to J. P. Dawkins, bearing date November 14th, 1869, before the exchange of notes, proposing to take a note for a smaller amount, and in which, among other things, he says he cannot reconcile it to his feelings to exact that amount, referring to the larger note. All these facts satisfy me that it was the intention of the parties that the smaller note should operate as payment and extinguishment of the larger note, and that the larger note is extinguished. I need not, then, in this case discuss the question whether or not the acceptance of a negotiable note in payment of a sealed unnegotiable note for a larger amount would operate an extinguishment of the larger note.

The last exception of Mrs. Stringfellow relates to the basis upon which the calculation was made on the note held against J. P. Dawkins by W. Choice and assigned to Mowry. I am of the opinion that the referee properly admitted proof of the note, notwithstanding judgment had been recovered upon it against the executor de son tort.

All exceptions to the report of the referee are overruled and the report confirmed.

It is ordered and decreed, that funds in the hands of the clerk of this court, and such funds as may be hereafter realized from

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*securities in his hands belonging to the estate of J. P. Dawkins, be paid first to the costs of this action: next, to the debts of the intestate as ascertained and allowed by the referee: next, to the mortgage debt of L. D. Mowry & Son, and, if there be any residue after these payments, that such residue be held by the clerk until the further order of this court.

The defendant, Sarah A. Stringfellow, gave notice of appeal from this decree upon the following grounds:

1. Because his Honor decides that a judgment obtained against an heir in possession of the land of an intestate, in a suit brought against the heir, as executor, does not bind the land, it appearing that the heir is also executor de son tort.

2. Because his Honor decides that such a judgment does not affect heirs or subsequent personal representatives, or the estate of the intestate.

3. Because his Honor should have decided that, as J. W. Tench and B. F. Dawkins represented and managed the estate of J. P. Dawkins by the consent and acquiescence of all the heirs and creditors of the said J. P. Dawkins, the judgment of Mrs. S. A. Stringfellow, fairly obtained against them as executors, found the real estate in their possession and managed by them, so far as heirs, creditors and subsequent personal representatives are interested therein.

4. Because his Honor should have decided that the administrator, in seeking the aid of this court to reach the real estate of J. P. Dawkins, deceased, in aid of assets, must do equity, and will not be permitted, by pleading the Statute of Limitations, to defeat the just claim of Mrs. S. A. Stringfellow, which had been continually assented to and recognized as a subsisting debt of the estate by all parties interested in the same.

5. Because his Honor should have decided that, as the heirs of J. P. Dawkins refused to plead the Statute of Limitations, and all the creditors of J. P. Dawkins and others interested in his estate were protected by the agreement of Mrs. S. A. Stringfellow to give precedence to all other claims against said estate over her own, the administrator will not be permitted to plead the bar of the Statute of Limitations to de-

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feat a just claim, con*tinually recognized by all interested in the estate since the death of J. P. Dawkins.

6. Because his Honor should have decided that the administrator of J. P. Dawkins, deceased, was equitably estopped from pleading the bar of the Statute of Limitations to the claim of Mrs. S. A. Stringfellow.

7. Because his Honor decided that the Statute of Limitations continued to run after the death of J. P. Dawkins, and was not arrested thereby until letters of administration were granted in respect to a debt owned and held by parties living "beyond seas."

8. Because his Honor should have decided that J. W. Tench and B. F. Dawkins were the agents of all parties interested in the estate of J. P. Dawkins and of the estate itself, and their continual recognition of the debt in question, and their promises to pay the same, arrested the Statute of Limitations and prevented it from barring the debt.

9. Because his Honor should have decided that the payment made in behalf of the estate upon the claim of Mrs. S. A. Stringfellow, by parties rightfully in possession of the estate and legally representing the

intestate, made with the knowledge and assent of all parties interested in the estate, arrested the Statute of Limitations from running in their favor.

10. Because his Honor should have decided that the payment made in behalf of the estate upon the claim held by Mrs. Stringfellow, by an heir of the intestate in possession of the estate, there being no administrator or other representative of the estate, arrested the Statute of Limitations.

11. Because his Honor should have decided that the promises and payments of the heirs in possession of the land of the intestate prevented the bar of the Statute of Limitations from arising in respect to the land against the claim of Mrs. S. A. Stringfellow.

12. Because his Honor should have decided that Mrs. S. A. Stringfellow was entitled to establish her claim against the estate of Joshua P. Dawkins by producing the sealed note of Joshua P. Dawkins given as evidence of the debt, which sealed note has not been paid.

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*13. Because his Honor should have decided that, as L. D. Mowry & Son took a mortgage upon the land in question, with notice of Mrs. Stringfellow's claim, their lien should be postponed to hers.

14. Because his Honor should have decided that, as the debt established against the estate of J. P. Dawkins by L. D. Mowry & Son was held by them as cumulative collateral security for the payment of the debt represented by the bond and mortgage of S. A. Dawkins, B. F. Dawkins, N. E. Tench and J. W. Tench, any payment made upon the said debt from the estate of J. P. Dawkins will discharge the same pro tanto; and his Honor has erred in directing the debt established by said creditors against said estate to be paid from the fund in court, and, also, the bond and mortgage referred to, instead of directing the amount received by said creditors from said estate to be applied as a credit upon the bond and mortgage debt.

The defendant, James B. Dawkins, appealed from this decree upon the grounds:

1. For that his Honor, Judge Wallace, overruled the exceptions of this defendant to the referee's report.

2. For that his Honor, Judge Wallace, held that the promissory note for $5,200 acted as payment and extinguishment of the sealed note for $8,100.

Mr. J. B. Steedman, for Mrs. Stringfellow.

Did the admissions, promises and payment of the heirs, in possession of the land, sustain the subsisting legal obligation of the debt and prevent the bar of the statute as to the real estate of the intestate? If so, the note was not barred. 3 Strobh. Eq. 43; 9 S. C. 430. The personal property is not before the court to be administered. The heirs are sued on their ancestor's debt. 9 S. C. 436. Lands descended are assets, but, in general, the cause of action must be established against the heir. Spears Eq. 250; 2 Hill Ch. 257; Rice Ch. 387; 1 S. C. 198; 1 Hill. 579; 4 McC. 131; 6 S. C. 156. The creditor has an immediate right of action against the heir, and is not bound first to exhaust his remedy against the personal rep-

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resentative. 2 S. C. 145. His *remedy does not depend on coöperation of administrator; he has an independent equity. 11 S. C. 582. In equity, the executor is a necessary party only for the protection of the heir. Id.; 2 Hill Ch. 260; Rice Ch. 239; 2 S. C. 140; 4 Id. 296. Action will be sustained against him alone unless he object. 9 S. C. 436; 12 Id. 9; see, too, 1 Desaus. *427; 1 McC. Ch. 325; Spears Eq. 250; 6 S. C. 66. Administrator does not represent intestate as to real estate; only as to the personalty. 1 Rice Dig. 315, No. 24; Spears Eq. 401; 3 Rich. Eq. 91, 95; 4 Desaus. *325; 13 Rich. Eq. 29; 13 S. C. 326; Cheves Eq. 27; Rice Ch. 19. See his oath and bond. Gen. Stat., Chap. LXXXVIII., § 4. His sureties are not liable for rent. 1 McM. 249. His admission does not bind real assets in the hands of the heir or devisee, or affect their right to plead the statute. 6 Johns. Ch. 373; 3 Russ. 188; 12 Eng. L. & Eq. 191; 18 Eng. Ch. 257; 1 S. C. 195. The heir is, therefore, the organ through which real assets are generally to be reached, and the administrator the organ through which personal assets are to be reached. The acknowledgment of the heir should, therefore, continue the liability of the real estate to the payment of the debt. Heirs in possession are trustees for the benefit of creditors. 6 S. C. 156; 9 Id. 436; It is this equity, and the statute 5 Geo. II., Ch. VII., and the insufficiency of personal assets, which give the creditor the right to come directly against the heirs. 2 S. C. 145; 4 Kent *420; 16 Pet. *63. It would seem, therefore, that as the admission of the administrator before action barred, prevents the bar of the statute as to personalty (Bailey Eq. 311), so the admission of the heir would prevent the bar as to the lands. In neither case should the promise or admission of the one bind the property represented by the other. Tench and Dawkins, under the agreement with intestate, were trustees for creditors. 14 S. C. 211. And were agents for the heirs. 10 Rich. 332; Story Cont., § 131. The heirs, here, all admit the debt and refuse to plead the statute. Ang. Lim., § 7.

Equity being invoked, will the court lend its aid except on fair terms? The administrator has only an equity. 1 Story Eq., § 551, note 2. And the court will require him to do equity. Id., § 557. The plaintiff, here,

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is clerk of the court, and its *mere hand.

14 Rich. 156. And the court has undertaken the administration. 10 Rich. Eq. 439. And should protect the rights of all parties. 4 Rich. Eq. 491; 1 Story Eq., §§ 64, 553. The heirs, here, could not plead the statute, therefore the administrator should not be allowed to do so in this action. The administrator's promises could not prejudice the heir; he should not be allowed to interfere to the prejudice of the creditor.

The Court of Equity will sometimes refuse to allow the statute to be pleaded. 1 Eq. Cas. Ab. 303; 2 Williams Ex. *1283, *1454; 2 Hill Ch. 91; Rich. Eq. Cas. 261; 3 Barr. 161. After their demands are satisfied, creditors are strangers.

The allegations of the complaint, and the use of Mrs. Stringfellow's claim to procure a sale, should estop plaintiff from afterwards pleading the statute. 2 Q. B. 117; 6 Jur. 389; 12 Q. B. 925; 8 Rich. 117; 10 Rich. 338; 6 S. C. 46. The administrator alone has pleaded the statute. The only persons interested in sustaining the plea are creditors of the heirs; the heirs cannot set it up, nor can their creditors. 22 Beav. 1; 2 Jur. N. S. 602. The court here should not permit the plea. 4 Strobh. Eq. 196; 1 McC. Ch. 174; 4 McC. 424; Harp. 205. The intestate here created a trust for his creditors, and the trustees admitted the debt. Ram Assets, Ch. XXXIV., § 7.

Mr. J. H. Rion, for J. B. Dawkins.

Messrs. Munro & Munro and S. Lord, Jr., for the administrator.

November 16th, 1881. The opinion of the court was delivered by

McIVER, A. J. Some time in August, 1870, J. P. Dawkins died intestate, possessed of a small personal but a very considerable real estate, leaving as his heirs-at-law, his widow, Sarah A., and his two children, B. F. Dawkins and Nannie E. Tench, the wife of John W. Tench.

It seems that, during the latter part of his life, the intestate had turned over the management of his property to his son, B. F. Dawkins, and his son-at-law, John W. Tench,

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and that after *his death they continued the management and control of the same without taking out letters of administration—their purpose, as expressed by them, being to pay up the debts of the intestate, provide for the support of the widow, and divide the estate between them, in pursuance of the "verbal will," as they termed it, of the said J. P. Dawkins. These expectations were, however, never realized, and, on the contrary, Tench and Dawkins not only failed to pay the debts of the intestate, but contracted a large liability to the defendants, Mowry & Son, principally for advances made to them to carry on the planting operations which they undertook to carry on with the property of the estate and to pay debts due by the intestate. To secure this liability to Mowry & Son, all the heirs of J. P. Dawkins, on April 13th, 1875, united in a bond, secured by a mortgage of the real estate left by the intestate, duly recorded, to the said Mowry & Son, who, as a further security, took an assignment of a judgment which one William Choice had recovered against Tench and Dawkins, as executors of J. P. Dawkins, on a note under seal given by the intestate to said Choice, the said Mowry & Son having furnished the money to pay Choice the amount due to him.

Subsequently, to wit, on October 6th, 1877, the plaintiff, who was clerk of the court, upon the demand of some of the creditors of J. P. Dawkins, obtained letters of administration on his estate, and on January 10th, 1878, commenced this action in the nature of a creditor's bill. The creditors were called in to prove their demands before a referee appointed for that purpose, and various claims were presented; but it is only necessary to direct our attention to two of these claims—one presented by Mrs. Sarah A. Stringfellow, and the other by James B. Dawkins, as the questions presented by this appeal arise out of these claims.

The Stringfellow claim was in the form of a promissory note of the intestate, payable to James B. Dawkins, or bearer, for $5,200, dated February 1st, 1870, payable one day after date, and transferred to Mrs. Stringfellow by James B. Dawkins on February 12th, 1872, as collateral security for a debt due by him to her. The claim of James B. Dawkins was in the form of a note under seal, executed by the intestate to said James

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B. *Dawkins on October 11th, 1869, payable one day after date, for the sum of $8,100. On February 1st, 1870, James B. Dawkins voluntarily accepted the above-mentioned promissory note for this note under seal, and, at the same time, canceled the sealed note by pen and ink marks drawn across the face of the note and the signature, and by the words "canceled by another note, (signed) J. B. Dawkins," written across its face, and delivered the same to the intestate, among whose papers it was found after his death and delivered to the attorney of James B. Dawkins by B. F. Dawkins after this action was commenced.

To the Stringfellow note, the Statute of Limitations was pleaded by the plaintiff, and to the sealed note for $8,100 the plea of payment and satisfaction was interposed. Both of these pleas were sustained by the referee, and, upon exceptions to his report, the Circuit judge overruled the exceptions and confirmed the report of the referee. From his judgment this appeal comes up, by which the questions raised are: 1. Whether the Stringfellow note is barred by the Statute of Limitations. 2. Whether the sealed note present-

ed by James B. Dawkins has been paid or satisfied. The Stringfellow note became payable on February 5th, 1870, so that, allowing five instead of four years on account of the payee and holder being "beyond seas," and adding thereto the nine months allowed by the act of 1789, the bar would have been complete on November 5th, 1875, unless something had occurred to arrest the operation of the statute. It will be observed that, inasmuch as the right of action upon this note had accrued before the adoption of the Code of Procedure, the question must be determined by the old law and cannot be affected by the provisions of Section 125 of the code. Bratton v. Guy, 12 S. C. 42.

Under the law as it stood prior to the code, there can be no doubt that, as the right of action had accrued during the lifetime of the maker of the note, the currency of the statute was not suspended during the time that there was no administration upon his estate. Nicks v. Martindale, Harp, 135 [18 Am. Dec. 647]; McCollough v. Speed, 3 McC. 455; Bugg v. Summer, 1 McM. 333.

It is contended that the bar of the statute is prevented: 1. By the admissions, promises

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and payment made by the heirs of *the intestate while in possession of his land. Under the view which we take of this matter it will not be necessary to inquire particularly when these admissions, promises and payment were made, because, even if made before the statutory bar was complete, we do not think they could have the effect of reviving or continuing the legal obligation which the intestate incurred when he executed the note. Executors of Blake v. Executors of Quash, 3 McCord 340. The persons who made these admissions, promises and payment did not stand in such a relation to the intestate as to entitle them either to create, revive or continue an obligation of the intestate. They did not represent the intestate, and nothing that they said or did can be allowed to have the effect of fixing a debt upon the estate. They cannot be regarded as legal administrators, because the law prescribes the only mode in which such a relation can be created, and, as they have not seen fit to adopt that mode, we are unable to perceive by what authority such a position can be claimed for them. They cannot be regarded, so far as this question is concerned, as standing in any other relation to the estate than that of executors de son tort, and, as such, no promise, admission or payment made by them can be allowed to have the effect of creating, reviving or continuing any legal obligation binding upon the estate, and for this doctrine express authority may be found in the case of Haselden v. Whitesides, 2 Strobh. 353. The fact that they were heirs of the intestate cannot affect the question, for, as such, they have no more authority to create or revive a debt against their ancestor than any other person would have. The question here is whether the legal obligation of the intestate still subsists or has been destroyed. They may create obligations binding upon themselves and upon their interests in the estate, but we are at a loss to discover any authority by which they can fix a debt upon their ancestor or upon his estate.

For like reasons we do not think that the judgment recovered by Mrs. Stringfellow on her note against Tench and Dawkins, as executors, so called, can help the appellant. Such a judgment would not bind the estate, inasmuch as it was obtained against persons who had no authority to represent the

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intestate, and it *cannot have the effect of arresting the operation of the Statute of Limitations when pleaded by the lawfully appointed administrator, the legal representative of the intestate.

Next, it is contended that the administrator having invoked the aid of the Court of Equity to reach the real estate for the payment of the debts of his intestate, that court will not permit him to plead the statute to this claim, which has always been and still is acknowledged to be justly due by the heirs. The authorities cited by the appellant to sustain this position are, in our judgment, far from establishing it, and, on the contrary, we think that the true rule is, as stated in Cumming v. Berry, 1 Rich. Eq. 114, that a Court of Equity is bound to apply the bar of the Statute of Limitations to a legal demand in the same manner as a court of law would apply it. Here, the demand is undoubtedly a legal demand, and if an action were brought upon it on the law side of the court, there cannot be a doubt that the plea of the statute would prevail.

Again, it is contended that the administrator is estopped from pleading the statute by reason of the fact that he has recognized the claim in his complaint as an existing demand against the estate. The foundation of this position is that the plaintiff in his complaint alleges that the indebtedness of the estate is very large, and that he names Mrs. Stringfellow as one of the creditors of the intestate, and that, without her claim is established, the indebtedness would be small. Without stopping to inquire whether such loose allegations would amount to an admission of the debt and an implied promise to pay it, and assuming, for the present, that the administrator had in the most positive and unqualified terms admitted the validity of the claim, we still do not think that this would prevent the bar of the statute. This so-called admission, it will be observed, was made after the claim was barred, for, as we have seen, the bar was complete on November 5th, 1875, and the action was not commenced, and, of course, the complaint was not filed until January 10th, 1878. Whether this was such

a positive and unqualified admission of the debt as would imply a promise to pay it, even if made by the debtor himself, might well be questioned, but, waiving that question, the point now presented is whether a

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promise to pay a *debt of his intestate made by an administrator, after the bar of the statute is complete, would revive the debt, or, more properly speaking, would constitute a valid cause of action against the estate; for the rule as established by the case of Smith v. Caldwell, 15 Rich. 373, and recognized recently in Hayes v. Clinkscales, 9 S. C. 450, is that a promise to pay a debt already barred by the statute constitutes a new contract and a new cause of action, the right of action upon the original obligation being absolutely gone. The question, then, is narrowed down to the inquiry whether an administrator can create a new debt against the estate of his intestate. To the question thus stated there can be but one answer. It is clear, therefore, that even if the administrator had in the most unqualified manner acknowledged this debt, and promised to pay it, after the bar of the statute was complete, it could not have the effect of either reviving the original debt or creating a new debt against the estate.

We are unable to see how the doctrine of estoppel applies to the case. This statement made by the administrator in the complaint cannot be said to have had the effect of inducing Mrs. Stringfellow to delay action until after the statutory period had elapsed, because, as we have seen, the bar of the statute was complete long before the complaint was filed and before such statement was made. There is no foundation, therefore, for the idea that Mrs. Stringfellow has, by this statement on the part of the administrator, been induced to alter her condition to the prejudice of her rights.

We are unable to perceive the force of the objection that the plea of the statute was interposed only by the administrator. As a matter of fact, we understand that the plea was insisted upon before the referee by some of the creditors, also. But, according to our view, this is not material, for the administrator was the proper party to set up the plea, and, indeed, according to some of the authorities, it was his duty to do so. Bird v. Houze, Speers Eq. 255. See, also, remarks of Carroll, Ch., in Hinton v. Kennedy, 3 S. C. 478; and see, also, the case of Shewen v. Vanderhorst, 1 Russ. & M. 349, 2 Russ. & M. 75, as stated in 2 Wms. Ex. 1283, in these words: "Under the common decree in an administration suit, a creditor

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applied to prove *a debt which was barred by lapse of time, and, the executor refusing to interfere, the plaintiff, a residuary legatee, insisted upon setting up the objection of the statute. Sir John Leach, M. R., held that it was competent for the plaintiff or any other person interested in the fund to take advantage of the statute before the master, notwithstanding the refusal of the executor, and this decision was confirmed by Lord Brougham on appeal."

The next question raised by the appeal is whether the sealed note presented by James B. Dawkins has been satisfied by his acceptance of the promissory note now held by Mrs. Stringfellow, and by his canceling and surrendering the sealed note to the intestate. The question whether one security is taken in satisfaction or as a mere substitute for another is a question of fact dependent upon the proof of the intention of the parties. If the intention is that the new security shall operate as a payment or extinguishment of the other, then such will be the effect of the transaction. Here both the referee and the Circuit judge have found the fact to be that the intention was to extinguish the larger note by the smaller, and we think their finding is fully supported by the evidence. The larger note was canceled and surrendered to the maker and remained in his possession up to the time of his death, and, in fact, should now be regarded as legally in possession of the administrator, for the return of it to the attorney of the payee by one of the family of the intestate after his death, and after this action was commenced, was altogether unwarranted and cannot be allowed to affect this question. The canceling and surrendering the note to the payee was the same in effect as if the payee had, upon the receipt of the smaller note, burnt or otherwise destroyed the larger note as a means of utterly extinguishing the debt secured by it.

The fact that the new security was a smaller amount and of inferior rank does not alter the result. The old artificial rule, which has no foundation in reason and ought not to be extended, but which has prevailed ever since Pinnell's Case (5 Co. 117), that the payment of a less sum than the whole amount due, on the day when the debt matures or afterwards, cannot be a satisfaction of the debt, applies only to a payment in money, and, therefore, when something other

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than money is accepted in *satisfaction of the debt it will be discharged, even though the value of the thing so accepted should be far less than the amount of the debt. Here the thing received in satisfaction of the debt was not money, and the rule does not apply, but the effect of the transaction must be determined by the intention of the parties.

So, too, the fact that the note received in satisfaction was a promissory note, and, therefore, inferior in rank, cannot affect the result. In Peters v. Barnhill, 1 Hill 236, a sealed note was allowed to operate as payment of a judgment. In Dogan v. Ashbey, 1 Rich. 36, a promissory note was held to be

payment of a judgment. In Mayer v. Mordecai, 1 S. C. 398 [7 Am. Rep. 26], confederate treasury notes, which were never money in any legal sense, but simply promises to pay, having been accepted, even by a trustee, in payment of a bond secured by a mortgage, by the legal owner of the bond, it was held that the bond was extinguished and the mortgage satisfied. So in numerous cases of a like character the same doctrine was held. It is clear, therefore, that there was no error on the part of the Circuit judge in holding that the sealed note to James B. Dawkins was extinguished by his acceptance of the note now held by Mrs. Stringfellow in satisfaction thereof.

It is also urged by the appellants that the claim in favor of Choice against the estate of J. P. Dawkins, assigned to Mowry & Son, is embraced in the mortgage debt held by them, and that any payment made on the Choice debt out of the assets of the estate should operate as a payment on the said bond and mortgage, and that the Circuit judge erred in not so ordering. We do not understand that anything is adjudged upon this point by the Circuit decree, as there was no exception to the referee's report bringing the question before the Circuit judge. All that is there adjudged is that the proceeds of the sales of the real estate shall be applied: 1. To the costs of the case. 2. To the debts of the intestate, as ascertained and allowed by the referee, amongst which is the Choice claim assigned to Mowry & Son. 3. To the mortgage debt due to Mowry & Son. 4. That the residue, if any, be held by the clerk until the further order of the court. If, therefore, it be true, as alleged by appellants, that the amount due on the mortgage debt to Mowry & Son has

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*never been judicially ascertained, that, of course, will have to be done before the Circuit decree can be fully carried out, and in doing this the appellants may then raise the question whether the amount applied to the Choice debt, now held by Mowry & Son, out of the assets of the intestate, should operate as a payment pro tanto on the mortgage debt to Mowry & Son.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 216

(Case No. 1112.)

WILSON v. KELLY.

(April Term, 1881.)

[1. *Bankruptcy* ⇐421.]

A discharge in bankruptcy operates as a bar to an action on an antecedent debt, but does not extinguish it.

[Ed. Note.—Cited in Nichols v. Briggs, 18 S. C. 485; Lanier & Co. v. Tolleson, 20 S. C. 62; Sartor v. Beaty, 25 S. C. 303, 306; Fowler v. Wood, 31 S. C. 404, 10 S. E. 93, 5 L. R. A. 721; Amaker v. New, 33 S. C. 34, 11 S. E. 386, 8 L. R. A. 687; Duckett v. Pool, 33 S. C. 242, 11 S. E. 689; Park v. Brooks, 38 S. C. 304, 17 S. E. 22; Jackson v. Plyler, 38 S. C. 501, 17 S. E. 255, 37 Am. St. Rep. 782; Jennings v. Parr, 62 S. C. 321, 40 S. E. 683; Ex parte Wilson, 84 S. C. 451, 66 S. E. 675.

For other cases, see Bankruptcy, Cent. Dig. §§ 772–774, 776, 777, 779–781, 783–786, 788–790; Dec. Dig. ⇐421.]

[2. *Bankruptcy* ⇐418; *Descent and Distribution* ⇐80; *Executors and Administrators* ⇐294.]

A son gave to his father a note for slaves purchased, and afterwards became a bankrupt and was discharged. The father died intestate after the emancipation. *Held*, that until the son accounted for this indebtedness, he was not entitled to receive any portion of his father's estate.

[Ed. Note.—Cited in Bobo v. Vaiden, 20 S. C. 281; In re Covin's Estate, Id., 475; White v. Moore, 23 S. C. 461; Small v. Usher, 77 S. C. 115, 57 S. E. 623; Ex parte Wilson, 84 S. C. 450, 66 S. E. 675.

For other cases, see Bankruptcy, Cent. Dig. § 764; Dec. Dig. ⇐418; Descent and Distribution, Cent. Dig. § 293; Dec. Dig. ⇐80; Executors and Administrators, Cent. Dig. § 1173; Dec. Dig. ⇐294.]

[This case is also cited and affirmed in Sartor v. Beaty, 25 S. C. 294.]

Before Hudson, J., Kershaw, June, 1880.

This was an action for the settlement of the estate of Wiley Kelly, who died intestate in 1873, instituted by his daughter, Emily C. Wilson, against Jane K. Kelly, Geo. W. Kelly, J. F. Kelly, W. D. F. Kelly and other distributees of the intestate, and John R. Shaw, administrator, and others. Upon the single point brought by the appeal to this court the case is fully stated in the opinion.

Mr. J. D. Kennedy, for appellant.

Mr. W. D. Trantham, contra.

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*November 16th, 1881. The opinion of the court was delivered by

McIVER, A. J. Wiley Kelly died intestate in 1873, and this action was instituted by the plaintiff, as one of his heirs-at-law and distributees, against the administrator and the other heirs-at-law and distributees, for account and partition. A note, under seal, executed by the appellant, W. D. F. Kelly, dated November 24th, 1858, and payable January 1st, 1860, to the intestate for $6,600, with sundry credits endorsed, was found among the papers of the intestate. The proof was that this note was given to secure the payment of the purchase-money of seven slaves, bought by W. D. F. Kelly from his father, the intestate, Wiley Kelly. On February 4th, 1868, W. D. F. Kelly filed his petition in the District Court of the United States, praying to be adjudged a bankrupt, and in March, 1871, he was duly discharged in bankruptcy. This, he claimed, released him from the debt

to the intestate, secured by the above-stated note, and that he is, therefore, now entitled to receive from his father's estate his full distributive share, without accounting for the balance due on the note. The master reported otherwise, holding that W. D. F. Kelly still owed the note, though he was discharged from any liability to suit thereon, and that he must account for the balance due on the note before he could receive his distributive share of the estate. To this report, exceptions were filed, which were overruled by the Circuit judge, who sustained the view taken by the master, and from his judgment this appeal has been taken. Under the view which we take of this case we do not think that the question of advancement or the question of legal set-off, discussed with much ability in the argument here, can properly arise, and need not, therefore, be considered.

We think it quite clear that a discharge in bankruptcy operates, like a successful plea of the Statute of Limitations, not as a payment or extinguishment of the debt, but only as a bar to an action thereon. Hence, where a debtor has been discharged in bankruptcy, while the legal obligation to pay the debt is gone, the moral obligation remains, because the debt is still unpaid, and it constitutes a

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sufficient consideration to sup*port a promise to pay the debt, just as in the case of a debt barred by the Statute of Limitations; for, if the debt was paid, or otherwise extinguished, there could be no moral obligation to pay it which would serve as a consideration for a new promise. That these views are fully supported by authority may be seen by reference to the cases collected in Bump Bankr. Pr. 644, seventh edition.

The effect of these principles, when applied to this case, is that the appellant still owes the debt to his father's estate, although the right to enforce its payment by an action has been destroyed by the discharge in bankruptcy. This being the case, the result is that the debt thus due by the appellant constitutes a part of the assets of the estate which is now in the hands of the appellant; and, if this be so, then nothing would seem to be plainer or more strictly in accordance with equitable principles than that the appellant should account for these assets before he can be entitled to receive anything out of the other assets of the estate. The practical result is that the assets for distribution consist of the amount due by the appellant added to the other assets belonging to the estate, and he having already received the amount now in his hands, in the form of the debt due by him, cannot be allowed to receive anything more until the other distributees have received out of the other assets an amount equal to that which he has already received.

These views are fully supported by authority. In Courtenay v. Williams, 25 Eng. Ch. R., 3 Hare 539, it was held that in a suit by a legatee to obtain payment of the legacy out of the assets of the testator, in a due course of administration, the executor might retain so much of the legacy as was sufficient to satisfy a debt due from the legatee to the testator, although the legal remedy for the recovery of such debt was, at the time of the death of the testator, barred by the Statute of Limitations. The remarks of Sir James Wigram, Vice Chancellor, in discussing this question, appear to be so appropriate to the case now under consideration that we cannot do better than to adopt his language. In speaking of a debt upon which the right of action has been lost or destroyed, leaving, however, the debt unpaid, he says that "it has been repeatedly

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decided, and is settled law, *that if a creditor, by means of a lien or other lawful means, can pay himself, without resorting to an action against the person of the debtor, he may lawfully do so." And, after reviewing the cases, he says this "is a suit to recover a legacy out of assets—that is, claiming a portion of the assets in the hands of the executor, and the claim is not made in any other way. The case is the same as if the assets were in the hands of the accountant-general. Now, to say that the right remains and the remedy only is barred, is, in a case like this, the same thing as saying that the legatee has already in his hands, to the amount of the debt, those assets of the testator which he seeks by his suit. Several ways of putting the case may be suggested in support of the argument on the part of the executors. They may say to the legatee, 'We admit your right to the legacy; you have assets of the testator in your hands; pay your legacy pro tanto out of those assets,' as in Jeffs v. Wood, 2 P. Wms. 128, and Campbell v. Graham, 1 Russ. & M. 453. Again, the executor might say: 'You ask for a portion of the assets of the testator, but you, yourself, are a debtor to the testator's estate, and his assets are diminished pro tanto by your default; it is against conscience that you should take anything out of the estate until you have made good what you owe to it;' and the equity of a trustee to impound the interest of a cestui que trust in the trust fund under such circumstances is clear [citing various cases]. To such a case, the rule that he who would have equity must do equity, would apply, by way of rebutter, to the plaintiff's demand."

This, as was held by Chancellor Walworth in Smith v. Kearney, 2 Barb. Ch. 533, is not a mere question of legal set-off, but of equitable right of retainer, which depends upon the principle that the legatee or distributee is not entitled to his legacy or distributive share while he retains in his own hands a part of the fund out of which that and other legacies or distributive shares ought

to be paid. In other words, as that distinguished chancellor, in substance, said, the legatee or distributee in such a case seeks to obtain a portion of the fund which the testator or the letters of administration placed in the hand of the executor or administrator for the purpose of paying debts and leg-

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acies or *distributive shares, while such legatee or distributee by withholding payment of the debt due by him diminishes the fund to that extent. It is, therefore, manifestly against conscience that he should receive anything out of the fund without deducting therefrom the portion of that fund already in his hands in the form of a debt due by him to the estate.

These principles apply as well to a case in which the debtor has been discharged in bankruptcy as to a case where the debt is barred by the Statute of Limitations, for, as we have seen, the effect in both cases is the same—merely to bar the right of action—leaving the debt unpaid, but without any legal remedy on the part of the creditor to enforce its payment. This seems to have been the view taken in Jeffs v. Wood, supra, and in several cases cited in 2 Wms. Ex. 936, to which cases, however, we have not been able to obtain access.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 220

(Case No. 1113.)

BANNISTER v. BULL.

(April Term, 1881.)

[1. *Wills* ⇐440.]

The intention of testator, to be gathered from the paper itself, is the first and great object of inquiry in the construction of a will.

[Ed. Note.—Cited in Lott v. Thompson, 36 S. C. 43, 15 S. E. 278.

For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. ⇐440.]

[2. *Wills* ⇐614.]

Where testator directed the balance of his estate, both real and personal, to be equally divided among his ten children, viz., "to my son, C., one equal part," and so on, naming eight in the same terms, and "to my daughter, J., one equal part during her natural life; after her death, to be equally divided among her children;" and the tenth share, in the same terms, to another daughter; the daughter J. took only a life-estate in the one-tenth part of this residuum, with a vested remainder to her children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393–1416; Dec. Dig. ⇐614.]

[3. *Wills* ⇐614.]

The words "balance of my estate," referred to what still remained of his own property, and the words "equally divided," referred to the size or quantity of his estate, and not to the manner, terms or conditions upon which the share was to be held.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393–1416; Dec. Dig. ⇐614.]

[4. *Wills* ⇐608.]

In the devise to J., the word "children" means immediate offspring, and is a word of purchase. The rule in Shelley's Case, therefore, does not apply.

[Ed. Note.—Cited in Smith v. Smith, 24 S. C. 315; Shanks v. Mills, 25 S. C. 362; Logan v. Brunson, 56 S. C. 10, 33 S. E. 737; Tindal v. Neal, 59 S. C. 11, 36 S. E. 1004; Robert v. Ellis, 59 S. C. 161, 37 S. E. 250; Mattison v. Mattison, 65 S. C. 355, 43 S. E. 874; Duckett v. Butler, 67 S. C. 135, 45 S. E. 137; Clark v. Neves, 76 S. C. 486, 57 S. E. 614, 12 L. R. A. (N. S.) 298.

For other cases, see Wills, Cent. Dig. § 1377; Dec. Dig. ⇐608.]

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[5. *Life Estates* ⇐8.]

*A purchaser from J., of lands acquired under this devise, could not hold adversely to the remaindermen until the life-estate terminated.

[Ed. Note.—Cited in Rice v. Bamberg, 59 S. C. 507, 38 S. E. 209.

For other cases, see Life Estates, Cent. Dig. §§ 24–28; Dec. Dig. ⇐8.]

[6. *Life Estates* ⇐8.]

The fact that such purchaser held a bond of indemnity from the remaindermen's deceased father, whose estate in part had been received by them, does not estop them from recovering this land.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24–28; Dec. Dig. ⇐8.]

[7. *Tenancy in Common* ⇐55.]

Two tenants-in-common may bring action against a stranger in possession of their land to recover their shares, without making the other co-tenants holding a third share in the land, parties to the action. But the verdict should be for only the aliquot part of the plaintiffs, even though the other tenants are before the court as defendants; and if the verdict is for the whole land, a new trial must be granted, as the court has no power to change such a verdict.

[Ed. Note.—Cited in Odom v. Weathersbee, 26 S. C. 248, 1 S. E. 890; Wilson v. Kelly, 30 S. C. 489, 9 S. E. 523.

For other cases, see Tenancy in Common, Cent. Dig. §§ 146, 154; Dec. Dig. ⇐55.]

[8. *Husband and Wife* ⇐207.]

Where an interest in remainder in land vested in a married woman before the adoption of the constitution of 1868, her husband is a necessary party to an action brought by her for its recovery after the death of the life-tenant in 1874.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 758; Dec. Dig. ⇐207.]

[This case is also cited in Hellams v. Switzer, 24 S. C. 46, without specific application, and in Whitaker v. Manson, 84 S. C. 29, 65 S. E. 953, and distinguished therefrom.]

Before Mackey, J., Orangeburg, January, 1881.

Action commenced September 6th, 1879, by Martha J. Bannister and Edward F. Reese against William H. Bull, William Fogle, Stephen Bannister, A. Z. Bannister and C. U. Bannister, for the recovery of a tract of land.

The plaintiffs and the defendant, W. H. Bull, both claimed title under the residuary clause of the will of Adam Shuler. It read as follows:

"The balance of my estate, both real and personal, I will and desire after my death to be equally divided among my ten children, viz., to my son Charles P., one equal share; my son Alexander, one equal part; my son Jacob F., one equal part; to my son Bennet, one equal part; my son Edward Y., one equal part; my son Willis, one equal part; my daughter Eliza, one equal part; my daughter Jennet, one equal part during her natural life, after her death to be equally divided among her children: my daughter Relvey, one equal part during her natural life, after her death to be equally divided among her children; my daughter Mahalah, one equal part. I have loaned to my son, Charles P., two negroes, namely, William and Birty, and to my son, Bennet, one negro named Gabriel. These negroes I will and desire to be divided among ten children above-mentioned and in the above-mentioned manner."

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*Jennet (Mrs. Reese) died in 1874 or 1875. Her husband, John Reese, died in 1857. Other facts are stated in the opinion of this court.

The exceptions correctly state so much of the requests to charge and of the charge to the jury, as is necessary to a full understanding of the points decided. They were as follows:

The defendant, William H. Bull, hereby gives notice that he excepts to the rulings of his Honor, T. J. Mackey, presiding judge of the said court, at the session thereof holden in January, 1881, made in the action above entitled, as follows:

1. Because he overruled the demurrer of the said William H. Bull.

2. Because, being requested by this defendant's counsel to charge "that under the will of Adam Shuler, his daughter Jennet Reese took a fee-conditional and not a life-estate, and that the children of Jennet Reese would take by limitation and not by purchase," he declined so to charge.

3. Because, being requested in like manner to charge "that if the jury believe from the evidence that Bennet Shuler occupied the tract in dispute adversely to Jennet Reese for more than ten years, their verdict must be for the defendant, William H. Bull," he declined so to charge.

4. Because, being requested in like manner to charge "that if the jury believe from the evidence that the plaintiffs, as heirs of John U. Reese, received estates greater in value than the land in dispute from him as his heirs-at-law, then they are estopped by his deed, and the verdict must be for the defendant, William H. Bull," he declined so to charge.

5. Because, being in like manner requested to charge "that a verdict cannot be found in favor of the defendants, Stephen Bannister, Charles U. Bannister and Altamont Z. Bannister," he declined so to charge.

6. Because, being in like manner requested to charge "that if a verdict be found in favor of the plaintiffs, it can only be for their aliquot part of the lands, not exceeding two-thirds thereof," he declined so to charge.

7. Because, being in like manner requested

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to charge "that as *to damages, if the verdict be for only two-thirds, the remaining one-third remaining in the defendant, William H. Bull, because not demanded by action, no damages can be recovered, except rents actually received and not rental value, and then only if W. H. Bull occupied all the land," he refused so to charge, and, on the contrary, charged the jury that the measure of damages is the rental value of the land in all cases.

8. Because, being in like manner requested to charge "that there is no testimony as to the rent actually received," he declined so to charge.

9. Because, being in like manner requested to charge "that if the jury believe from the evidence that the defendant, William H. Bull, has never occupied the part of the land in dispute, assigned and admeasured to the widow of Bennet Shuler as her dower, verdict cannot be found for the plaintiffs for that portion, as no trespass was proven," he declined so to charge.

10. Because, being requested in like manner to charge "that if the court holds that the estate of Martha Jane Bannister, as a child of Jennet Reese, vested at the death of Adam Shuler, then Rousam Bannister, her husband, has an estate in the land and is a necessary party and entitled to the rents and profits in her share for at least her coverture with him as tenant by the courtesy," he declined so to charge, and, on the contrary, charged that Section 137 of the code settled this question; she died six years ago, which was after the adoption of the constitution, and under Section 8, Article XIV., thereof, she has the right to bring an action and be sued as a married woman.

11. Because, being requested in like manner to charge "that if the court holds that the estate of Martha Jane Bannister was devised directly under the will of Adam Shuler, then Rousam Bannister has an estate in the land, and is a necessary party, during coverture being entitled to her share of rents and profits," he declined so to charge, and, on the contrary, charged "that Martha Jane Bannister could bring this action without joining with her husband."

12. Because he instructed the jury that Jennet Reese took a life-estate under the

residuary clause of Adam Shuler's will, and not a fee-conditional.

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*13. Because he declined to instruct the jury that the plaintiffs, as heirs of John U. Reese, receiving assets by descent, were estopped from disputing the title of Bennet Shuler and his assigns by their ancestor's deed to said Bennet Shuler.

14. Because he instructed the jury that they could find for the plaintiffs the whole of the land in dispute.

15. Because he instructed the jury that Jennet Reese could not divest the plaintiffs, her children, of their rights under the will of Adam Shuler.

16. Because he instructed the jury that if the will of Adam Shuler was recorded, such recording is ample notice to every party who proposes to deal with any portion of the estate to which the will relates.

17. Because his Honor refused the motion made by the defendant, William H. Bull, for a new trial of the said action.

Messrs. W. J. De Treville, J. F. Izlar and S. Dibble, for appellants.

Under the residuary clause of Adam Shuler's will, his daughter, Jennet, took an estate in fee-conditional in his real estate. 3 Mod. 45; 6 Id. 109; 2 P. Wms. 524; 2 McCord 67; 3 Rich. Eq. 78. The particular intent must yield to the general. 1 Burr. 50; 5 T. R. 303; 7 Id. 531; 1 East 229; 2 Wms. Ex. 978; 1 Barn. & Ald. 137; 12 East 515; 9 Ves. 566; 11 Rich. 509. The rule in Shelley's Case applies. 2 Jarm. Wills, ch. 37, 39, 40; 2 Barn. & Ald. 1; 1 Barn. & Ald. 720; 6 Coke 17; 9 Rich. Eq. 67; 1 Id. 404; 4 S. C. 18. This would make it an estate tail, or, in this State, a fee-conditional. 2 Bay 397; 9 Rich. Eq. 549. W. H. Bull is entitled to the benefit of the title by adverse possession acquired from Bennet Shuler. Cheves 204; 1 N. & McC. 307; 2 Brev. 155. No recovery can be had against W. H. Bull of the part of the land in dispute embraced in the dower tract admeasured to the widow of Bennet Shuler, for he has never been in possession of it. 1 McCord 466; 2 Bailey 81. The plaintiffs cannot, in any event, recover more than two-thirds. 2 Bay 457; 1 McCord 161; 4 Id. 144. The plaintiffs are estopped, as they

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received from *their father an estate greater in value than the land here in dispute. Big. Estop. 269–294. M. J. Bannister, being a married woman, has no capacity to sue. Pom. Rem. §§ 200–209; 12 N. Y. 211; 101 Mass. 339; 11 S. C. 71.

Messrs. Glover & Glover and M. I. Browning, contra.

The demurrer was properly overruled. 10 Rich. 369; Rules of Circuit Court, No. 18; Code Pro. §§ 141, 142, 168, 199; 2 Tillingh. & S. Pr. & Pl. 148, 1077; Wait's An. Code 239a. As to second, third, twelfth, thirteenth and fifteenth exceptions—2 McCord 75; Bailey Eq. 351; 3 Rich. Eq. 559; 2 Jarm. Wills 315, 344, 401, 406; 2 Blacks. Com. 110. Fifth exception—Code §§ 285, 298; 25 N. Y. 266; 2 Tillingh. & S. Pr. & Pl. 689 et seq.; 19 N. Y. 440; Pom. Rem. § 757. Sixth and seventh exceptions—2 McCord Ch. 440; 1 Hill Ch. 322; 2 Tillingh. & S. Pr. & Pl. 915; 11 S. C. 349; 6 Paige 273; 2 Bailey 215. Ninth exception—2 Bay 421; 11 Rich. 24; Wait's An. Code 794. Tenth and eleventh exceptions—Code § 137; 12 S. C. 592; Wait's An. Code 128; 1 Tillingh. & S. Pr. & Pl. 479; 7 S. C. 88; Wells Mar. W. §§ 42, 43, 71, 72. Sixteenth exception—see 9 Rich. Eq. 19; 6 S. C. 23.

November 17th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action to recover a tract of land. Adam Shuler died in 1848, leaving a will, which contained the following residuary clause: "The balance of my estate, both real and personal, I will and desire after my death to be equally divided among my ten children, viz.: To my son, Charles P., one equal share" [naming them all in the same way. And as to his daughter, Jennet, the words are]: "My daughter, Jennet, one equal part during her natural life; after her death to be equally divided among her children," &c. After the death of the testator his residuary estate was divided and the land in dispute was allotted to Jennet, who was then the wife of John Reese, and she and her husband duly conveyed it (1849) to her brother, Bennet Shuler, and Reese, the

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husband, in addi*tion, gave Shuler a bond of indemnity to secure him as to title. Shuler held possession until he died, during the late war (about 1863). The assets of his estate were marshalled, and in 1870 the land was sold subject to the claim of his widow, Mary E., in a part of it for her dower. At that sale the land was purchased by the defendant, W. H. Bull, who claims the same. The defendant, Fogle, is his tenant.

Jennet Reese died about six years ago, leaving surviving her two children, Martha Jane Bannister, wife of Rousam Bannister, and Edward F. Reese, the plaintiffs, and two grandchildren, Altamont Z. Bannister and Charles U. Bannister, children of a deceased daughter, Margaret, who died after the death of the testator but before the death of Jennet, leaving also a husband, Stephen Bannister. These heirs of Margaret refused to join in the action as plaintiffs, and were made defendants. Stephen Bannister answered, echoing the prayer of the plaintiffs for relief, but the sons, Altamont and Charles, did not answer at all.

The defendant, Bull, demurred for want of necessary parties plaintiff: First, because Stephen, Altamont and Charles Bannister were not made plaintiffs, and, second, be-

cause Rousam Bannister, the husband of Martha Jane, should have been joined with her as plaintiff, and without him she had not capacity to sue. The demurrers were overruled, and Bull answered, claiming title to the land, and that he had made improvements upon it. The case was heard on the merits, and, under the rulings of the judge, the jury found for the plaintiffs the whole land in dispute. The defendant, Bull, appeals to this court. The exceptions are long and numerous, being seventeen in number, and we will not attempt to follow them seriatim, but to consider all the points which should properly be decided at this time.

The leading question in the case, made by exceptions 2, 3, 12, 13 and 15, is as to the rights of the parties under the will of Adam Shuler. The plaintiffs claim that the will gave a fee-simple to "the children" of Jennet, who were in esse at the time the will took effect, subject to a life-estate which was carved out for Jennet. That at the

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time of testator's death she had three *children, viz., Martha Jane Bannister, Edward F. Reese and Margaret Bannister, (the latter of whom died before the life-estate fell in six years ago, leaving surviving her a husband, Stephen, and two children, Altamont and Charles,) in whom the remainder vested, and upon the death of the life-tenant, each of the living children was entitled to one-third of the land, and the heirs of Margaret together were entitled to the other third. The defendant, Bull, insists that the terms of the will gave a fee-conditional to Jennet; that upon the performance of the condition in having children, the title of the land became absolute in her so far as to authorize her to alienate, which she did to him, and he has good title.

In the construction of wills, the first and great object of inquiry should be, What was the intention of the testator? That intention must be gathered from the paper itself, and sometimes, from the inaccurate use of words which have a technical as distinguished from the ordinary meaning, there is difficulty in ascertaining the intention; but no such difficulty exists in this case. The word "estate" in the phrase "balance of my estate, both real and personal," manifestly referred to what still remained of his own property which he was about to give, and not to any of the parts to be given out of that residuum. So, too, in regard to the words "to be equally divided," reference was had to the size of the shares, and not to the terms or conditions which he might attach to any one of them. The word "equally," in its context, does not mean that the shares of the ten children were to be given and held in the same manner, but to be equal in quantity.

There is as little difficulty in regard to the word "children," the legal construction of which accords with its signification, namely, as designating the immediate offspring; for in all the cases in which it has been extended to a wider range of objects it was used synonymously with a word of larger import, as issue. 2 Jarm. 690, 5th Am. ed. The word indicates a class of persons, and not a line of indefinite descent, like "issue" or "heirs of the body." This is not a fee-conditional, for the reason that the land is not given to Jennet and the heirs of her body, but to her expressly for life. It is true that

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the rule in *Shelley's Case does apply in cases where the first taker has only an estate for life, but this is not a case for its application, for the reason that the land is given over to the "children," and not to her issue or heirs of her body. We understand that the rule in Shelley's Case applies only where the limitation over is to issue or heirs of the body. Chancellor Harper expressed it very clearly in the case of Williams v. Foster, 3 Hill 194, as follows: "By the rule in Shelley's Case, which has been an admitted and established rule of law for centuries, and the wisdom of which is more approved as it is better understood, it was determined that if an estate of freehold be given to the ancestor, and a remainder be therein limited to his heirs or to the heirs of his body, such remainder is immediately executed in possession in the ancestor so taking the freehold, and he takes an estate in fee or in tail, according to the terms of the limitation," &c. In this case an estate of freehold was given to the ancestor, but the remainder was not limited over to her issue or heirs of her body, but to "her children." There is nothing in the will which requires us to construe "children" as being equivalent to issue or "heirs of the body." It is a word of purchase, and they take per formam doni, and not by descent. Shearman v. Angel, Bailey Eq. 351 [23 Am. Dec. 166]; McLure v. Young, 3 Rich. Eq. 559.

It is true Jennet conveyed the land to Bennet Shuler, but she could convey no more than her life-estate, and her donee could not hold adversely to the remaindermen until their right to possession accrued at the death of the life-tenant. The children are not estopped by having received shares of the estate of their father, John Reese, whose bond of indemnity may, by possibility, make his estate liable over, but cannot affect their rights in the land. It was not error in the Circuit judge to hold that the plaintiffs are entitled to recover.

It is insisted, however, that the judge erred in overruling the demurrers for lack of necessary parties as plaintiffs. The heirs of Margaret, to whom her vested third had descended, refused to join in the action as plaintiffs, and were thereupon made defendants. The demurrers made the point that such omission was fatal. That is to say, the proposition is that one tenant in common cannot sue for his interest in land without

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joining with *him in the action, as plaintiff or defendant, all who have a similar interest, and Section 142 of the Code of Procedure is relied upon to sustain it. That section is as follows: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and where the question is one of a common or general interest of many persons, or where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the whole."

The case before us does not fall within the operation of this section. This is not a suit to partition land among tenants in common, in which it might be necessary to have all the co-tenants before the court as plaintiffs or defendants in order to have a complete determination of the questions involved. But this is purely a legal action for the recovery of land—an action of trespass to try titles against a stranger. The last paragraph of the section cited, allowing "one or more to sue for the benefit of others," does not apply to such a case, but was manifestly intended for creditors of an insolvent estate and cases of that character where the interest is in common. So, also, as to the first paragraph in regard to making all parties who are united in interest. That does not control this case, for the reason that the interests of co-tenants are not united. They may be said, in one sense, to have a common interest, but according to our decided cases they are not, as against a stranger, united in interest in the sense of this section of the code. They have interests in the same property while it remains undivided, but such interests are distinct. Each has a right to the extent of his share. Indulgence is extended in allowing tenants-in-common to join in an action against a stranger, but they are not required to do so. "Tenants-in-common may sever, and any one of them may bring ejectment for his share, and, upon proof, recover it, or may bring ejectment for the whole, and, upon proof, recover his share." Dorn v. Beasley, 6 Rich. Eq. 420, in the late Court of Errors, where the authorities are cited.

The heirs of Margaret refused to join in

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the action, and we *know of no rule of law which authorizes the court to make parties sue for what may be supposed to be their rights, or to withhold their rights from those who do sue, only for the reason that others having similar interests in the same property do not join. They had the right to refuse to sue. They may wish to have a separate suit for their interest or they may not intend to set up their rights at all. It was not necessary that they should be joined either as plaintiffs or defendants to enable Martha Jane Bannister and Edward F. Reese, who did sue, to recover to the extent of their shares.

But we think Rousam Bannister should have joined his wife, Martha Jane, in bringing the action. At the time the constitution was adopted the interest of Martha Jane, under the will of Adam Shuler, had vested, and her husband's rights had attached, although she was not entitled to the possession until the death of the life-tenant, which occurred after the adoption of the constitution. That instrument did not operate retrospectively so as to divest the interest of the husband, which still remains and might be levied for his debts. Bouknight v. Epting, 11 S. C. 72.

The fifth and sixth exceptions state that the Circuit judge, upon being requested, refused to charge the following proposition, viz.: "That a verdict cannot be found in favor of the defendants, Stephen Bannister, Charles U. Bannister and Altamont Z. Bannister, and, if a verdict be found in favor of the plaintiffs, it can only be for their aliquot parts of the land, not exceeding two-thirds thereof."

We think the refusal of the judge so to charge was error. We have already seen that the parties named as defendants were not necessary parties in order to determine the rights of those who were plaintiffs, and those rights were in no way enlarged by the fact that these parties were named as defendants.

This was an action at law tried by a jury, and the plaintiffs could not recover more than they, in their own right, were entitled to, only because those who owned the remaining share were before the court as defendants. Nor, could these defendants, whose position was antagonistic, have an interest in the verdict recovered against the defendants, including themselves.

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*Sometimes a judge, sitting as a chancellor, under the flexible rules of equity, may decide the rights of all parties, plaintiffs and defendants, but, under the rigid rules of law, no such course is possible in reference to the verdict of a jury. The general verdict of a jury for the plaintiff must be taken to be what it purports to be, and not partly for some of the defendants. So far as it regards rights of property, the verdict is a unity, and the court cannot declare that it is in part for the plaintiffs and in part for the defendants. If the verdict were in money, in favor of the right party and against the proper defendants, the court might indirectly reduce the amount by granting a new trial nisi. But we do not see how anything of that kind can be done in this case. This is not a special verdict under Section 285 of the code, but a general verdict in behalf of the plaintiffs for the land in dispute, and, as it stands, is an entirety, either right or wrong. We cannot change its terms by ordering it to

read two-thirds or one-third, instead of the whole land in dispute; nor, have we the right to declare that one-third of it is for those who were called in as defendants and do not ask it. Such practice, if followed, would make the record speak falsely and introduce confusion as to the rights of parties.

The judgment of this court is that the judgment of the Circuit Court be reversed and the case remanded for a new trial, with leave to apply to the Circuit Court for an order to amend by making Rousam Bannister a co-plaintiff with his wife, Martha Jane Bannister.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 231

(Case No. 1114.)

TARRANT v. GITTELSON.

(April Term, 1881.)

[1. *Appeal and Error* ⇐1050; *Evidence* ⇐142.]

Where, in action on a special contract for services rendered, the parties differ as to the compensation agreed upon, there is no material error in admitting testimony of the value of like services as bearing upon the reasonableness of the conflicting evidence, the jury being properly instructed to confine themselves to the issue involved.

[Ed. Note.—Cited in Edward & Walter v. Enterprise Bank, 87 S. C. 86, 68 S. E. 961; Crawford v. Rich & Hutchins Baltimore Co., 98 S. C. 121, 82 S. E. 273.

For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. ⇐1050; Evidence, Cent. Dig. § 422; Dec. Dig. ⇐142.]

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[2. *Pleading* ⇐248.]

*The complaint alleged that the defendant was "indebted to plaintiff in the sum of $100 for work, labor and services done," etc. Upon objection made by defendant to the introduction of evidence to prove a special contract, the trial judge permitted the plaintiff to amend his complaint so as to allege a special contract, and then received the evidence. *Held*, that the amendment was permissible under Section 196 of the code.

[Ed. Note.—Cited in Crane, Boylston & Co. v. Lipscomb, 24 S. C. 438; Sibley & Co. v. Young & Napier, 26 S. C. 422, 2 S. E. 314; Whitmire v. Boyd, 53 S. C. 341, 31 S. E. 306; Citizens' Savings Bank v. Efird, 96 S. C. 23, 79 S. E. 637.

For other cases, see Pleading, Cent. Dig. § 702; Dec. Dig. ⇐248.]

[3. *Continuance* ⇐30.]

The amendment was opposed by defendant, but time to answer was not asked for. It was within the discretion of the Circuit judge to allow the trial to proceed on the amended complaint.

[Ed. Note.—Cited in Richardson v. Wallace, 39 S. C. 223, 17 S. E. 725.

For other cases, see Continuance, Cent. Dig. §§ 99–112; Dec. Dig. ⇐30.]

[This case is also cited in Birlant v. Cleckley, 48 S. C. 298, 26 S. E. 600, and distinguished therefrom.]

Before Thomson, J., Abbeville, February, 1880.

The reporter has not been furnished with a brief in this case, but the opinion seems to state the case fully. The title of the case is M. M. Tarrant against I. Gittelson.

Mr. M. P. DeBruhl, for appellant.

Mr. T. P. Cothran, contra.

November 19th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. This was an action by the plaintiff, alleging that "the defendant is indebted to him in the sum of $100 for work, labor and services done and performed by the plaintiff for the defendant, at the request of the said defendant, at Abbeville Court House, S. C." The services were rendered by plaintiff as a clerk in defendant's store. The defense was a denial of each and every allegation of the complaint. The plaintiff offered to prove that the defendant was to pay him $25 for the first month, and, if he was pleased with his services, $50 per month after the first. Exception was taken that this proof could not be received, as no special contract was alleged in the complaint. The judge allowed the plaintiff to amend his complaint alleging a special contract and received the evidence.

Both parties alleged and relied on a special contract. The dispute was as to the sum to be paid the plaintiff, who gave testimony in reply; and a merchant swore that a clerk's services were more valuable in the latter

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months of the year, and gener*ally worth more than $25 per month; that plaintiff worked for defendant at the close of the year and until January. The Judge refused a non-suit, and, under his charge, the jury found for the plaintiff $48.75. The defendant appealed.

Upon motion of the defendant, the hearing in this court was suspended at November Term, 1880, to enable defendant, appellant, to make application to the Circuit Court (notwithstanding the pendency of the appeal) for a rehearing of the case on the ground of after-discovered evidence. 14 S. C. 620. Whether such application was ever made, this court is not informed. The parties now move for judgment on the original record.

The defendant filed the following exceptions:

1. "Because his Honor erred in allowing the plaintiff to amend his complaint without giving the defendant time to answer such amended complaint.

2. "Because the action was brought for a quantum meruit for services rendered by the plaintiff, and the amendment was in effect to allow the plaintiff to abandon the suit which he had brought, and to have an action upon the contract without the issuing of and service of a summons and complaint.

3. "Because it was an error in his Honor to refuse the motion for a non-suit, when the plaintiff, in his testimony, admitted there was a contract.

4. "Because it was an error in his Honor to admit testimony to show the value of plaintiff's services after a contract had been proved.

5. "Because it was an error in his Honor to forbid the defendant's attorney to comment upon such testimony in arguing the case to the jury, and afterwards to allow the plaintiff's attorney to comment fully upon such testimony, and then charge the jury to take such testimony into consideration in making up their verdict.

6. "Because it was error in his Honor to charge the jury that the certificate of character which the defendant had given the plaintiff was the best evidence of plaintiff's services, when said certificate fixed no value upon plaintiff's services at all, thus determining the quantity and sufficiency of the evi-

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dence, which *was solely the province of the jury." The sixth exception has not been pressed in this court.

The fourth and fifth complain of the admission of testimony as to the value of plaintiff's services. Upon an issue as to the existence or non-existence of a special contract to pay for services at a specified price, testimony generally as to the value of such services was not directly pertinent, but we can see that it might have some small bearing upon the credibility of witnesses as tending to prove or disprove the reasonableness of their testimony. The report of the judge makes a different case from that indicated by the exceptions. He says: "Inasmuch as both parties relied upon a special contract, the court endeavored to narrow the argument of counsel to the issue, What contract was made by the parties? This effort may not have been wholly successful; but if the jury listened to the instructions of the court, any argument not strictly upon the issue could have had no weight with them. The jury were instructed to exclude from their consideration the question of the value of plaintiff's services as the ground for a recovery. * * * That all the testimony was before them, and, in coming to a conclusion, such parts of the testimony as would support the statements of the one or the other of the parties as to the contract made should be weighed, and in this connection the wages of clerks generally, or the value of their services, might be considered."

Thus explained, and the jury carefully guarded as to the issue, and how the testimony should be considered, we cannot say that there was a material error in admitting it.

As to the first, second and third exceptions: Upon the proof of a special contract being offered, the court allowed the plaintiff to amend his complaint so as to cover the case made. Was that error? The Code of Procedure favors amendments. Its great object, as declared, was to prevent a failure of justice arising out of mere technicalities in the forms of pleading. All that it requires is that the complaint shall contain "a plain and concise statement of facts constituting a cause of action without unnecessary repetition." The complaint in this case alleged that the defendant was indebted to the plaintiff for "work, labor and services," but did not state that these services were rendered

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*under a special contract per month. The complaint certainly informed the defendant of the general nature of the claim, so that he was not taken by surprise. If it was necessary to amend the complaint so as to make it conform to the exact state of facts, (Pom. Rem., § 542,) the Circuit judge had the right, "in furtherance of justice," to order it made under Section 196 of the code, which provides that "the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change, substantially, the claim or defense, by conforming the pleading or proceeding to the facts proved." Gen. Stat. 611–12; S. C. Railroad Co. v. Barrett, 12 S. C. 174.

The defendant objected to the order allowing the amendment on the ground that "he would be surprised and was not ready to meet the new complaint by proof;" but it does not appear in "the case," that when the amendment was made, he moved for further time to answer, as was done in the case of Coleman v. Heller, 13 S. C. 491. The judge says: "The amendment, however, did not seem so great as to be a surprise, and plaintiff was allowed to proceed." We cannot say that this was error. The Circuit judge in such matters must have large discretion. The amendment was germane to the matter. It was really more formal than substantial. It made no new case between new parties, but only put in particular form the claim for compensation already made in the original complaint. Under the old system of pleading it would have been styled the addition of a special to the common counts of the declaration.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

16 S. C. *236

*(Case No. 1115.)

COUNTY OF RICHLAND v. MILLER, CLERK OF COMMISSIONERS.

(April Term, 1881.)

[1. *Counties* ⟸217.]

For moneys alleged to be due to Richland county, an action may properly be brought in the name of "The County of Richland."

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 348; Dec. Dig. ⟸217.]

[2. *Counties* ⟸74.]

The clerk of the board of county commissioners from 1872 to 1876 was entitled to charge for the number of days he was actually and necessarily employed in discharging the duties of his office, and was not limited to the days his board was in session.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 105; Dec. Dig. ⟸74.]

[3. *Counties* ⟸57, 206.]

The accounts of such officer for his services as clerk having been duly audited by the board of county commissioners and ordered to be paid, their action, in the absence of mistake or fraudulent collusion, cannot be disregarded by a succeeding board, nor suit maintained by the county to recover back moneys received on the accounts so audited.

[Ed. Note.—Cited in State ex rel. Cummings v. Kirby, 17 S. C. 565; State ex rel. Myers v. Appleby, 25 S. C. 103; State ex rel. Bank of Marlboro v. Covington, 35 S. C. 260, 14 S. E. 499; Tinsley v. Union County, 40 S. C. 284, 18 S. E. 794; State ex rel. Lockwood v. Adams, 63 S. C. 191, 41 S. E. 82; State ex rel. J. Fraser Lyon, Atty. Gen. v. State Dispensary Commission, 79 S. C. 333, 60 S. E. 928; State ex rel. People's Bank of Greenville v. Goodwin, County Supervisor, 81 S. C. 424, 62 S. E. 1100; State ex rel. People's Bank of Greenville v. Goodwin, 59 S. E. 37.

For other cases, see Counties, Cent. Dig. §§ 74, 325; Dec. Dig. ⟸57, 206.]

[This case is also cited in State ex rel. School District v. Rice, 32 S. C. 100, 10 S. E. 833, without specific application.]

Before Mackey, J., Richland, November, 1880.

Action commenced in May, 1878, by the county of Richland against Daniel B. Miller, as clerk of the board of county commissioners for Richland county.

The facts are sufficiently stated in the opinion of this court. The case seems to have been referred to the master, upon whose report the case was heard by the Circuit judge, without a jury. His findings of fact and conclusions of law were as follows:

Findings of Fact. 1. That the defendant was clerk of the board of county commissioners for Richland county from January 1st, 1874, to January 1st, 1877.

2. That during that period he rendered accounts against the county which contained illegal charges, as alleged in the complaint, amounting to the sum of $2,091.

3. That the said charges were audited, and the sum of $796.62 paid thereon to said defendant out of the county funds, at the times alleged in the complaint and exhibit.

4. That $57 of said sum so illegally charged and paid were for certain days' services

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which the defendant had previously *been paid for, and the remaining $739.62 were for days on which he did not render any service required of him by law as clerk of the board, and it is proved by the minute books of the board that the board did not meet on those days.

5. That the accounts of defendant themselves do not state what were the services charged for.

Conclusions of Law. 1. The words, "The County of Richland," used in the complaint, are a proper designation of the plaintiff.

2. The board of county commissioners were not acting as a court, but merely as an auditing board in passing upon the accounts in question, and their proceedings were ex parte as regards the county; therefore, the county is not concluded by their decision.

3. The defendant should have stated in his accounts what were the services he charged for on each particular day.

4. It having been proved that the board of county commissioners was not in session on the days for which the illegal charges sued on were made the burden of proof was on the defendant to prove that those days were actually and necessarily employed by him, as clerk of the board, in the discharge of his duties under the statute. On the contrary, he does not prove that he rendered any particular service upon any particular day of any week in the year; and the services he testified to as having been rendered by him, such as superintending the building of the court house, examining, approving and reporting on claims, &c., were not such services as devolved upon the clerk under the statute. But, in fact, in so doing he was assuming to himself the functions of the entire board. Still less should he receive pay for the entire day, when he examined, as he states, only one account.

It is, therefore, ordered and adjudged, that the plaintiff have judgment against the defendant for the sum of $796.62, with interest thereon from the dates when the several payments aggregating that sum were made to said clerk.

And it is further ordered and adjudged,

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that the said illegal *charges named in the above findings of fact be canceled, and that the said accounts of the defendant be corrected accordingly. And the defendant is hereby enjoined from collecting, and the county treasurer of Richland county is enjoined from paying the unpaid pro rata portion of said illegal charges. And the county commissioners are enjoined from drawing any order or orders therefor.

It is further ordered, that all moneys now in the hands of the county commissioners or

the county treasurer for Richland county, to the credit of said D. B. Miller, or which may hereafter be in their hands or in the hands of either of them to his credit, be applied to the payment of this judgment, and that said county commissioners and said county treasurer are enjoined from paying any of the accounts of said D. B. Miller against said county, which he holds either as the original payee, or as assignee, or otherwise, until this judgment is satisfied.

The defendant appealed upon the following exceptions:

First. The defendant, Daniel B. Miller, excepts to the findings of fact numbered 2, 4, 5.

Second. The defendant excepts to the conclusions of law numbered 1, 2, 3 and 4.

Third. The defendant further excepts to the said judgment, and submits the following grounds therefor:

1. Because the court erred in ordering and adjudging, "That the plaintiff have judgment against the defendant for the sum of $796.62, with interest thereon from the dates when the several payments aggregating that sum were made to said clerk."

2. Because the court erred in ordering and adjudging, "That the said illegal charges named in the above findings of fact be canceled, and that the said accounts of the defendant be corrected accordingly. And the defendant is hereby enjoined from collecting, and the county treasurer of Richland county is enjoined from paying the unpaid pro rata portion of said illegal charges. And the county commissioners are enjoined from drawing any order or orders therefor."

3. Because the court erred in ordering and adjudging further, "That all moneys now in the hands of the county commissioners or the county treasurer for Richland county, to the

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credit of *said D. B. Miller, or which may hereafter be in their hands or in the hands of either of them to his credit, be applied to the payment of this judgment, and that the said county commissioners and the said county treasurer are enjoined from paying any of the accounts of the said D. B. Miller, which he holds either as the original payee, or as assignee, or otherwise, until this judgment is satisfied."

Messrs. Melton & Clark and Youmans, attorney-general, for appellant.

Messrs. Bacon & Moore, contra.

November 19th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. Daniel B. Miller, the defendant, was clerk of the board of county commissioners for Richland county from January 1st, 1872, until 1876. During that period, from time to time, he rendered his account for services as clerk of the board, which were audited, approved and ordered to be paid by the board. Some of the accounts have been paid in full, others in part, and the remainder are still outstanding as unpaid county claims.

In the year 1877, a commission was appointed by the Governor to investigate the indebtedness of the county of Richland under the "Act to investigate and ascertain the actual bona fide indebtedness of the various counties in the State, and to regulate the manner of paying the same." 16 Stat. 312. The duty of the commission was to report, in writing, a statement of said bona fide indebtedness to the board of county commissioners and to the general assembly at its next session thereafter. This commission, after laborious and careful inquiry, rejected the claims of the defendant as clerk of the board of county commissioners, in so far as the same contained charges for services rendered upon days on which the board did not meet for the transaction of business. They ascertained that for the whole period the defendant was clerk, he charged for six hundred and seventy-eight days on which the board

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did not meet, amounting, *at $3 per day, to the sum of $2,034, of which the defendant had received, at various times, in part, $739.62. Besides it was admitted that there was a mistake of nineteen days, which amounted to $57, wrongfully charged.

This report was placed in the hands of the grand jury of the county, which recommended "that the solicitor be ordered to take such legal steps as may be necessary for the protection and good of the county as suggested by the said report of the said commission."

Accordingly, this action was brought in the name of "The County of Richland," under the recommendation of the grand jury, for the purpose of recovering back from the defendant so much of said accounts alleged to be illegal as had been paid to him, and also for the purpose of enjoining the payment of the remainder. The defendant made defense that the county could not sue by the designation "The County of Richland," denied that the claims were illegal, and insisted that, the county commissioners having audited and allowed the claims, the county was concluded by that action until reversed or set aside.

The cause came on to be heard before Judge Mackey without a jury, who held: 1. That "The County of Richland" was the proper designation of plaintiff. 2. That the county was not concluded by the action of the board of county commissioners upon the claims of the defendant. 3. That certain of the charges contained in defendant's accounts were illegal, as they were for services rendered upon days on which the board did not meet. The judge gave judgment for said alleged illegal charges, which had been paid by the county, viz., $796.62, and for the cancellation of the remainder, and enjoined Miller from collecting, and the county commis-

sioners and county treasurer from paying any accounts held by the defendant against the county. From this judgment the defendant appeals to this court.

This case was heard in connection with that of "The County of Richland v. Daniel B. Miller, as Clerk of the Court of Common Pleas,"† which is to be re-argued, but, as this case does not involve the difficulties which made a re-argument of the other necessary, we will now deliver the judgment in the case.

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*We will consider the exceptions of defendant:

First. As to the capacity of plaintiff to sue. Section 28 of Chapter XVIII., Gen. Stat., under the head of "Counties and their Corporate Powers," declares that "Richland county is bounded as follows," &c., and in Section 34 declares that "Each county shall be a body politic and corporate for the following purposes: To sue and be sued," &c., but neither this act nor the constitution anywhere declares in express terms what shall be the title of Richland county as a corporation. The meaning of the phrase, "The County of Richland," seems to us to be precisely equivalent to that of "Richland County." It appears that the two forms of expression are used indifferently in the constitution and laws, and we cannot say that the expression, "The County of Richland," is not a proper designation of the plaintiff. The question is really one only of words. A corporate body is merely ideal and does not move until put in motion. In some of the States where counties have such bodies as our board, the practice is to sue in the name of such board. In New York, the county is required by law to sue in the name of its board of supervisors. There is no such provision in this State, but this is substantially an action by the present board of county commissioners of Richland county; for, if a recovery should be had, the money could only be received by the treasurer, the financial agent of the county, under the direction and control of the county commissioners.

Second. The defendant further insists that the complaint to recover back money paid does not state facts sufficient to constitute a cause of action. He denies that any of the items were illegal, but, if so, as they were regularly audited and ordered to be paid by the board of county commissioners for Richland county for the time being, he insists that the plaintiff is estopped from recovering back money which has been paid upon claims so audited, and that it was error in the Circuit judge to rule that "The board of county commissioners were not acting as a court in passing upon the accounts in question, but merely as an auditing board, and their proceedings were ex parte as regards the county, and, therefore, the plaintiff is not concluded by their decision." We believe the

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point is new in this State, and cer*tainly it is one of importance. We will not now enter into the inquiry whether the particular items of the accounts indicated in the complaint were, as alleged, illegal or overcharges, but confine ourselves to the question whether the board of county commissioners, who were in office at the time, and audited and paid the claims, had the power to consider and decide that question, so as to preclude the county of Richland from now disregarding that audit and recovering back the money paid thereon.

The question is purely legal, and cannot, in any way, be affected by the report of the commissioners appointed by Governor Hampton to investigate the indebtedness, or the presentment of the grand jury of the county. This is not a suit to set aside the action of the board of county commissioners for fraud in officials or for other cause, nor is it an effort by the present board of county commissioners to revise the audit of their predecessors, but, ignoring that action as if it had never taken place, it is an action at law in the nature of an action of assumpsit for money had and received by the defendant, which he ought not to retain, but which ex equo et bono belongs to the plaintiff.

This case rests upon peculiar grounds, and it will not be necessary here to consider the character of the organization and the jurisdiction of the board of county commissioners in auditing accounts generally.

In reference to the compensation of the clerk of the board, the law provided as follows: "Each board of county commissioners shall appoint some proper person to be their clerk whenever necessary, and may remove him at pleasure, whose general duties it shall be, &c. * * * Said clerk shall take the oath prescribed by the constitution. He shall receive a reasonable compensation for his services, to be fixed by the board, not to exceed three dollars per day for the time actually and necessarily employed," &c.

This was the law during the whole time in which these services were rendered. By the act of 1877, "to reduce the pay of county commissioners and their clerks," (16 Stat. 235,) the pay of county commissioners was reduced from three to two dollars per day for each day actually consumed in the service of their respective counties, and the pay of

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clerks was reduced to *two dollars per day "for each day employed and allowed by their respective boards, but not in excess thereof; provided, that not more than one hundred days shall be allowed to any clerk for any one year," &c. In 1880 (17 Stat. 509) the law was again amended so as to allow the county commissioners for Richland county pay for one hundred days, and their clerk "not in excess of two hundred days in any one year."

†See next case, post.

But, at the time the accounts of the defendant were rendered and allowed, there was no limit to the number of days in any one year in which the clerk might be employed and be paid for. We are unable to see anything which made it unlawful for the clerk to charge for more days that the board was in session, provided he was actually and necessarily employed. The law fixed no limit, and it is not perceived that the nature of the clerk's duties were confined to days when the board was in session. The last act upon the subject (1880) provides pay for the county commissioners for one hundred, and for their clerk two hundred days in the year, which would seem to indicate that, in the view of the legislature, the duties of the clerk could not be performed in the same time in which the commissioners could discharge theirs. It may be that the defendant was required to perform services for an ignorant and inexperienced board which were beyond the range of his appropriate duties as clerk. It may be possible, although the proof seems to be to the contrary, that the county commissioners for the time being, allowed their clerk, who did most of their business for them, pay for more days than he was "actually and necessarily employed," but the law made them the exclusive judges of the matter. The clerk was entitled to reasonable compensation, "to be fixed by the board," and the action of the board in auditing and ordering paid the accounts of defendant cannot now be disregarded by the present authorities of the county, and the money paid recovered back, except in case of mistake or fraudulent collusion. "So, when it is necessary for county supervisors, in passing upon an account presented against the county for services rendered, to determine the number of days of actual service, their decision as to this matter will be regarded as a judicial decision, and not

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subject to revision by proceedings *in mandamus." High Extr. Rem. § 345; People v. Supervisors of Livingston County, 26 Barb. 118.

The clerk of the board of county commissioners is not one of the officers upon whom the law imposes a penalty for charging excessive fees, and the complaint in this case contains no cause of action for a penalty.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial, unless the plaintiff shall, within ten days after written notice of this judgment, remit upon the record of the Circuit Court all of the amount recovered in excess of the sum of $57, admitted by the defendant in his answer to have been overpaid him by mistake.

SIMPSON, C. J., and McIVER, A. J., concurred.

16 S. C. 244

(Case No. 1266.)

COUNTY OF RICHLAND v. MILLER, CLERK OF COURT.

(April Term, 1881.)

[1. *Counties* ⇐217.]

"The County of Richland" and "Richland County" are equivalent phrases, and in an action by that county, either designation may be used.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 348; Dec. Dig. ⇐217.]

[2. *Judgment* ⇐547.]

The board of county commissioners is not a court in such sense that its record may be pleaded in bar as evidence of a former recovery, or as res judicata in respect to a claim against the county allowed by the board.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 992; Dec. Dig. ⇐547.]

[3. *Counties* ⇐206.]

While not a court, it is the agent of the county in regard to all matters within the scope of its agency. As to all such matters requiring discretion and determination, their acts are quasi-judicial and binding upon the county until set aside for fraud or collusion in a direct proceeding brought for that purpose; but those involving the exercise of no judgment, are ministerial, and, if erroneous, are void.

[Ed. Note.—Cited in Wheeler v. County of Newberry, 18 S. C. 135; Walpole v. City Council, 32 S. C. 555, 11 S. E. 391.

For other cases, see Counties, Cent. Dig. § 325; Dec. Dig. ⇐206.]

[4. *Counties* ⇐207.]

Where the board acts upon claims fixed in character and amount by law, as salaries, tax costs, &c., their action involves no discretion, but is purely ministerial.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 324; Dec. Dig. ⇐207.]

[5. *Counties* ⇐94.]

The county may recover, from a clerk of court, moneys illegally or excessively charged by him for fees in State cases, even where his accounts have been audited by the board of county commissioners, approved by the Circuit judge, and warrants issued for their payment, and payment received from the county treasurer.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 132; Dec. Dig. ⇐94.]

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[6. *Counties* ⇐89.]

*An action to recover the penalty for fees illegally charged, may be instituted by any party injured by the charge, and is not confined to parties to the cause in which the fees were taxed. Therefore, for illegal and excessive fees charged against a county, or collected from it, by a clerk of court, the county may bring action for the penalty prescribed by law, and their right to recover cannot be affected either by the action of the board of county commissioners in approving the account, or by the payment of the money by the county treasurer.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 135; Dec. Dig. ⇐89.]

[7. *Pleading* ⇐80.]

In action to recover, on a first cause of action, a sum of money, for fees illegally collected, made up of several items, and on a second cause of action for a penalty for such illegal charges, the answer interposed a plea "that in respect to many of the items constituting the said alleged cause of action, they are barred by

the Statute of Limitations in such case made and provided." *Held*, that this plea was not separately stated so as to make it intelligibly distinguished as a defense to the second cause of action, and was, therefore, insufficiently pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 183; Dec. Dig. ⟸80.]

McIver, A. J., dissenting.

Before Mackey, J., Richland, October, 1879.

The opinion fully states the case.

Messrs. John E. Bacon, A. C. Moore and John R. Abney, for plaintiff.

Messrs. Melton & Clark, and Youmans, attorney-general, contra.

August 19th, 1882. The opinion of the court was delivered by

McGOWAN, A. J. This cause was heard at April Term, 1881, and as it involved questions of importance and difficulty, the court ex mero motu ordered it re-argued at November Term, 1881. The court has now reached a conclusion, which I am directed to pronounce.

Daniel B. Miller was clerk of the court of Richland county from January 1st, 1870, to January 1st, 1877. During that period, from time to time, he rendered his accounts against the county for costs alleged to be due him in

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certain cases prosecuted *in the sessions, in which the defendants had been discharged from inability to pay costs, &c. These accounts, as to form, were regular, approved by the presiding judge of the Circuit, and audited for payment by the board of county commissioners then in office. Some of these accounts were paid in full, and others in part, leaving balances which are still held as outstanding claims against the county of Richland.

In the year 1877, a commission was appointed by the governor to investigate the indebtedness of the county under the "Act to investigate and ascertain the actual bona fide indebtedness of the various counties in the State, and to regulate the manner of paying the same." 16 Stat. 312. This commission reported that in the accounts of the defendant, as clerk of the court, before referred to as allowed, he had made overcharges to the amount of $2,127.55, and recommended that the penalty of ten times the amount overcharged provided by law be enforced. The legislature adopted no plan for settling the indebtedness of the county of Richland as they did in regard to the indebtedness of the county of Charleston in the "Act to provide for the funding the debt of Charleston county" (16 Stat. 695; see Holmes & Calder v. Charleston, 14 S. C. 146); but the grand jury of the county of Richland recommended that the solicitor be ordered to take such legal steps as might be necessary for the protection of the county as suggested by the said report.

This action was brought, setting forth two causes of action—the first, to recover back $1,309.82, alleged to have been paid on the illegal charges, and to cancel those claims so far as they had not been paid; and the second, to recover $21,275.50, being the penalty of ten times the amount of the alleged overcharges. The defendant put in several defenses: That the plaintiff, as styled "The County of Richland," had not capacity to sue; denied that he had made any charges not authorized by law, and averred "that in respect to many of the items constituting the said alleged cause of action, they are barred by the Statute of Limitations in such case made and provided." The case was heard by Judge Mackey, without a jury, who held that the county could sue in the style of "The

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County of Richland," overruled the *demurrers in the answer, and gave judgment for the defendant on the second cause of action, but for the plaintiff on the first, for the money paid on the audited accounts held by him to be illegal, $1,309.82, and the judgment went on to order the audited accounts, held to be illegal, and not yet paid, to be canceled; and to enjoin the county commissioners and the county treasurer from paying the same, or any accounts held by the defendant in his own right, or as assignee, until the judgment was paid. Both parties appealed—

The defendant upon the following exceptions:

Third. "The defendant further excepts to said judgment, and submits the following grounds therefor:

1. "Because the court erred in deciding that 'from these findings of fact, and conclusions of law, it appears that the charges as set forth in the complaint and exhibits are illegal.'

2. "Because the court erred in ordering and adjudging 'that the plaintiff have judgment against the defendant for the sum of thirteen hundred and nine dollars and eighty-two cents, with interest thereon from the dates when the several payments aggregating the sum were made to the said clerk.'

3. "Because the court erred in ordering and adjudging 'that the said illegal charges named in the above finding of facts be canceled, and that the said account of the defendant be canceled accordingly; and the defendant is hereby enjoined from collecting, and the county treasurer of Richland county is enjoined from paying the unpaid pro rata portion of the said illegal charges, and the county commissioners are enjoined from drawing any order or orders therefor.'

4. "Because the court erred in ordering and adjudging further 'that all moneys now in the hands of the county commissioners or the county treasurer for Richland county, to the credit of said Daniel B. Miller, or which may hereafter be in the hands of either of them, to his credit, be applied to this judgment; and

that the said county commissioners and said county treasurer are enjoined from paying any of the accounts of the said Daniel B. Miller against said county, which he holds, either as original payee, or as assignee or otherwise, until this judgment is satisfied.'"

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*First as to the capacity of the plaintiff to sue. This court has held in a case lately decided, ante page 236, in which the defendant, Miller, was a party, that the plaintiff could sue by the designation of "The County of Richland," which is equivalent to the phrase "Richland County."

The defendant further insists that the first count does not state facts sufficient to constitute a cause of action. He denies that any of the items were illegal, but if so, as they were regularly audited by the board of county commissioners, the county cannot recover back money paid upon claims so audited, and that it was error in the Circuit judge to rule that the "board of county commissioners were not acting as a court in passing upon the accounts in question, but merely as an auditing board, and their proceedings were ex parte as regards the county."

We will not now enter into the inquiry whether the particular items of the accounts were, as alleged, illegal, or overcharges, but confine ourselves to the question whether the board of county commissioners who were in office at the time and audited the claims, had the power to consider and decide the different items so as to preclude the county of Richland from disregarding that audit. This is not an action to set aside the audit of the board for fraud or collusion with the defendant, nor to revise it; but ignoring that, it is in the nature of an action of assumpsit to recover money which ex equo et bono belongs to the county; and, therefore, the solution of the question depends, to a large extent, upon the jurisdiction of the board of county commissioners.

The constitution in Section 19, Article IV., provides that "the qualified electors of each county shall elect three persons for the term of two years, who shall constitute a board of county commissioners, which shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursements of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties; provided, that in all cases there shall be the right of appeal to the State courts."

The Legislature has passed acts defining the powers and duties of county commissioners, which acts provide that county commissioners elected under the constitution

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shall have jurisdiction *in all matters relating to taxes and disbursements of money for county purposes, "To examine, settle and allow all accounts chargeable against such county, and draw orders on the county treasurer for the same, but no allowance beyond legal claims shall ever be allowed," &c. 15 Stat. 985.

The board of county commissioners is an important body. As was said in the case of Ostendorff v. Charleston, 14 S. C. 308, "It is the local administrative body of the county. The powers and duties of all the county boards (previously existing) were united in the board of county commissioners, and others, no less important, were added, including the payment of contingent accounts formerly paid by the State." The Circuit judge held that the board, in passing upon the accounts, was not acting "as a court," but merely as an auditing board, and, therefore, its action might be disregarded, and money paid under its order recovered back.

It is not easy to give an exact definition of a court, or to state what is indispensably necessary to constitute one. There are various kinds of courts, classified from the nature and extent of their jurisdiction, as courts martial, superior and inferior courts, and courts of general jurisdictional and local courts. The term seems to be general, without any well defined signification. In the case of Ex parte Childs, 12 S. C. 118, it was held that "The Court of Claims," established by the act of March 22d, 1878, (16 Stat. 555,) was not a court in the sense of the term as used in the constitution, so that the Supreme Court could issue to it a writ of certiorari. It is there said that the question must be tested, not by the nature of the instrumentalities employed, "but rather from the objects which the legislature had in view in creating it, and the scope and extent of its powers."

Some of the powers incident to a court have undoubtedly been conferred on the county commissioners, but they are styled a board and not a court; its members are called commissioners, not judges; it was not created by the legislature under the judicial section (Article IV., § 1,) of the constitution, giving the power "to establish such municipal and other inferior courts as may be deemed necessary," but by the constitution itself. It does not proceed according to the forms gen-

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erally deemed *essential to a court with parties before it as plaintiff and defendant, but in a summary way, without formal pleadings, evidence or record. It has no process to enforce its judgment, except the very efficient one of giving orders on the county treasurer for their payment. The right of appeal generally indicates judgment pronounced between parties, but the right of appeal here given could not have been intended for the benefit of the county, as one of the parties before a court, but for the persons presenting county claims. The commissioners for the time, being the only medium through which the county acts, it could

not have been foreseen that an occasion would arise when the county or the people of the county, as distinguished from the commissioners, would be under the necessity of appealing as a suitor. Chicot County v. Tilghman, 26 Ark. 462.

In that case the party presented against the county a note. The commissioners ordered it paid by the county. The county attorney and other citizens made an effort to appeal in behalf of the county, and the court dismissed the appeal, saying: "As we have seen, the county court was vested by law with the power 'to audit, settle and direct the payment of all demands against the county.' From the judgment of the county court, in auditing, settling and directing the payment of demands against the county, an appeal is given, but this appeal only extends to such persons as may have an interest in the claim, and who feel aggrieved by the allowance or rejection of their demand; it has no reference to the citizens of a county, who are not interested in the allowance of the claim. The idea of a county appealing from the allowance of a claim made by its own county court is simply ridiculous. The county courts represent the county," &c.

We do not think that the board of county commissioners is a court in such sense that its record may be pleaded in bar as evidence of a former recovery, or res adjudicata in respect to a claim against the county allowed by the commissioners.

It does not, however, follow that the action of the board in auditing accounts is, in all respects, a mere nullity and may be entirely disregarded by the successors. The board is not a court, but it is the agent of the county in regard to all matters embraced

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*within the scope of its agency. While there may be successive boards composed of different individuals, the county remains the same, and the action of each board, upon matters fairly within its jurisdiction and submitted for the exercise of its judgment, is so far binding upon the county that it cannot, in a collateral manner, without the charge of fraud, ignore or disregard that action.

The commissioners are elected to decide between the county and those having claims against it, and it is not reasonable to regard their action as entirely without force, but, at the same time, there is some difficulty in determining the precise extent of that force. Several of the States have county boards similar to ours, called indifferently, "county courts," "boards of supervisors" and "county commissioners;" notably, New York, Illinois, Missouri and Arkansas; and in these States the extent of the powers and the precise effect of the action of such boards have been much discussed. Different views have been taken, and the cases are far from being in accord. The better opinion seems to be that, as to matters which require discretion, judgment, their acts within their jurisdiction are quasi-judicial, and binding upon the county something like the award of a board of arbitrators, unless they are assailed for fraud or collusion in a direct proceeding for that purpose; but their acts, which involve the exercise of no discretion or judgment, but are purely ministerial, if erroneous or against law, are void.

The case recently decided by this court against the defendant, Miller, as clerk of the board of county commissioners, is an example of the former class. In that case the law then of force did not fix the value of the clerk's services, but declared that he was entitled to reasonable compensation, to be fixed by the board, and in doing so it was necessary for them to determine the number of days he was actually and necessarily employed. High Extr. Rem. § 345; People v. Supervisors of Livingston County, 26 Barb. 118; Big. Estop. 173.

But in respect to the effect of the action of the board, there is a difference between acts quasi-judicial and those which are purely ministerial. In regard to the latter, nothing is submitted for the exercise of their

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judgment, and they are not the agents *of the county to hear and determine, but simply its ministerial officers. As to all claims against the county which are liquidated by law, determined in character and fixed in amount, such as salaries, tax costs, &c., the commissioners are entrusted with no duty but to put them in proper form and have them paid as the law directs—the amount fixed by law—nothing more and nothing less. If they refuse they may be compelled to do so by mandamus. The State ex rel. Marshall v. Starling, 13 S. C. 266. In that case it is said: "The county commissioners have no discretion to allow or reject this claim. It is for a salary, and need not be audited. It is fixed by law and ordered to be paid. It is the duty of the county commissioners to check for a salary fixed in amount and ordered to be paid by the county, as a ministerial act positively required by law."

Suppose, in that case, the commissioners had undertaken to double the salary, and had issued their check for $1,200 instead of $600, can there be any doubt that the action, as against the county, would have been beyond the scope of their agency, and void? "Counties are political corporations, and, as such, their powers are strictly construed. The power to audit and settle claims against the county must be confined to such claims as the county had authority to contract." English v. Chicot County, 26 Ark. 454.

In the State of Missouri, it seems that the County Court performs the duties usually performed by courts of Probate, and also that of auditing county claims. In that State, the distinction we are considering

was very clearly made in the case of Carroll County v. Roberts, 60 Mo. 404. The court says: "A distinction was, however, made in the cases of Marion County v. Philips, 45 Mo. 79, and Owens v. Andrew County, 49 Mo. 372, which, we think, a sound one. Settlements made with the County Court in regard to administrators, guardians, &c., may properly be considered as judicial acts, since they are judgments of a court on proceedings inter partes in which there is notice required, and in which the county and the court are not interested. In settlements with collectors, it is a mere accounting between principal and agent, or between a supervisory agent and the subordinate. I refer

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to the opinion of Judge Bliss, in 45 *Mo. 171, where the learned judge has fully discussed the point and established this discrimination with the sanction of all the court."

In this State the county commissioners are authorized "to examine, approve and order paid all county claims, and to draw orders upon the county treasurer for the payment of the same; but no allowance or payment beyond legal claims shall ever be allowed." The costs allowed the clerk of the court are fixed by law, and as to these items of tax costs, the duty of the commissioners was purely ministerial. In respect to them, neither their allowance nor their amount is left or committed to the commissioners, whose duty is to put them in form, vouch them, and draw checks for them upon the treasurer. Whenever the county commissioners undertake to approve such accounts for sums larger than those fixed by law, they act beyond the scope of their agency, and such acts are not binding upon the county.

Our conclusion is as to plaintiff's first cause of action, that it does not matter whether the commissioners, in passing upon the accounts, were acting as a court, or merely as an auditing board, such action, until set aside, should have been respected, in so far as it was judicial, or quasi-judicial, in its character, the result of hearing and determining matters submitted to their judgment, but that it could not stand in the way of recovering back the erroneous excess, in so far as it related to tax costs fixed by law, as to which their duty was purely ministerial.

The plaintiff also excepts upon the ground that it was error to hold—"That the penalty of ten times the amount of fees sued for in the second cause of action is intended by the acts to be given to a party to a cause who has been charged an excessive fee; and the county, not having been a party to any of the causes in which these illegal charges and overcharges were made, is not entitled to recover the said penalty."

We think this was error. The acts which prescribe the penalty are as follows: "If any officer herein named shall charge any other fees, or for any other services than those herein recited, such officer shall be liable to forfeit to the party injured ten times the amount of excess of fees so improperly charged, to be recovered by suit in the Court of

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Common Pleas, *in which no imparlance shall be allowed," &c. Act 1839, 11 Stat. 14.

In 1872, this was re-enacted substantially, (Gen. Stat. 186,) and also in 1874 (15 Stat. 608). The right to sue for the penalty is "to the party injured," which means the real or artificial person injured by the excessive fees, and not necessarily a party to a cause. The services, for which the clerk is allowed to charge fees are often required to be done when no regular cause has been instituted, such as taking renunciation of dower, recording deeds, &c., &c. The county, as we have seen, practically, has no appeal from the action of its own officers, the county commissioners, which may result in depriving it of redress as to the allowance of excessive claims by those who are merely citizens, but as to certain officers, the law has prescribed a penalty for making excessive charges, and as to these, it is particularly important that the county, as a corporate body, should not be deprived of the right which all other injured parties have to sue for such penalty. It was held in the case of Greenville County v. Runion, 9 S. C. 1, that "the county of Greenville was a 'person aggrieved'" by the defalcation of the county treasurer, and, as such, could maintain an action on his official bond.

This action, for the penalty, is a distinct and separate remedy, independent of all agency of the board of county commissioners. As to this action, the audit of the accounts by the board with a view to payment, and even their actual payment, works no estoppel to the county, the party injured. The wrong intended to be punished was the charging of excessive fees, an act alone of the officer who makes such charges. The claim, so far as tax costs were concerned, needed no audit, the amount was fixed by law, and for charging excessive fees the penalty was also fixed by law, to be recovered in the Court of Common Pleas. If illegal charges have been made, the fact that they were allowed by the county commissioners cannot sanctify them or make legal that which was illegal, for the board of audit may have acted ignorantly or corruptly, and by allowing illegal claims only aggravated the wrong.

Upon the issue as to charging excessive

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fees, the fact that such *fees had been allowed by the board, would not be conclusive as matter adjudged, but, as we suppose, like any other pertinent fact, would be admissible only for what it was worth. Nor should the fact that such accounts have been partly paid, affect the action for the penalty, which is given to the party injured as satisfaction for the wrong done, which wrong was certainly

not diminished but rather aggravated by enforced payment. Palmer v. Conly, 4 Denio 374; Tinsley v. Kirby, 8 S. C. 113.

The fifth defense is in these words: "This defendant avers that in respect to many of the items constituting the said alleged cause of action, they are barred by the Statute of Limitations in such case made and provided." As a plea of the Statute of Limitations, this is certainly very indefinite and informal. The objection that the action was not commenced within the time prescribed can only be taken by answer. Jones v. Massey, 9 S. C. 391. The defendant has the right to set forth in his answer as many defenses as he may have, "but each must be separately stated and refer to the cause of action which it is intended to answer, in such manner that they may be intelligibly distinguished." Code, § 173.

This defense does not purport to refer to any but one cause of action. If it were entirely regular in form, both by its terms and as explained in argument, it only refers to some of the items—those of 1870 and 1871—sued for in the first cause of action. We think, as a plea, it is not "separately stated so as to make it intelligibly distinguished" as a plea to the plaintiff's second cause of action for the penalty. It was error in the Circuit Court to overrule the second cause of action for the penalty.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the cause be remanded to the Circuit Court for a new trial, according to the principles herein indicated.

SIMPSON, C. J., concurred.

McIVER, A. J., dissenting.

As I cannot concur in the conclusions

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reached by a majority of *the court, I propose to state, as briefly as possible, the grounds of my dissent.

The board of county commissioners are the representatives or agents of the county for certain specified purposes, one of which is to examine and allow or disallow all claims against the county, and, therefore, their action, within the scope of their powers, is the action of the county itself, and, in the absence of any charge of mistake or fraud, absolutely conclusive against it. For, while the constitution does provide for the right of appeal, yet this must be regarded as a right secured to those presenting claims against the county, as it would be anomalous—not to use any stronger term—to say that the county could appeal from the act of its own agent. Hence, when the board has acted upon any matter within its jurisdiction, such action, even though erroneous, is final so far as the county is concerned, and the only remedy is that to which all other persons, natural as well as artificial, must resort, who are so unfortunate as to employ faithless or incompetent agents, viz.: To discharge those who have proved themselves to be inefficient or unworthy of trust, and employ others who are more honest and efficient.

It seems to me, therefore, that when the accounts of the appellant against the county of Richland were audited and approved by the board of county commissioners, such action of its own agents was conclusive against the county, and could only be assailed for fraud or mistake in a direct proceeding for that purpose

New trial granted.

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16 S. C. 256

(Case No. 1116.)

WITTE v. WOLFE.

(April Term, 1881.)

[1. *Husband and Wife* ⇐159.]

A married woman may contract as surety for her husband, and thereby make herself and her separate estate liable for the payment of the debt.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 629; Dec. Dig. ⇐159.]

[2. *Husband and Wife* ⇐169.]

A married woman has express authority, under the act of 1871, (14 Stat. 325; Gen. Stat., Ch. C., § 2,) to mortgage a tract of land conveyed to her sole and separate use after the passage of that act.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 660–670, 702, 949, 951; Dec. Dig. ⇐169.]

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[3. *Husband and Wife* ⇐169.]

*A married woman, independently of the constitution of 1868 and the act of 1871, may execute a valid mortgage of a tract of land conveyed to a trustee in trust for the sole and separate use of such married woman, and "subject in all respects to her use, disposition, charge and control by deed or will, by her made, in all respects and to the same extent as though she were discovert and sole."

[Ed. Note.—Cited in Aultman & Taylor Co. v. Rush, 26 S. C. 529, 2 S. E. 402; Wallace v. Craig, 27 S. C. 519, 4 S. E. 74; Gleaton v. Gibson, 29 S. C. 516, 7 S. E. 833.

For other cases, see Husband and Wife, Cent. Dig. § 660; Dec. Dig. ⇐169.]

[4. *Trusts* ⇐79.]

Where lands are purchased by A., upon his individual credit, for the benefit of B., to be conveyed to B. when the purchase-money has been fully paid, there is a resulting trust in favor of B., and a mortgage of such lands executed by B. is valid and binding, subject to the right of A. to have the balance due on the purchase-money paid out of the proceeds of sale.

[Ed. Note.—Cited in Lake v. Shumate, 20 S. C. 30.

For other cases, see Trusts, Cent. Dig. § 111; Dec. Dig. ⇐79.]

[5. *Bonds* ⇐62.]

In February, 1874, a bond was given by A. and B. to C., in the penal sum of $12,000, conditioned that A. and B. would pay to C. the "sum of $6,000 on the first day of January next,

with interest * * * and ship to C. for sale, on commissions of two and one-half per cent. 375 bales of cotton before said January 1st next, and pay, also, any balance that may then be due C. on any transactions in buying and selling cotton or otherwise on said January 1st next." This bond was secured by mortgage of lands of A. and of B. On the day before the maturity of this bond A. and B. gave their second bond to C., in the penal sum of $16,000, conditioned that A. would pay the sum of $8,000 * * * and ship 500 bales of cotton * * * and also pay to the said C. on the first day of January, 1876, any balance that may be due C. by A. on any transactions in buying or selling cotton or otherwise prior to said date last given," and this bond was in like manner secured by a mortgage of the same property. *Held*, that the first bond and mortgage were not satisfied upon the shipment of 375 bales of cotton, but that they also secured a balance of $5,567.62, due on the operations of 1874, although there were over 1,500 bales of cotton shipped, and this balance resulted from transactions in buying and selling cotton to an amount largely in excess of the penalty of the bond.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 63; Dec. Dig. ⟸62.]

[6. *Principal and Surety* ⟸97.]

If B. was a surety she was not discharged from her liability on the first bond by an allowance of one per cent. return commissions, credited to A. on all the cotton shipped after the receipt of the first 375 bales, in compliance with a promise made by C. to A. at the time this covenanted number were delivered, such return commissions being according to the custom of cotton factors.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 157; Dec. Dig. ⟸97.]

[7. *Principal and Surety* ⟸109.]

Nor, is she released from her liability on the second bond by a mortgage accepted by C. from B., calling for the delivery, at a future day, of thirty bales of cotton of a growing crop, as further security for a balance then due on such bond, there being no agreement for further indulgence on such indebtedness.

[Ed. Note.—Cited in State v. Scheper, 33 S. C. 581, 11 S. E. 623, 12 S. E. 564, 816; Providence Machine Co. v. Browning, 70 S. C. 155, 49 S. E. 325.

For other cases, see Principal and Surety, Cent. Dig. § 219; Dec. Dig. ⟸109.]

[8. *Payment* ⟸41.]

Where a debtor ships cotton to his creditor to be credited on a security which proves to have been already satisfied, the court, at the request of the creditor, may make application of the proceeds to any other indebtedness of such debtor to this same creditor.

[Ed. Note.—Cited in Frost & Co. v. Weathersbee, 23 S. C. 365.

For other cases, see Payment, Cent. Dig. §§ 115–120; Dec. Dig. ⟸41.]

[9. *Action* ⟸46.]

A cause of action for an unsecured demand arising on contract may be united with a cause of action for foreclosure of mortgage in one complaint.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 460; Dec. Dig. ⟸46.]

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*Before Hudson, J., Fairfield, September, 1880.

Action by George W. Witte and Arnim F. Witte, doing business as partners in a cotton factorage business under the firm name of Witte Brothers, against Saling Wolfe, Sarah S. Wolfe, Simon Baruch and other defendants, who were lien creditors of the two defendants first named. The several securities and demands, upon which this action was founded, and the balances due thereon, together with other facts explaining the case, are stated in the opinion of this court.

The Circuit decree, omitting its statement of the pleadings and order of sale, was as follows:

After hearing the elaborate arguments of the counsel upon these points, I am of the opinion that the mortgages are valid liens upon the separate estate of Mrs. Wolfe. The first bond is dated February 23d, 1874. This bond is secured by a mortgage of the lands of husband and wife, or of other persons held for her. The second bond is dated December 31st, 1874. This bond matured on January 1st, 1876, and is secured by a mortgage upon the same real estate as secures the first-mentioned bond. Both these bonds and mortgages are signed by the defendants, Saling Wolfe and Sarah S. Wolfe. Now, these cotton transactions were very extensive; large balances are due thereon, and the language of the condition of the bonds is very broad, and certainly covers whatever balances might be due thereon up to January 1st, 1876.

Subsequent to January 1st, 1876, a lien for advances during the year was given plaintiffs by the defendants, Saling Wolfe and Sarah S. Wolfe. It appears that in 1876, fifty-two bales of cotton were shipped by Saling Wolfe to the plaintiffs. The proceeds of this cotton must be applied as a credit on the indebtedness secured by this lien. The fifty-two bales netted $2,099.86.

There is no conflict as to the balance due by Mr. Wolfe; and for these balances, as reported by the referee, both he and his property, mortgaged to secure the same, are liable. But the principal contest is as to the liability under the mortgage of Mrs. Wolfe's separate property.

It was the well-established rule in South

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Carolina, prior to *the adoption of the constitution of 1868, that a married woman had no power to bind or charge her separate estate unless such power was expressly given her in the instrument by which such separate estate was created. Ewing v. Smith, 3 Desaus. 417. But in 1868, under the constitution, all this was exploded, and full power has been given her by the constitution and the act of January 27th, 1870, (14 Stat. 325,) to devise, bequeath and convey her separate estate; and she has also been authorized, in express terms, to make deeds, mortgages and other legal instruments. The act goes a bow-shot beyond the statutes of other States. In New York, under the New York statutes, the courts uphold the doctrine that a married woman cannot bind her separate estate by

contract, unless her intention so to do be expressed in the instrument creating the charge, or may be presumed from the nature of the contract itself. But in South Carolina, a married woman has been almost if not completely emancipated. But even in other States this contract would bind her, for her intention to bind her separate estate is therein stated in express terms, and cannot be disputed. What separate estate, then, has she? Certainly the tract conveyed by F. Copes to her directly is her separate estate and in fee.

The deed from Manus Baum to Simon Baruch, trustee, contains the following clause: "But subject, in all respects, to the use, disposition, charges and control of the said Sarah S. Wolfe, by deed or will by her made, in all respects and to the same extent as though she were discovert and sole." Under this clause she has the right to mortgage the property named in this deed. She can make a valid deed thereof and a valid mortgage, and it is bound by the mortgage.

Now, as to the deed from Shaw and McCants to Dr. Baruch, individually. Dr. Baruch has testified: "I do not know from what source the money [for the cash portion of the purchase-money and the credit portion of the purchase-money of the Shaw place] was derived. Mr. Wolfe induced me to enter into the purchase as a good thing, and I left him to attend to it for me. I always felt myself bound for the money until the bond was paid. Witness did not furnish the money himself. So far as his information goes, it

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was derived by Mr. Wolfe *from working the places. The place purchased from James B. McCants has been paid for in the same way, but I hold my titles to the Shaw place and the McCants place, though not by any agreement with anybody, still, as security, to protect myself against the balance due on the bond of James B. McCants." Dr. Baruch also testified that "It is witness' intention, after the money is paid, to convey these lands to Mrs. Wolfe and her children."

This testimony conclusively shows that, although the titles to these lands were taken by Dr. Baruch in his own name, the property was not paid for by him; but that, as he was and is liable for the credit portion of the purchase-money, he retained the titles in his own name as an indemnity against this liability. This creates in Baruch a resulting trust in favor of either Mr. Wolfe or Mrs. Wolfe (for which we need not consider; these latter have shown the light in which they regarded these lands, by including the tracts in the mortgages, and they cannot now say that they had no right to do so). These mortgages by husband and wife create valid liens on these premises. They had a right and a power to mortgage them, and the plaintiffs have a right to have the interest of Mr. and Mrs. Wolfe sold, and when sold the purchaser will take an absolute fee-simple estate. But Dr. Baruch must be indemnified, and whatever amount he may be liable for, on account of the purchase-money of these lands, must be first provided for out of the proceeds of their sale, that the lands may be resold free from all encumbrance.

The report of the referee as to the accounting is approved, except in so far as the same is modified by this opinion, from which the following will result:

The $4,000 bond, dated February 15th, 1875, has been adjudged satisfied in the case of Sarah S. Wolfe v. George W. Witte and Arnim F. Witte. The proceeds of twenty bales of cotton, sold in 1879, and directed to be applied to said bond in the mortgage of crop of 1878, and which were applied thereto by the referee in the account by him, are no longer applicable, the said bond having been satisfied before said cotton was raised and sold. The proceeds of this cotton should, therefore, be applied as a credit to the ac-

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count contracted in 1877, between *the plaintiffs and Saling Wolfe alone. Applying them, therefore, as credits of proper dates, this account becomes extinguished on October 29th, 1879. The credits subsequently applied to this account by the referee (being $79.14 overplus of payment of October 29th, 1879, and $540.27 paid on November 26th, 1879,) should be applied to the mortgage debts. So, applying them as credits of proper dates, the balance due on September 15th, 1880, upon the bonds secured by the mortgages of real estate, is $12,091.73, of which $7,743.82 is secured by the bond and mortgage dated February 23d, 1874, and $4,347.91 is secured by the bond and mortgage dated December 31st, 1874, alone.

On the account secured by the lien of Saling Wolfe and Sarah S. Wolfe, dated January 7th, 1876, after applying the proceeds of the fifty-two bales of cotton hereinbefore directed to be applied thereto, there remains a balance of $1,232.85, and for this sum a judgment must go against Mr. Wolfe and Mrs. Wolfe.

I have thus disposed of the various points made before me in this case, and will now sum up my conclusions of law and fact in the manner directed by the Code of Procedure.

I find as matters of fact:

1. That the bonds and mortgages sought to be foreclosed in this action were duly executed and delivered to the plaintiffs by the defendants, Saling Wolfe and Sarah S. Wolfe, at the times and upon the considerations mentioned in the complaint.

2. That said mortgages have been duly recorded.

3. That the bond, chattel mortgage and agricultural lien dated February 15th, 1875, and sued on herein, are satisfied and discharged.

4. That the balance of $7,743.82, reported

by the referee as due under the security of the bond and mortgage of date February 23d, 1874, is correct.

5. That the balance due on September 15th, 1880, under the security of the bond and mortgage of date December 31st, 1874, is $4,347.90, and that said balance is secured by said bond alone.

6. That the balance due on the account secured by the lien given by Saling Wolfe and Sarah S. Wolfe, dated January 7th, 1876, and now unsecured, is $1,232.85.

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*7. That there is nothing due upon the account between plaintiffs and Saling Wolfe alone.

8. That the deed from Manus Baum to Simon Baruch, trustee, contains a clause in words following: "But subject, in all respects, to the use, disposition, charge and control of the said Sarah S. Wolfe, by deed or will by her made, in all respects and to the same extent as though she were discovert and sole."

9. That the Shaw place has been fully, and the Vann place partially paid for with moneys derived from Saling Wolfe, or from the income and profits of land cultivated by him, either individually or as agent for Mrs. Sarah S. Wolfe.

10. That Dr. Simon Baruch is individually liable for the unpaid balance of the purchase-money of the Vann place.

11. That Dr. Simon Baruch holds in his own name the titles to the Shaw place and the Vann place, to indemnify him against loss by reason of his liability on either place.

Upon the foregoing facts I hold as matter of law as follows:

1. That under the constitution and laws of South Carolina, the bonds and mortgages and lien given by Mrs. Sarah S. Wolfe bind her and her separate estate as amply and to the same extent and in like manner as if she were sole.

2. That the trust deed from Manus Baum to Simon Baruch, trustee, gave Mrs. Sarah S. Wolfe a legal and valid power to pledge, by way of mortgage, the property therein mentioned.

3. That the transactions of Dr. Baruch, in the purchase of the Shaw and Vann places, create a resulting trust as to those places in favor of Saling Wolfe or Sarah S. Wolfe, as the case may be, which it is unnecessary and immaterial now to inquire.

4. That the interest and estate of Saling Wolfe and Sarah S. Wolfe in the Shaw place and the Vann place were legally mortgaged by them.

5. That such mortgage is that of the fee, subject to Dr. Baruch's right to be indemnified out of the proceeds of the sale of said places, against his liability for the purchase-money thereof.

6. That the mortgages mentioned in the pleadings are valid and subsisting liens on

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all the premises therein mentioned and *described, except that of February 15th, 1875, upon the personal property of Mrs. Sarah S. Wolfe.

7. That as between Mrs. Sarah S. Wolfe and her husband, she may be regarded as his surety, and she is entitled to have his property first sold in exoneration of her separate estate.

8. That the mortgages given in 1878 and 1879 by Saling Wolfe were merely additional securities to the bonds referred to by said mortgages, and, as they did not extend the time of payment, Mrs. Sarah S. Wolfe, even had she been, as to Witte Brothers, a surety, was not released from her liability upon the bonds and mortgages by her given jointly with her husband.

9. That the plaintiffs allowing Saling Wolfe a return commission on the cotton shipped in excess of that stipulated in the bonds and mortgages constitued in no respect a new contract quoad those bonds and mortgages, and, hence, could not have the effect of releasing Mrs. Sarah S. Wolfe, even if regarded as the surety of Saling Wolfe.

I am, therefore, of opinion that the plaintiffs are entitled to a judgment of foreclosure of said mortgages, and a sale of the tracts of land embraced in the same, and a judgment against the defendants, Saling Wolfe and Sarah S. Wolfe, for the unpaid balance of the lien account of 1876.

The exceptions of Sarah S. Wolfe are copied into the opinion. The exceptions of Saling Wolfe are substantially the same as those of his wife. The defendant, Baruch, filed three exceptions. The third is the same as the eighth of Mrs. Wolfe. The others were as follows:

1. Because his Honor erred in finding as matter of law that the defendant holds the Shaw place and the Vann place under a resulting trust in favor of Mr. or Mrs. Wolfe, and that said property, standing in his own name, and held by him as his individual property, could be mortgaged by Saling Wolfe and Sarah S. Wolfe for the debt of the former.

2. Because his Honor erred in permitting any such question to be made in this action.

Mr. S. P. Hamilton, for appellant.

Mr. J. H. Rion, contra.

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*November 19th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. On February 23d, 1874, Saling Wolfe and Sarah S. Wolfe, his wife, of Winnsboro, Fairfield county, executed to the plaintiffs their joint and several bond in the penalty of $12,000, conditioned for the performance of covenants, viz.: To pay $6,000 on the first of January then next, with interest thereon from date of advancement

at the rate of one per cent. per month, "and ship to them for sale, on commissions of two and one-half per cent., 375 bales of cotton before said first day of January next, and pay also to said Witte Brothers any balance that may be due to them on any transaction in buying and selling cotton or otherwise on said first day of January next, without fraud or further delay," &c. This bond, which, in the case, is called Exhibit A., was secured by a mortgage of real estate belonging to both Saling Wolfe and Sarah S. Wolfe, as follows: The Avick place, containing 100 acres; the Shurley place, containing 317 acres; the Weston place, containing 850 acres, and the Delleney place, containing 940 acres, belonging to Saling Wolfe; and the following four parcels, viz.: The Shaw place, containing 237 acres; the Vann place, containing 140 acres; the Leitner place, containing 100 acres, and the town lots in Winnsboro, belonging to the separate estate of Sarah S. Wolfe. The business did not stop at the amount secured by the bond, but during the year 1874 the plaintiffs advanced the sum $97,342.97, and they sold cotton for defendants which amounted to $87,097.37; this left a balance due at the maturity of the bond of $10,245.60. But reducing this by the sales of cotton, up to February 15th, 1875, there was then due $5,567.62, which was admitted by Saling Wolfe.

On December 31st, 1874, the business of that year had not been closed up, but it was known there would be a balance against Saling Wolfe and Sarah S. Wolfe, and on that day they executed to plaintiffs another joint and several bond in the penalty of $16,000, with the following conditions: "That if the above-bound Saling Wolfe, his heirs, executors and administrators, shall and do well and truly pay or cause to be paid unto the above-named Witte Brothers * * * the

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full and *just sum of $8,000 on the first day of January A. D. 1876, with interest thereon, as the same may be advanced by the said Witte Brothers to the said Saling Wolfe, from the dates of the advancements respectively, at the rate of one per cent. per month, computed by way of discount; and shall ship during the year 1875 to the said Witte Brothers 500 bales of cotton, to be sold by them on commission of two and one-half per cent.; and shall also pay to the said Witte Brothers, on the said first day of January, 1876, any balance that may be due by him on any transactions in buying or selling cotton prior to said date last given, without fraud or further delay," &c. To secure this bond, which is known as Exhibit B., a mortgage was executed by them upon the same real estate as secured the first bond.

On February 15th, 1875, Saling and Sarah S. Wolfe executed to plaintiffs another joint and several bond conditioned for the payment of $4,000 and interest, and the shipment of 200 bales of cotton on or before January 1st, 1876. This bond was secured by a mortgage of certain chattels, horses, mules, wagons, &c., purporting to belong to both Saling and Sarah S. Wolfe, but which belonged alone to Sarah S. This bond, which is known as Exhibit C., was also secured by an agricultural lien of even date given by both Wolfe and his wife. Under the security of these two bonds and mortgages last named, and the agricultural lien of 1875, the plaintiffs advanced during that year to the amount of $21,635.35, and cotton was delivered which paid the amount, except the sum of $3,853.88. These sums, with interest, were claimed by the plaintiffs in their first cause of action to be covered by the mortgage of which they prayed foreclosure and sale of the property.

On January 7th, 1876, Saling Wolfe and Sarah S. Wolfe executed an agricultural lien to secure further advances, and on February 21st, 1877, Saling Wolfe alone executed another agricultural lien to secure further advances, and on May 13th, 1878, he executed a mortgage on his crops of that year, and April 30th, 1879, another mortgage on the crops of that year, the last expressly for the purpose of further securing the past indebtedness. The balance due on these se-

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curities was claimed in the *second cause of action as a debt against Saling Wolfe and wife, but not secured by mortgage.

An action was brought by Sarah S. Wolfe against Witte Brothers to cancel the bond and chattel mortgage C., upon the ground that cotton, to wit, 134 bales, shipped under lien of February 15th, which provided that cotton shipped under that lien was to be applied to the payment of the bond secured by the chattel mortgage, should be so applied to the extinguishment of said bond and mortgage.

The defendants, Saling Wolfe, Sarah S. Wolfe and Simon Baruch, trustee, resisted the recovery, and insisted that Mrs. Wolfe signed the several bonds and mortgages only as security for her husband, and that being a married woman she had not legal capacity to bind herself by such a contract, and, consequently, the bonds and mortgages, so far as she was concerned, were void and her separate property not liable. And even if she was originally bound as surety, that the course of dealing between the plaintiffs and her principal, especially in so largely exceeding the business indicated by the amounts of the bonds and mortgages, not only released her as surety, but, in effect, paid and discharged entirely the bonds and mortgages as securities. If not that, she was discharged by new agreements between her principal and plaintiffs, and, in any view, that the defendants were entitled to a credit for the $4,000 bond secured by the chattel mortgage, to which the cotton shipped should be first

applied, and, if so applied, said bond was paid in full and should be eliminated from the account.

It was referred to a referee to take the testimony and state the accounts. He took much evidence, and stated the accounts substantially as related in the foregoing meagre outlines. He reported as due upon the several bonds secured by mortgage of Saling Wolfe and wife, the aggregate amount of $11,929.90; that there was due by them also upon the lien of 1876, $1,232.90, and by Saling Wolfe alone, on lien executed by him February 21st, 1877, the sum of $206.27.

The case came up before Judge Hudson on exceptions. At the same term of the court the case of Sarah S. Wolfe against Witte Brothers, to cancel the bond and chattel

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mortgage, was *tried. The judge decreed that the bond C. and chattel mortgage were, in effect, paid by the cotton which had been delivered by Saling Wolfe. In this case he confirmed the report of the referee in every respect, except as to the application of the proceeds of certain cotton, and as to that he made a small change, which he thought was made proper by the aforesaid decision in the matter of the bond and chattel mortgage, to which item more particular reference will be made hereafter. He held that the bonds and mortgages were not discharged; that Mrs. Wolfe, as well as her husband, was liable for the amount of $12,091.13, covered by the mortgages, for which he gave judgment, and ordered foreclosure by sale of all the lands embraced in them, and he also decreed against them both the sum of $1,232.85, due under lien of January 7th, 1876, but not secured. The defendants, Saling Wolfe, Sarah S. Wolfe and Simon Baruch, all appealed and filed exceptions, but the questions made can be considered under those of Mrs. Wolfe, which are as follows:

1. "That his Honor erred in finding that the bond and mortgage of February 23d, 1874, were not paid by the shipment of 375 bales of cotton, and the contract terminated on November 27th, 1874, as stated in the letter of Witte Brothers to Saling Wolfe.

2. "That his Honor erred in finding that this defendant is liable, under the bond and mortgage of February 23d, 1874, for balances against her husband, Saling Wolfe, incurred by the shipment to Witte Brothers of 1,209 bales of cotton after the termination of the contract stated in said bond.

3. "That his Honor having found that this defendant was surety for her husband, Saling Wolfe, on the bond for $6,000, dated February 23d, 1874, he erred in not finding that this defendant, as such surety, was discharged by the making of a new contract and agreement, without her consent, between Saling Wolfe, her principal, and Witte Brothers, the creditor, by the letter of the latter, dated November 27th, 1874, whereby the rate of commission allowed Saling Wolfe, of one per cent. return commission, was changed from that named in the bond.

4. "That his Honor having found that this defendant was the surety of her husband,

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Saling Wolfe, on the bond dated *December 31st, 1874, he erred in not finding as matter of law that the mortgage on the crop made by Saling Wolfe to Witte Brothers, dated April 30th, 1879, was a new agreement between the creditor and principal, without her knowledge or consent, by which an extension of time was granted to Saling Wolfe for the payment of said bond, and thereby this defendant, his surety, was discharged.

5. Not urged.

6. "Because his Honor erred in finding the balances against Saling Wolfe, as reported by the referee, as correct, when his decree in the case of Sarah S. Wolfe v. Witte Brothers has decided the bond for $4,000 and chattel mortgage to be paid and satisfied, and that amount is eliminated from the account of the plaintiff, and the report of the referee should have been recommitted to him to be recast in conformity with the decree in this case.

7. "Because his Honor found, as matter of law, that the defendant could bind her separate estate as surety for her husband, and this was error.

8. "Because he found that she could bind the property in Winnsboro, held under the trust deed of August 8th, 1868, from Manus Baum to Simon Baruch, without consent of her trustee.

9. "Because his Honor granted to the plaintiffs a money judgment against Saling Wolfe and this defendant on a joint contract made on agricultural lien dated January 7th, 1876, and decreed that it was a lien on her separate estate."

For the sake of clearness we will not attempt to consider the exceptions in their order, but under general heads according to their subject-matter.

First. The seventh and eighth exceptions deny that Sarah S. Wolfe, being a married woman, had the legal capacity to make a contract as surety for her husband, so as to make herself, or her separate estate, liable for the different bonds, mortgages and agricultural liens signed by her with her husband. In the case of Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 581 [40 Am. Rep. 705], just decided, this court held that under our present constitution and laws, a married woman may make a contract "as if

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she were *unmarried," and that the contract of suretyship is no exception. It is not necessary to repeat here the reasoning of that judgment, to which reference is made. In that case the married woman did not sign as surety for her husband, but for a mercantile firm, of which her son was a member,

but the law applies equally in the case of surety for her husband. In some of the States, limitations on this point have been imposed upon the wife's power to contract, but none have been imposed in our State. Here a wife can contract as surety for her husband as well as for any one else, only provided that the contract is upon sufficient consideration, and not made under circumstances which would avoid any contract for duress. Wright v. Remington, 12 Vroom (41 N. J.) 48. In that case it was held that "a threat by a husband, conveyed through a payee, that he will poison himself unless his wife signs a note as surety for him, does not amount to duress, such as will avoid her contract." In the case before us there is no evidence that improper means, undue influence or illegal persuasions, threats or solicitations were made use of for the purpose of inducing Mrs. Wolfe to sign the papers: certainly there is none intimating participation in or consent to such conduct on the part of the plaintiffs.

This question does not touch the tracts of land which belong to Saling Wolfe, viz., the Avick place, the Shurley place, the Weston place, and the Delleney place. As to the other tracts it will be necessary to consider further. The act of 1870 (14 Stat. 325) gives the power to a married woman to contract and be contracted with as if she were unmarried, and expressly declares that "all deeds, mortgages and legal instruments of whatever kind shall be executed by her (married woman) in the same manner and have the same legal force and effect as if she were unmarried." Under this act, Mrs. Wolfe had the right to mortgage the Leitner place, which, after the passage of the above act, March 9th, 1871, was conveyed by Frederick Copes "to Sarah S. Wolfe for her sole and separate use," &c.

Mrs. Wolfe had the right to mortgage the "town lots in Winnsboro," and all the land conveyed by the deed of Manus Baum to Simon Baruch, trustee, bearing date August 5th, 1868, after the adoption of the constitu-

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tion but before the passage of *the act above cited. The trusts of that deed are: that the trustee should hold "subject in all respects to the use, disposition, charge and control of the said Sarah S. Wolfe by deed or will by her made, in all respects and to the same extent as though she was discovert and sole." Without reference to the effect of the constitution, under this power she could charge the property specifically by mortgage, even according to the principles which were applied in this State before the constitution. "What constituted a charge upon the estate was simply a rule of evidence. All agree that when the wife had expressly charged the payment of a debt upon her separate estate, whether it be her own debt or the debt of another, such charge was valid and would be enforced, provided the power to do so was given by the deed." 1 Bishop, § 812; Yale v. Dederer and Wife, 18 N. Y. 265; Reid v. Lamar, 1 Strobh. Eq. 27; Ewing v. Smith, 3 Desaus. 418 [5 Am. Dec. 557].

As to the Shaw and Vann places, the facts are as follows: Simon Baruch, at the instance of Saling Wolfe, purchased them and gave his bonds for the purchase-money, but Wolfe and wife took possession and have had the rents and profits. Baruch testified that he did not hold this property by any secret trust, but in his own name; that he took title in his own name; did not pay the cash or any other part of the purchase-money, but, as Mr. Wolfe had induced him to enter into the purchase as a good thing, he left him to attend to that; did not know from what source the money was derived, but, so far as his information goes, it was derived by Mr. Wolfe from working the place; that he holds the title to both places to secure his liability for the balance of the bond still due to McCants for the Vann place, and that as soon as all the money was paid it was his intention "to convey these lands to Mrs. Wolfe and children." Under these circumstances the Circuit Judge decided that the purchase-money was paid by Saling Wolfe from the proceeds of the crops, and that there was a resulting trust in favor of Mr. Wolfe or Mrs. Wolfe, depending upon the fact whether the money came from his or her plantations, and in either case this interest was bound by the mortgage which was executed by both, subject to the right of Baruch to have the remainder of the purchase money now due

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*paid out of the proceeds of sale. We cannot say that this was error either in law or fact.

Second. The first and second exceptions make the point that the first bond and mortgage of February 23d, 1874, were paid by the shipment of 375 bales of cotton, and the contract terminated on November 27th, 1874, and it was therefore error to decree any balance arising out of the operations of the year 1874.

The second bond and mortgage were executed on December 31st, 1874, the last day of the calendar year, but the cotton season was not then closed, and it could not be known precisely what would be the result. It was known, however, that there would be a balance against Wolfe and his wife. The referee reports as matter of fact that there was a balance due on the transactions of that year, and so far as Saling Wolfe is concerned he never denied that there was such a balance which was covered by the bond, but year after year, on various occasions and in different forms, acknowledged it.

But it is insisted that the business of 1874 went largely beyond the amount of the bond, and that as soon as it overflowed the bond and mortgage they were, in effect and by operation of law, paid, and should be can-

celed. This must depend upon the contract. Was it the intention of the parties that the advances should all be within $6,000, and the shipment of cotton stop at 375 bales? If so, the view that the bond and mortgage must be considered paid as soon as the business went beyond them in amount would be very strong. In that case, the debt, as a balance of account, might remain, but the security would be gone. That, however, does not seem to be the true construction of the bond. It was not a money bond, but a bond with a penalty to secure the performance of covenants. It was not given for so much money received at the time, but to cover advances to be made at future times. That is manifest, both from the nature of the transaction and the terms of the bond itself. There are no words expressly fixing a limit to the business, and there is none unless the mention of a particular amount in the bond amounted, by implication, to such limit, which is negatived by the terms of the covenant: "to pay, also, to said Witte Brothers any balance that may be due them on any transactions in buying

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*and selling cotton or otherwise," &c. Manifestly the business of buying and selling cotton was in contemplation, and the penalty of the bond seems to have been given, not to limit business to the amount therein stated, but to ensure it to that extent and to cover any balance which might be struck, without regard to the amount of business that produced that balance. That the bond, to the extent of its penalty, was intended as a general guaranty to Saling Wolfe in the business of buying and selling cotton.

This was certainly the understanding of Saling Wolfe himself, when, December 9th, 1874, he wrote to the plaintiffs, saying: "Now, gentlemen, if I remember correctly, when I gave the mortgage of our property to you it read in that way; if I draw more than $6,000, our property is responsible for it." Witte also testified that "all transactions were considered by plaintiffs as covered by the bonds in existence." This view is confirmed by the subsequent conduct of the parties. On December 29th, 1874, a new arrangement was entered into, and the idea that the first bond and mortgage were paid and discharged was not even suggested. On the contrary the new arrangement embraced the identical property covered by the first, and the covenant in the bond then executed was in the following words: "Also to pay the said Witte Brothers any balance that may be due them by him on any transactions in buying and selling cotton or otherwise prior to the date last given," &c. This covenant, by its terms, covers a balance then due, as well as one which might arise after its date and prior to maturity.

In respect to this very matter of the absence of limitation in the contract, this case is not analogous to that of Ryan v. Shawneetown, 14 Ill. 20, cited and relied upon by the defendants. In that case certain persons, as sureties, gave a mortgage to secure a loan to the trustees of Shawneetown, "not to exceed $20,000." The loan was to run ten years, and the money to be used for walling the banks of a river adjacent to the lots. The bank loaned $40,000 for that purpose and took their note for it, and brought a bill to foreclose the mortgage: *Held*, That the loan was not made in pursuance of the mortgage, and that the sureties were not liable even for $20,000. That case did not go on the ground of payment by exceeding the limits but of depart-

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*ure from the contract. "For it may be that they would not have become responsible for any amount but for the assurance that the loan would be limited to the amount stipulated."

In this case, as we understand the contract, there was no assurance that the business should not go beyond $6,000, but, on the contrary, the covenant was to pay "any balance" that may then be due on "any transactions" in buying or selling cotton or otherwise. Conway v. Cunningham, 6 S. C. 351; Greer v. Bush, 57 Miss. 575; S. C., 9 Reporter 473.

Third. The third and fourth exceptions insist that if Mrs. Wolfe was liable, she was merely surety for her husband, and, as such surety, she was discharged by certain transactions of the plaintiffs with her principal, Saling Wolfe. It is not perfectly clear that Mrs. Wolfe was merely a surety and not a joint contractor. The bonds in form are joint and several. In the first the covenants were to be performed by both of them, and in the second by Saling Wolfe alone. At least part of the money advanced was to support the family and make crops on the different plantations, some of which, as well as some of the stock, belonged to Mr. and some to Mrs. Wolfe, and the crops followed the ownership of the property. But assume that she was only surety. We have already seen that a married woman may be surety for her husband, and how does it appear that she was discharged?

I. It is insisted that Mrs. Wolfe was released from liability on the first bond by a new agreement, without her consent, between Saling Wolfe, her principal, and the plaintiffs, "by the letter of November 27th, 1874, whereby the rate of commissions allowed Saling Wolfe, of one per cent. return commissions, was changed from that named in the bond." The letter referred to is in these words: "We would here mention that we have divided the lot I M I so as to render your account sales exactly for 375 bales cotton, on which full commissions are to be charged, after which a return commission will be credited to you." It is true that "any agreement between the creditor and principal which varies essentially the terms of the contract by which the surety

is bound, without the consent of the surety, will relieve him from responsibility." But

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assuming that the letter as to *return commissions was an agreement, we fail to see that it touched the terms of the contract. The express contract only related to 375 bales, "and ship to them for sales, on commissions of two and one-half per cent., 375 bales of cotton." This contract was complied with to the very letter. Beyond that there was no express stipulation as to commissions, and it was no violation of the contract to make a reduction of commissions in accordance with what was proved to be the usual custom and practice in such cases.

II. It is also insisted that Mrs. Wolfe was relieved from liability on the second bond by the crop mortgage executed by Saling Wolfe to plaintiffs, April 30th, 1879, which it is alleged was "a new agreement, without her knowledge or consent, by which an extension of time was granted for the payment of said bond." Saling Wolfe and his wife had given to the plaintiffs a lien on their crop for the year 1876, and Saling Wolfe alone had executed a lien for the year 1877, and he also executed a crop mortgage for the year 1878, and on April 30th, 1879, executed the crop mortgage, which, it is alleged, extended the time of payment of the money due and covered by bond B. This paper was signed only by Saling Wolfe. It was given expressly as further security for the debt. It mentioned nothing about indulgence but it is insisted that such was the necessary effect of the following provision in it, viz.: "And it is the true intent and meaning of the parties to these presents that if the said Saling Wolfe do and shall well and truly deliver or cause to be delivered unto the said Witte Brothers thirty bales of cotton, or pay the said debts or sum of money aforesaid, with the interest thereon, if any shall be due, according to the true intent and meaning of said bond and these presents, then this deed of bargain and sale shall cease, determine, and be utterly void," &c. The defendant contends that the plaintiffs, by accepting this lien to deliver thirty bales of cotton in October, November and December, 1879, agreed to indulge on the debt, and, by implication, bound themselves not to sue until that time.

Mere indulgence will not discharge a surety. In order to have that effect there must be an agreement for indulgence between the creditor and principal debtor, obligatory on

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the *creditor, and for a certain or definite period. Parnell v. Price, 3 Rich. 121. We see here no evidence whatever of such agreement. It was only an effort to secure something on the debt. The plaintiffs could have sued at any moment.

Fourth. The sixth exception insists that the $4,000 bond, which was decreed paid in the case of Sarah S. Wolfe v. Witte Brothers, should have been eliminated from the account of the plaintiffs, and the report of the referee should have been recommitted and recast in conformity with that decree.

After the referee had made his report on the accounts, Judge Hudson decreed that the bond for $4,000 and the chattel mortgage to secure it had been discharged by the application to this bond of the proceeds of certain cotton which had been sent forward. At first view it would seem that this would necessarily change the account of the referee, so that the amount of the first bond should be set down as a credit to the defendants, or, as the defendants say, be "eliminated from the account:" but when we look to the manner in which the accounts are stated we will see that this is not the case.

The advances made on B. and C. were stated in one account in the view that the latter was cumulative security for the former. The bonds were not, as in the case of simple money bonds, the measure of the amount due, but the limit to the amount which could be recovered. The actual advancements were the debt, and the bonds were only the securities which covered it. The referee had stated all the advancements before bond C. was declared paid, and therefore the only effect of striking out that bond was to discharge one of the securities which covered the aggregated advances, leaving them as already stated.

That decree, however, did slightly affect the credits. The proceeds of twenty bales of cotton had been placed, by direction of defendants, under bond C., but that was observed after it appeared that said bond had been discharged long before, and as there was then no direction as to how the proceeds of that cotton should be applied, the plaintiffs claimed that they had the right to have it applied first to the extinguishment of the small amount found due by Saling Wolfe individually. The Circuit judge allowed the claim, decreed nothing against

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Saling Wolfe indi*vidually, and increased thereby, to a small extent, the decree against Saling Wolfe and wife. We cannot say this was error. In the absence of direction by the debtor the creditor may direct the application of payments.

The decree for $1,232.85 against Saling Wolfe and wife upon the agricultural lien of 1876 is a simple judgment on money demand, and not covered by the mortgages. We see no reason why, under the code, that cause of action could not be united with one for the foreclosure of the mortgage against the same parties.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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(Case No. 1117.)

TRAPIER v. WALDO.

(April Term, 1881.)

[1. *Judicial Sales* ⇐31.]

It is the policy of the courts to sustain a judicial sale when it can be done without violating legal principles or inflicting injury, but it will not be confirmed against the objections of a purchaser, where the title is bad or of doubtful validity.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59–67; Dec. Dig. ⇐31.]

[2. *Judicial Sales* ⇐53.]

A purchaser at a judicial sale is not affected by irregularities in the proceedings under which the sale was made, if the court had jurisdiction of the subject-matter and all proper parties were before it; and this rule applies as well to cases in which the purchaser objects to the title tendered, as where he defends his purchase. Bulow v. Witte, 3 S. C. 323, approved.

[Ed. Note.—Cited in Tederall v. Bouknight, 25 S. C. 280; Powers v. Bullwinkle, 33 S. C. 298, 11 S. E. 971; Lyles v. Haskell, 35 S. C. 404, 14 S. E. 829; Iseman v. McMillan, 36 S. C. 36, 15 S. E. 336; Gardner v. Cheatham, 37 S. C. 77, 16 S. E. 368; Smith v. Winn, 38 S. C. 192, 195, 17 S. E. 717, 751; Howlett v. Garner, 50 S. C. 12, 27 S. E. 533.

For other cases, see Judicial Sales, Cent. Dig. §§ 104–107; Dec. Dig. ⇐53.]

[3. *Mortgages* ⇐422.]

An action for foreclosure of mortgage of lands, lying in Georgetown county, was instituted in the Court of Common Pleas for Charleston county, in October, 1879, and no demand was made by the defendants for a change of the place of trial. *Held*, that the court in Charleston, under the first paragraph of Section 149 of the Code of Procedure, had jurisdiction of the action, and such jurisdiction having attached, it was not affected by the repeal of this paragraph in December, 1879, before the hearing.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1260; Dec. Dig. ⇐422.]

[4. *Mortgages* ⇐422.]

But as to parties brought in by amendment after such repeal, one of whom was an infant, and the other—an adult—did not appear, the court in Charleston was without jurisdiction, for at that time the requirement of the law was that the action must be tried in the county where the lands lay. As to these parties, the order of foreclosure and sale was void.

[Ed. Note.—Cited in Ware v. Henderson, 25 S. C. 387; Ex parte Ware Furniture Co., 49 S. C. 30, 27 S. E. 9; Howlett v. Garner, 50 S. C. 11, 27 S. E. 533; Nixon & Danforth v. Piedmont Mut. Ins. Co., 74 S. C. 442, 54 S. E. 657.

For other cases, see Mortgages, Cent. Dig. § 1255; Dec. Dig. ⇐422.]

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[5. *Executors and Administrators* ⇐438.]

*In an action for foreclosure of mortgage of land, the personal representative of the mortgagor, who was dead, was not made a party, although the complaint demanded judgment for deficiency, if any. *Held*, that this nonjoinder could not be urged by the purchaser at the foreclosure sale, as an objection to the validity of the sale.

[Ed. Note.—Cited in Butler v. Williams, 27 S. C. 224, 3 S. E. 211; Simon v. Sabb, 56 S. C. 43, 33 S. E. 799.

For other cases, see Executors and Administrators, Cent. Dig. § 1779; Dec. Dig. ⇐438.]

[6. *Mortgages* ⇐434.]

The administrator of a deceased heir-at-law of such mortgagor was not a proper party to the action.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1282; Dec. Dig. ⇐434.]

[7. *Infants* ⇐80.]

Under the express authority conferred upon the Probate judge by Section 138 of the Code of Procedure, he may appoint a guardian ad litem to appear for infants who are parties to a cause in the Court of Common Pleas.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 211; Dec. Dig. ⇐80.]

[This case is also cited in Hunter v. Ruff, 47 S. C. 554, 25 S. E. 65, 58 Am. St. Rep. 907, as to facts.]

Before Mackey, J., Charleston, April, 1881.

The opinion fully states the case.

Messrs. W. St. J. Jervey, G. R. Walker, Rutledge & Young, C. R. Miles and T. W. Bacot, for appellants.

Messrs. Simonton & Barker, contra.

November 19th, 1881. The opinion of the court was delivered by

McGOWAN, A. J. Under proceedings in the case of Trapier v. Trapier, a rice plantation in Georgetown county, known as Windsor, was sold by order of court in 1870, and purchased by Mrs. Sarah C. H. Waldo, of New York, for $21,500, for which she gave five bonds, each for the sum of $4,300, and to secure the same, executed a mortgage of "that plantation or tract of land known as Windsor, on Black river, Georgetown county," consisting of several parcels, particularly described. The said Sarah died about 1873, leaving a paper purporting to be her last will and testament, executed in the State of New York, by which she undertook to devise Windsor to Horace Waldo and Francis Waldo, the latter of whom soon after died in New York, leaving as his heirs-at-law, his widow, Gertrude, and her infant son, Rhinelander Waldo, and two minor children by a former marriage, viz., Rosalie L. and Katherine L. Waldo. Horace Waldo was named executor of the will of the said Sarah. He qualified in the State of New York, and assumed to act

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as sole executor, *but the will was never lodged or proved in South Carolina, for the reason, as stated, that it was not executed in the presence of three witnesses, and, therefore, was not effective as a will in this State.

The bonds, secured by the mortgage aforesaid, were assigned and are owned by different parties—one by Mrs. Charlotte T. Trapier, one by Benjamin F. Trapier, one by Richard S. Trapier, one by Hannah H. Jervey, wife of Arthur P. Jervey, and the remaining one by the plaintiff, Alicia S. Trapier, who instituted these proceedings to foreclose the mortgage. Without objection, the complaint was filed in Charleston county, October 13th, 1879, and, besides the owners of the other bonds named above, and the tenant

in possession, the following persons were made defendants, viz., Horace Waldo, as heir, and as executor of the will of Sarah C. H. Waldo, and Rosalie L. Waldo and Katherine L. Waldo, minor children of the first wife of Frank Waldo, deceased, being heirs-at-law of Sarah C. H. Waldo at the time of her death.

The complaint prayed that the mortgage be foreclosed by sale of the land, "and the proceeds applied to the payment of the debt, and execution awarded for the balance, if any." Notice of lis pendens was filed in Charleston and Georgetown counties, which described the land and stated that the action was for foreclosure of mortgage, &c. To this complaint, Horace Waldo answered, both as executor and heir, November 8th, 1879. On the same day, Laurens N. Chisolm was appointed by the Probate judge of Charleston county, guardian ad litem of the infant defendants, Rosalie L. and Katherine L. Waldo, and, as such guardian, answered.

On February 2d, 1880, leave was given to amend the complaint, and May 19th, 1880, an amended complaint was filed, making Mrs. Gertrude Waldo, the widow of Frank Waldo, and Rhinelander Waldo, her infant son, residents of the State of New York, defendants, which amended summons and complaint were duly served upon the said defendants on June 1st, 1880, under an order of publication of May 29th, 1880. No new notice of lis pendens, after amendment, was filed. Under a general order of reference, by consent of all

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the counsel engaged, the master *made a report recommending that the plantation be sold, and the proceeds held subject to the further order of court, and all questions raised by the pleadings be reserved. July 16th, 1880, Judge Thomson made an order confirming the report, and ordering the land sold on the third Tuesday of December (21st), 1880.

The land was not sold under this order for the reason that Rhinelander Waldo was not represented when the order was made. On December 30th, Judge Wallace appointed W. M. Bruns, guardian ad litem of the infant, Rhinelander. On the next day, December 31st, 1880, Bruns filed his answer as guardian ad litem, and the master reported that the land had not been sold under the order of Judge Thomson because the infant, Rhinelander, was not then represented in the cause, and again recommended that the mortgaged premises be sold, &c.

On January 1st, 1881, Judge Wallace, by consent of all the counsel, confirmed the report and ordered sale. Under this order, Windsor was sold at public auction in the town of Georgetown, on February 1st, 1881, and was knocked down to the respondent, Benjamin Allston, as the highest and last bidder, at the price of $17,800. Judgment by default was taken against Gertrude Waldo on February 21st, 1881, being the first day of the term. The case was not put on calendar 6, and the judgment was not endorsed on the complaint.

After the sale, Mr. Allston went upon the Windsor plantation and employed labor preparatory to planting the same, but soon after he refused to take the land, and the matter was again referred to Master Clancey, and, upon his report, Judge Mackey, February 25th, 1881, issued a rule against Allston to show cause why he did not, as purchaser, comply with the terms of sale. To this rule he made return, refusing compliance, and alleging that for numerous irregularities and violations of law in the proceedings under which the sale was made, "it was impossible for the master to make a legal conveyance of said plantation." The question thus raised was also referred to Master Clancey, who, after a careful examination, made an able report, stating that, in his opinion, good titles could be made to Mr. Allston, and recommending that the rule should be made

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*absolute. Judge Mackey overruled this report and discharged the rule. From this order the appeal comes to this court upon the following exceptions:

1. Because his Honor erred in holding that the said respondent has shown reasonable grounds of objection to the title which it is the purpose of these proceedings to compel him to take, and that the rule be discharged with his costs allowed him.

2. Because his Honor erred in holding that the sale was void because the action was for the foreclosure of a mortgage of a plantation in Georgetown county, and that it was tried in Charleston county, contrary to the mandate of Section 146 of the Code of Procedure, Gen. Stat. 597.

3. Because his Honor erred in holding that Gertrude Waldo, widow, and Rhinelander, the infant child of Frank Waldo, were not properly before the court when the cause was at issue in July, 1880, or at the time when the account should have been taken and proof had preparatory to a decree for foreclosure and sale, and are not bound by the decree.

4. That his Honor erred in holding that Katherine L. Waldo and Rosalie L. Waldo, the other infant children of Frank Waldo, were not properly made parties to the cause by the appointment of Laurens N. Chisolm as guardian ad litem by the Probate judge of Charleston county, inasmuch as no jurisdiction has been granted by the statute to a Probate judge to appoint guardians ad litem to represent infants in suits pending in the Court of Common Pleas.

5. Because his Honor erred in holding that after order to amend the summons and complaint by making new parties, a new notice of lis pendens should have been filed in the cause, there being, it is submitted, no requirement of law to that effect.

6. That his Honor erred in holding "that this being an action against infants, ordering

a sale of their inheritance in land, a reference should have been held to inquire specially whether it was for the interest of the infants or necessary that the land should be sold, and a report thereon should have been made to the court before decree."

7. Because his Honor erred in holding "that inquiry should have been had as against the

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defendant Horace Waldo, who *represented the personal estate of S. C. H. Waldo, as to the sufficiency thereof, and of the estate of Frank Waldo for payment of the debts of S. C. H. Waldo before resort was had to the real estate of infant defendants. And that the administrators of S. C. H. Waldo and of Frank Waldo were necessary parties to the suit which sought a decree against their heirs for payment of the debts."

8. Because his Honor erred in holding "that the rule of the Court of Equity in enforcing a contract of sale against a purchaser requires that the objections to the title raise a rational doubt as to its validity, and this the respondent has done."

9. That his Honor erred in not ruling that the purchaser, by his action in going on the land and exercising acts of ownership, waived his right to make objections to irregularities in the proceedings or defects which may be cured by subsequent orders in this cause.

This was what is known as a judicial sale by the court as vendor. From the nature of our institutions such sales are necessary and common with us, and it is the policy to sustain them when it can be done without violating principles or injuring any one. We were gratified when it was announced at the bar that in making this question the respondent was animated only by a desire to test the validity of the sale under which he holds and to get good titles. It has been said that at such sales the rule of caveat emptor applies, and it does seem to have been held in this State, "that by the falling of the auctioneer's hammer, and by the entry of the sale by the master in his book, the contract of sale is complete," yet the court confirms these sales, and in doing so exercises large powers. In most cases a referenee will be allowed to inquire into the validity of the title. By his bid the purchaser in some sense connects himself with the proceedings, and the rule is that if he refuse to take a conveyance and complete the purchase he may be ordered to do so. "But he cannot be compelled to take title if the same is incurably bad or of doubtful validity. If there is a defect in the title, and it is a curable one, and the purchaser is offered a confirmatory deed, which remedies the defect, he cannot refuse to complete the purchase." Ror. Jud. Sales § 155; 5 Wait Pr. 234.

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*In this case it is not alleged that there were any defects in the title of the mortgagor, but exclusively in the legal proceedings under which the land was sold. The parties to that proceeding, whose title it was the object to transfer, do not suggest any doubt as to the validity of the title. Neither plaintiff nor defendants—creditors, personal representatives or heirs of the mortgagor—make any objections; these are raised only by the purchaser.

It is well settled that a purchaser at a judicial sale is bound to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before it, but beyond that he is in no way responsible for irregularities in the proceeding. This is certainly true when his title is assailed by others, and he acts defensively, and we suppose that the rule, at least to the same extent, applies when he acts offensively and makes the objection himself. Our view upon this subject is well expressed in the case of Bulow v. Witte, 3 S. C. 323: "If we stretch the obligation of purchasers at public sales beyond the mere duty of ascertaining whether the court had jurisdiction in the matter in which it claimed to act, and whether all the parties to be bound are before it, in the language of Lord Redesdale, in Benet v. Hamil, 2 Sch. & Lef. 577, 'we shall introduce doubts on sales under the authority of the court which would be highly mischievous.' Something is certainly due to the purchasers at these sales from the confidence which the public reposes in the judgments of the courts of the country. They must be upheld, at least so far as they operate on the title of parties to the proceeding; and if the title, though of infants, is thus alienated by the sale, the conveyance of the officer of the court operates as an estoppel to the same extent and in the same manner that the proper deed of an adult carrying his title would bar him from asserting it against his grantee," &c. McNish v. Guerard, 4 Strobh. Eq. 80; Williman v. Holmes, 4 Rich. Eq. 491.

As to the alleged want of jurisdiction in the court of Charleston county to foreclose a mortgage on lands situate in Georgetown county, there is no doubt that the Court of Common Pleas has general jurisdiction in the matter of foreclosing mortgages. That was part of the jurisdiction of the old Court of Chancery, to which the Court of Com-

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mon Pleas succeeded when the jurisdic*tions were united by the constitution of 1868. It is not enough, however, for the court to have a general jurisdiction of the subject-matter; it must also have jurisdiction of the particular cause, and to have that, certain things are required. Although an action to foreclose a mortgage on real estate partakes somewhat of the nature of a proceeding in rem, the practice is settled that persons holding certain relations to the property must be made parties, and there have always been some rules of procedure as to the local

court in which the proceeding should be had. In the time of our old Court of Chancery the place of trial was determined, not by the locality of the land, but by the county in which the defendants, or a majority of them, resided. In Smith v. Petigru, 2 Strobh. Eq. 324, a bill to partition real estate in Abbeville county was actually transferred to Charleston because the defendant resided there. According to the law, as it stood then, the complaint in this case was properly filed in Charleston, where all the defendants who were in the State resided.

But in 1870 the Code of Procedure was adopted, which prescribed a new rule as to the county in which trials should be had. The provisions on the subject are as follows:

"Sec. 146. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in cases provided by statute. * * * 3. For the foreclosure of a mortgage of real property."

Section 147 provides that certain actions must be tried in the county "where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial in cases provided by statute."

Section 148 provides that in all other cases the action shall be tried in the county in which the defendant resides, &c., "subject however, to the power of the court to change the place of trial in the cases provided by statute."

"*Sec. 149. If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand, in writing, that the trial be had in the proper county, and the place of trial be*

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*thereupon changed by *consent of parties or by the order of the court as is provided in this section.* The court may change the place of trial in the following cases: 1. When the county designated for that purpose in the complaint is not the proper county. 2. When there is reason to believe that an impartial trial cannot be had," &c.

It would seem that these regulations were prescribed exclusively for the benefit of parties to the suit, and that persons outside of the record have no rights in the matter, as cases of all kinds are allowed to be tried in any county by "consent of parties or by the order of the court." In the case before us, no demand in writing was made that the trial should be had in Georgetown county. Indeed, all the defendants who were in the State, resided in Charleston, and, doubtless, it was more convenient for both clients and lawyers that the case should be there heard.

In opposition to this view, the respondent insists that the provisions of Section 149, allowing the case to be tried in a county not indicated as the proper one, if no objection be made, do not apply to cases arising under Section 146 relating to the locality of lands, the requirements of which are jurisdictional and not subject to waiver. This court has decided, more than once, that the provisions of Section 149 applied to cases arising under Section 148 in relation to the residence of defendants, and that it was merely a regulation of practice. Lebeschultz v. Magrath, 9 S. C. 276; Parker & Co. v. Grimes & Co., Ibid. 284. We are not aware that the precise point here made has ever been decided in this State, but we do not see why the provisions of that section should not apply as well to cases under Section 146 as to the location of lands, as to cases under Section 148 as to the residence of defendants. In both sections, the power is given to change the place of trial "in the cases provided by statute." And one of the cases provided by statute is "when the county designated for that purpose is not the proper county."

The provisions of our code are identical with those of the State of New York, and in that State the exact question was decided in the case of Marsh v. Lowry, 26 Barb. 197. That was an action for the foreclosure of a mortgage on lands in Westchester county, and the place of trial was in the city of

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*New York. After judgment and sale of the mortgaged premises, the purchaser raised the objection that the action was not tried in the county where the premises were situated. It was held that "a demand to change the place of trial, and an order of court thereon, are essential to change the place of trial, even in local causes of action, when the complaint does not state the proper county. * * * The last section places the application to change the place of trial because the cause of action is local, on the same footing, in one respect, as when the motion is founded on the convenience of witnesses. In both cases there must be a demand or motion to change it, and in both there must be a consent to the change or an order of court. The proceedings are regular in the county first selected unless the consent to change be given or an order of court be made to that effect," &c. 16 How. Pr. 42.

But it is said that when the order of sale was made, the first nine lines of Section 149 (indicated above in italics) had been repealed by the act of 1879, 17 Stat. 14, and, therefore, at that time, the requirement of Section 146 that the action "must be tried in the county," &c., was absolute and not subject to waiver. The complaint was filed October 13th, 1879, and the answers of the parties originally made defendants were all filed before the repeal aforesaid, December 18th, 1879. The right to change the place of trial existing at the time the answers

were filed having been waived by the parties, the jurisdiction of the court in Charleston county then attached, and, having attached, it was not, as to the parties originally made defendants, divested by the subsequent repeal, which operated only prospectively from its passage; and, as to the parties who were originally made defendants, the court had rightful authority to proceed to a final determination of the cause. After the jurisdiction of the court vests, it cannot be divested by subsequent events. Morgan's Heirs v. Morgan, 2 Wheat. 290 [4 L. Ed. 242]; Mullen v. Torrance, 9 Wheat. 539 [6 L. Ed. 154; Clarke v. Mathewson] 12 Pet. 164 [9 L. Ed. 1041]; United States v. Dawson, 15 How. 484 [14 L. Ed. 775].

As to the alleged want of parties. The purchaser at a foreclosure sale of mortgaged premises cannot be required to complete his purchase if one who was a necessary par-

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ty was not *legally before the court when the order of sale was made. There were two decrees of foreclosure and orders of sale. Where the inquiry is whether the necessary parties were before the court, it is proper to consider the last as the decree in the case, January 1st, 1881. Were all necessary parties before the court on that day? The question is made by one who has no connection with the case except through his purchase of the land sold. If the proceedings are sufficient to carry good titles to the land he should not be heard to make objections which reach beyond that.

First. It is claimed that, this being an action to foreclose a mortgage, the personal representative of the mortgagor was a necessary party, and, conceding that Horace Waldo may have been the executor of Sarah C. H. Waldo in the State of New York, he was not her legal representative in South Carolina, and no such representative was before the court. Originally, the mortgagee had the right to take the land itself, and pay himself out of the rents and profits, or, as an alternative remedy, to foreclose by bill in chancery the debtor's equity of redemption. This latter was termed a strict foreclosure. But courts of equity delight to do complete justice, and they adopted the system of foreclosure and sale, causing the proceeds of sale to be brought into court and applied on the debt, the overplus, if any, to be paid to the mortgage debtor, but, in case of deficiency, the residue had to be collected at law. To avoid this circuity of action, another advance in practice was made, which was to allow in the foreclosure proceedings also a judgment for the remainder of the debt. Ror. Jud. Sales § 185.

This practice is useful, especially when, as in this State, the same court administers both law and equity. There is no doubt that this is generally the proper and safe practice. The plaintiff in this case made an effort to conform to it, and supposed she had done so when she made a party defendant "Horace Waldo, as executor of the last will and testament of Sarah C. H. Waldo, deceased," who, as executor, submitted himself to the judgment of the court. Under these circumstances the order of sale was made, but it now appears that there was a misapprehension in the matter—that the

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paper purporting to be *the will of Mrs. Waldo was not a will in South Carolina, and that Horace was not her personal representative in this State. Now, the question arises whether it was so indispensable to have before the court the personal representative of Mrs. Waldo, that the lack of such party, legally appointed, must make void the sale of the land.

Whilst the practice in the foreclosure of mortgages, above indicated, is the proper one, and especially useful for the mortgagee, as giving him complete justice, is he obliged to conform to it on pain of invalidating the whole proceeding, even as to the sale of the mortgaged premises? Would not the proceeding be maintainable, at least to carry title to the land, if, giving up the remainder of his debt, he should go for a strict foreclosure on the land alone? In such case, the personal representative of the mortgagor would not be a necessary party. We can very well see how such a proceeding might fail to afford full remedy to the mortgage creditors, and how the heirs of the mortgagor, having the right to push the debts over on the personalty, might object to it; but, if neither creditors nor heirs made objection, we do not see how the purchaser of the land could do so. "Although a mortgage is a debt primarily charged on the personal assets, a mortgagee is not bound to involve himself in an intricate account concerning the personalty of his debtor, and may, at his option, pursue, singly, his real security, leaving the terre-tenant to his remedies for reimbursement. * * * Whatever may be the form of procedure as to foreclosure, the same propriety exists of exempting the mortgagee from the necessity, against his option, of intermeddling in the administration of the personalty. One having a ready remedy should not be delayed until the equities of all interested in the matter should be adjusted." Bryce v. Bowers, 11 Rich. Eq. 49; Wightman v. Gray, 10 Rich. Eq. 518; Wright v. Eaves, Ibid. 583.

Does it alter the case that here the complaint contained a prayer for judgment as to the balance of the debt which the proceeds of sale might leave unpaid? We do not consider this a suit for the enforcement of the debt of the ancestor against land in the possession of the heirs, but for the foreclosure

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of a *mortgage. In this view, the prayer for judgment against the heirs, for any bal-

ance of the debt, was inappropriate. Such prayer could only be made properly against the personal representative of the debtor-mortgager. That prayer was made, but as soon as it appeared that Horace Waldo was not, in this State, the representative of Mrs. Waldo, it became ineffectual and mere surplusage. But the fact that such prayer was in the complaint did not vitiate other prayers which were good, or affect the relief granted to the extent which was authorized by the pleadings and the state of the parties. The heirs of the mortgagor were all parties, and the proceeding stood substantially as if its original scope had been only for a sale of the land by a strict foreclosure.

Mrs. Waldo had no personal property in the State, and administration on her estate would be purely formal. It is familiar doctrine that the administrator has no control over land, or right to control the proceeds thereof. Bank v. Inglesby, Speers Eq. 399. We are of opinion that the respondent cannot refuse to complete his purchase of the land, on the ground that the administrator of Sarah C. H. Waldo, appointed in South Carolina, was not a party to the proceedings under which the land was sold.

In the view we take of the case, the personal representative of Frank Waldo was not a proper party to the proceedings. He was not liable for the mortgage debt, and, in this proceeding, no judgment could be rendered for it or any part of it against his administrator. His widow and children were proper parties only for the reason that, after his death, they were heirs of Mrs. Sarah C. H. Waldo, who were necessary parties for the purpose of carrying to the purchaser her title which had descended to them.

Second. It is denied that the judge of Probate had the right to appoint guardians ad litem for the infant heirs-at-law, Rosalie L. Waldo and Katherine L. Waldo, and, therefore, they were not properly parties in the cause. Section 138 of the code, in the title headed "Parties to Civil Actions," under which the appointment was made, is in these words: When an infant is a party he must appear by guardian, who may be appointed

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by *the court in which the action is prosecuted, or by a judge thereof, or a Probate judge." The corresponding section of the New York code is in the precise words of this section, except the last phrase, which is, "or a county judge."

We have not been referred to a case in which the point was made either as to the power of a Probate judge in this State, or that of a county judge in New York. Under these circumstances we can only adopt our own construction. In our State the Probate judge has jurisdiction in relation to the appointment of guardians and the management of the estates of their wards, and in all business appertaining to minors. We do not think that the provision authorizing said judge to appoint a guardian ad litem for an infant party to a case in another court is so extraordinary as to require us to disregard its express terms. The Court of Equity treats infant parties as wards of the court. These infant defendants were represented, and their rights fully considered.

Third. But it is insisted that Mrs. Gertrude Waldo and her infant son, Rhinelander, residents of the city of New York, were not legally made parties to the cause in Charleston county, and that Mrs. Waldo, when the attempt was made to bring her in as a party by publication, made default, and the order pro confesso was not entered until after the last decree of foreclosure and order of sale. Mrs. Waldo and her son were heirs of Frank Waldo, and, through him, necessary parties. Publication was not made against them until after the amendment to the complaint was filed, May 19th, 1880, which was subsequent to the repeal of the nine lines of Section 149, December 18th, 1879, before referred to. An amendment for the purpose of making new parties must, upon a question of jurisdiction, be considered as to such parties an original proceeding. Campbell v. Bowne, 5 Paige 36; 4 Wait Pr. 691; Jeffries v. Cook, (Cal.) Rep. Nov. 1881, 586.

At the time the amendment was filed to make Mrs. Waldo and her son parties, the law permitting the trial by the court in Charleston, provided no objection was made, had been repealed, and that repeal had rendered nugatory the succeeding provision that "The court may change the place of trial in

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the following *cases: 1. When the county designated for that purpose in the complaint is not the proper county." At that time, Section 146 was left of force, without qualification or exception, requiring, in positive terms, that "The action must be tried in the county in which the subject of the action or some part thereof is situated."

It seems to us that the court in Charleston never acquired jurisdiction over the persons of Gertrude Waldo and her infant son, Rhinelander. This was not a mere irregularity, but a substantial defect, which rendered the decree of foreclosure and order of sale void, so far as these parties were concerned, and we are, therefor, constrained to hold that, to this extent, the title tendered the purchaser was defective and cannot be cured.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

16 S. C. 290

(Case No. 1118.)

McINTYRE v. McINTYRE.

(April Term, 1881.)

[1. *Wills* ⇐439.]

The intention of the testator must prevail when not in conflict with some rule of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. ⇐439.]

[2. *Wills* ⇐608.]

In this State, the rule in Shelley's Case does not apply, where the word issue after a precedent life-estate is so qualified by additional words as to evince an intention not to use "issue" in the sense of an indefinite line of descent.

[Ed. Note.—Cited in Glenn v. Glenn, 21 S. C. 313; Fields v. Watson, 23 S. C. 46, 55; Boykin v. Ancrum, 28 S. C. 495, 6 S. E. 305, 13 Am. St. Rep. 608; Carrigan v. Drake, 36 S. C. 366, 15 S. E. 339; Reynolds v. Reynolds, 61 S. C. 250, 39 S. E. 391; Williams v. Gause, 83 S. C. 267, 65 S. E. 241.

For other cases, see Wills, Cent. Dig. § 1374; Dec. Dig. ⇐608.]

[3. *Wills* ⇐614.]

Lands were devised to A. for life and after her death to be equally divided between her children, to be held by them for life, and after their death to the issue of them and their heirs forever. *Held*, that the children of A. after her death took a life-estate with remainder in fee to their immediate issue as purchasers.

[Ed. Note.—Cited in Fields v. Watson, 23 S. C. 56; Smith v. Smith, 24 S. C. 315; Bethea v. Bethea, 48 S. C. 444, 26 S. E. 716; Simms v. Buist, 52 S. C. 560, 30 S. E. 400; Robert v. Ellis, 59 S. C. 162, 37 S. E. 250; Clark v. Neves, 76 S. C. 489, 57 S. E. 614, 12 L. R. A. (N. S.) 298; Williams v. Gause, 83 S. C. 269, 270, 65 S. E. 241.

For other cases, see Wills, Cent. Dig. §§ 1393–1416; Dec. Dig. ⇐614.]

[This case is also cited in Simms v. Buist, 52 S. C. 554, 30 S. E. 400, and distinguished therefrom.]

Before Aldrich, J., Marion, November, 1880.

This was an action by George A. McIntyre and others, children of Archibald McIntyre,

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deceased, (the testator,) against *Robert C. McIntyre, and others, children of testator. All the children of testator's children were parties defendant. Archibald McIntyre executed his will April 28th, 1850, and died within a month afterwards. The widow of testator died in February, 1880. Soon afterwards, the plaintiffs brought this their action for a partition of the lands of testator, but doubts having been entertained as to the right of testator's children to an absolute estate in this property, the grandchildren were made parties, and a construction of testator's will asked for. The entire will is given in the opinion of this court, and other facts are stated therein.

Mr. W. W. Harllee, for appellants, cited and commented on the cases to be found in Bailey Eq. 541; 1 Hill Ch. 268; 2 Id. 198 7 Rich. Eq. 407; 1 Bro. Ch. C. 206; 2 Strange 1125; 7 T. R. 531; 2 Speers 793; 1 Strobh. Eq. 344; 3 Rich. Eq. 559; 1 Id. 407; 2 Hill Ch. 244; 10 S. C. 58; 6 Rich. 26. Also, 4 Kent 219–230; Fearne Rem. 119, 134. Mr. Fearne on page 118, is not sustained by the authorities cited.

Mr. C. D. Evans, contra, cited some of the same authorities, and, also, 4 Rich Eq. 428, 439.

November 21st, 1881. The opinion of the court was delivered by

McIVER, A. J. Archibald McIntyre, having duly made and executed his last will and testament, departed this life in May, 1850, leaving his widow and nine children named in his will surviving, another child having been born soon after his death. All of these children now have issue living, one of them haing had issue born since the commencement of these proceedings. The testator left a very considerable real and personal estate, which he disposed of as follows: "I give, devise and bequeath, after the payment of my just debts, to my well-beloved wife, Sophia McIntyre, for the term of her natural life, all my property, real and personal, to wit: [Here follows a description of the property.] To have and to hold all the said property, real and personal, and the increase

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thereof, for the term of her *natural life; and from and immeditely after her decease to my children now living, Matilda, Richard, Robert, Duncan, George, Rebecca, Archibald, Joseph, Sarah, and one in process of being, but not yet born, should the same live after its birth, likewise for the term of their natural lives, and to be divided among them share and share alike, the children of deceased parents representing such deceased parents and taking his or their share only; and, finally, upon the decease of my said children now living, and that now in process of being, to the issue of them and their heirs forever. Item. And I do hereby appoint my well-beloved wife, the said Sophia McIntyre, the executrix of this my last will and testament. I do hereby authorize, direct and empower my said executrix to keep my estate, real and personal, together, and to manage and improve the same during her natural life, that it may pass at her death into the hands of my said children, the life-tenants after her, and descend to their heirs in an improved and accumulated condition. And, finally, all the rest and residue of my estate and effects, real and personal, whatsoever and wheresoever, not herein disposed of, after payment of my debts and legacies, and funeral expenses and other charges, I do give, devise and bequeath, in manner and form, upon the same limitations and to the same parties aforesaid."

The widow took possession of all the property as executrix and tenant for life, and re-

mained in possession until her death in February, 1880. After the death of the testator, but before the death of the widow, two of the sons named in the will, Richard and Archibald, died, each leaving one child: Richard leaving a son named Richard H., and Archibald leaving a son also named Archibald.

There is no controversy as to the disposition of the personal property, satisfactory provisions for its distribution having been made, and the only question is as to the real estate—or rather the proceeds thereof—it having been sold under an order granted in these proceedings, which directs that the proceeds be held subject to the order of the court.

The Circuit judge held that under a proper construction of the will of the testator each of his children took an estate for life in the realty, with remainder to their children

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in fee, and directed *that when the master shall collect the bonds given to secure the purchase-money of the real estate, he shall invest the same in bonds bearing interest payable annually, which interest shall be paid to the life-tenants, and that the corpus be paid to the tenants-in-fee, or their guardians, as the life-estates determine. From this judgment the plaintiffs and certain of the defendants appeal upon two grounds: First. Because of error in the construction of the will, the appellants claiming that, by a proper construction of the will, the children of the testator take a fee-conditional and not a life-estate in their shares of the realty. Second. Because Richard H. and Archibald McIntyre, the two children of the deceased sons, take an absolute estate in fee-simple by the express terms of the will, and, therefore, the judgment of the Circuit Court must, in any view of the question, be so modified as to give them at once their shares of the corpus absolutely.

There is no doubt that the rule in construing a will is that the intention of the testator must govern, unless such intention is in conflict with some rule of law. In this case, we suppose there is as little doubt that the testator only intended to give his children a life-estate, for he says so in express terms in the direct gift to them, and, in a subsequent part of his will, speaks of his children as life-tenants.

But this is not conclusive, for if this manifest intention comes into conflict with a well-settled rule of law, it cannot be carried into effect, but the intention must give way to the rule of law. The appellants contend that this intention of the testator comes into conflict with a rule of law which has been so long and so firmly settled as to entitle it to be called a rule of property, which is familiarly known as the rule in Shelley's Case. Without entering into a consideration of the origin of this rule or the reasons upon which it was originally founded, it is sufficient for us to say that by that rule it is well settled that where there is a devise to A. for life, and, at his death, to his issue, the limitation to the issue serves only to enlarge the estate of A. to a fee-conditional, and does not create a remainder to the issue as purchasers, notwithstanding the manifest intent to the contrary. Whitworth v. Stuckey, 1 Rich. Eq. 404, and the cases therein cited. So, that if, in this case, the devise were to

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the children *of the testator "for the term of their natural lives," and, at their decease, "to the issue of them," with nothing more, then, clearly, an estate in fee-conditional would have been created, and the issue could not take as purchasers. But such are not the terms of the devise under consideration.

The terms are to the children for life, and, at their decease, "to the issue of them *and their heirs forever*." So that the precise question in this case is, whether the words italicized in the preceding sentence are sufficient to take the case out of the operation of the rule in Shelley's Case. It is not to be denied that there is no little conflict in the English cases upon this question; but we think the authorities in this State conclusively show that where the word "issue" is so qualified by additional words as to evince an intention that it is not to be taken as descriptive of an indefinite line of descent, but is used to indicate a new stock of inheritance, the rule does not apply.

In Myers v. Anderson, 1 Strobh. Eq. 346 [47 Am. Dec. 537], the testator gave certain slaves to his son for life, and at his death to be equally divided between his two daughters "during their natural lives," and after their death "to be the absolute property of the issue of their bodies forever." The court held that the daughters took only life-estates with remainder to their issue as purchasers. In this case the court uses the following language: "All the authorities agree that if the limitation be to the heirs of the body or issue, and to their heirs, this constitutes them purchasers, as it shows an intention to give them an estate not inheritable from the first taker, but an original estate, inheritable from themselves as a new stock of descent." It is true that this was a bequest of personal property, but as will be seen from the remarks of Dunkin, chancellor, in delivering the opinion of the Court of Errors in McLure v. Young, 3 Rich. Eq. 576, this principle was regarded as equally applicable to a devise of real estate.

In that case the devise was to the daughter of the testator for life, "and at her death I give, bequeath and devise the same absolutely and forever to her lineal descendants; and in case she should die without lineal descendants (one or more) living at the time of her death, then it is my will that the whole of said real estate revert to my estate and be

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disposed of as hereinafter *directed." The daughter having died leaving a son, it was held that the daughter took a life-estate with remainder to her son as purchaser. In this case the doctrine laid down in Myers v. Anderson, supra, was distinctly recognized and declared applicable to real as well as personal estate, and the distinction between this case and that of Whitworth v. Stuckey, supra, was pointed out. In that case there were no additional words qualifying the term "issue," and hence it was there regarded as a word of limitation, and the case fell within the rule in Shelley's Case; but in McLure v. Young, as in Myers v. Anderson, there were such additional words and hence those cases did not fall within that rule.

It will be observed that the additional words in both Myers v. Anderson and McLure v. Young, which were held to take those cases out of the operation of the rule in Shelley's Case, were not so strong as in the case now under consideration. In the former the words were: "To be the absolute property" of the issue, and in the latter "absolutely and forever," which the court held were equivalent to a devise to the issue and their heirs; and these are the words used in this case.

In Lemacks v. Glover, 1 Rich. Eq. 141, there was a bequest of personal property to the use of the testator's sister Jane, "and after her death I give and bequeath the same to the heirs of her body, to them, their heirs and assigns forever," and the court held that the words "heirs of the body," which are stronger words of limitation than the word "issue," were words of purchase—one of the grounds of the decision being that the additional words "to them, their heirs and assigns forever," evinced an intention that such heirs should take in their own right as a new stock of inheritance and not successively and by descent from the first taker. In support of this decision Dunkin, chancellor, delivering the opinion of the court, in addition to two English cases there cited, relied upon the case of Dott v. Wilson, 1 Bay 453 [1 Am. Dec. 624], where the bequest was to Sarah Dott "during her life, (without the control of her husband,) and at her death to the heirs of her body and their heirs and assigns forever; but if she should leave no issue, then to be disposed of as she should think proper." In that case the court said:

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"That she [the *testatrix] did not mean or intend a perpetuity is obvious from her adding immediately after the words heirs of her body, 'and their heirs and assigns forever.' That although the first words, 'heirs of her body,' unqualified and alone, would have made an estate-tail, yet the words superadded or engrafted on them make a joint tenancy, which is tantamount to share and share alike, and evidently shows she intended an equal distribution of the property among her grandchildren after her daughter's death." Chancellor Dunkin further remarks upon this case that "the decision of the court was made on the qualifying terms stated, although they thought that if any doubt existed on that clause it was removed by the language used in the proviso." In Lemacks v. Glover, Harper, chancellor, dissented upon another point, and commenced his dissenting opinion in these words: "It seems hardly to be questioned that the words 'to the heirs of her body, to them and their heirs and assigns forever,' are to be regarded as words of purchase. In addition to the cases referred to by the chancellor, the cases of Doe v. Laming, 2 Burr. 1100, and Luddington v. Kime, 1 Ld. Raym. 203, are authority that after a devise to 'heirs of the body' or 'issue,' the superadded words 'and to his or their heirs' have the effect of converting the former into words of purchase. * * * But in the present case it is plain that the words must be regarded as words of purchase only, and not words of limitation. The words of limitation are added—'their heirs and assigns forever'—denoting that the former words signify merely the persons who are to take in the first instance, and do not include any succession. The persons who are to take, are to take in fee or absolutely."

It will be observed that this distinguished chancellor, whose language has just been quoted, delivered the opinion of the court in Whitworth v. Stuckey, at the next succeeding term of the court, where he held that a devise to one for life, and at his death to his issue, there being no superadded words qualifying the term "issue," enlarged the estate given for life to the first taker to a fee-conditional, and that he soon afterwards concurred in the case of Myers v. Anderson, where the superadded words regarded as equivalent to the words "and to their heirs."

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had *the effect of converting the word "issue" from a word of limitation into a word of purchase. This shows that he recognized fully the distinction which we have drawn in this case.

It seems to us clear that the case now under consideration comes fully up to the test laid down by Sir William Blackstone in the famous case of Perrin v. Blake, as to whether the rule in Shelly's Case is to be controlled by the manifest intent of the testator. For this purpose, according to his opinion, two things must appear upon the face of the will: 1. "That the testator meant to confine the first taker to an estate for his life." 2. "That he meant to effectuate that intent by some clear and intelligent expression of a design to have the heirs of his son take by purchase and not by descent."

Now it is perfectly manifest that the first requirement of this test is met by the terms of the will now under consideration, for the

testator has, in express terms, declared his intention that his children should take estates for their lives only. It is conceded, however, that this, by itself, would not be sufficient, and we must, therefore, be also satisfied that the second requirement is met —that is, that the testator has expressed clearly his design that those who are to take after the children are to take by purchase and not by descent. The language which he used is, "to the issue of them and their heirs forever." Now what does this language mean? It cannot mean that the issue of the children are to take by descent, because, if that construction is placed upon it, then the result would be that the issue, if they could take at all, would take an estate in fee-conditional, while the language declares that the issue are to take in fee-simple, for it is clear that no more appropriate language could be used to create an estate in fee-simple in the issue than the language employed—to them and their heirs forever. Hence, to apply the rule in Shelley's Case to the devise under consideration would defeat both of the intentions of the testator, declared in express terms: 1. That the children should take estates for their lives only. 2. That their issue should take estates in fee-simple.

Applying the language used by Johnston, chancellor, in his Circuit decree in Myers v. Anderson, which is quoted with approbation in the opinion of the Court of Errors in Mc-

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Lure v. *Young, to this case, we may say, if obliged by the rules of law to extend the interests of the children of the testator, which are expressly declared to be for life only, to estates in fee-conditional, or practically in fee-simple—all of them having had issue born—and to declare that the interest which is given to their issue expressly in fee-simple is no interest at all—that the absolute property is not in the issue to whom it is given, but in their parents, to whom it is not given, but, on the contrary, from whom it is expressly withheld; if we are required by the rule, in Shelley's Case, to do this, we should feel that we were sacrificing the intention of the testator, as to which there can be no mistake. But no such unpleasant alternative is presented to us, for, as we have shown, without infringing the rule in that celebrated case, and only recognizing an exception to it, which is well settled by the authorities in this St , we are at liberty to construe this will in accordance with what every one who reads it must believe to have been the intention of the testator.

As to the second ground of appeal, it is not clear that the Circuit judgment is open to the objection therein taken. That judgment determines that the children of the testator take an estate for their lives only, with remainder to their children in fee, and directs that the interest be paid to the life-tenants annually, and then concludes in these words: "The corpus to be paid to the tenants-in-fee, or their guardians, as the life-estates determine," and it is argued that as the life-estates preceding the remainders secured to the defendants, Richard H. and Archibald McIntyre, had already fallen in, the words "to be paid * * * as the life-estates determine" might leave it doubtful whether these parties could receive what they are now entitled to in fee. While the language used might afford room for some doubt, we think the intention is that those who are adjudged to be entitled in fee are entitled to receive their shares whenever it is ascertained that the precedent life-estates have fallen in, whether that occurs before or after the rendition of the judgment in the Circuit Court.

The judgment of this court is that the judgment of the Circuit Court, as herein construed, be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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*(Case No. 1120.)

Ex parte DUNOVANT.

(April Term, 1881.)

[1. *Appeal and Error* ⇐1219.]

The time at which this court loses its jurisdiction of a cause is determined by the proper issuing of the remittitur by the clerk of the Supreme Court, and not by its filing or receipt by the clerk of the Circuit Court.

[Ed. Note.—Cited in State v. Adams, 83 S. C. 152, 65 S. E. 220.

For other cases, see Appeal and Error, Cent. Dig. § 4720; Dec. Dig. ⇐1219.]

[2. *Appeal and Error* ⇐1217.]

Filing a full copy of the opinion of this court with the clerk of the court below causes this court to part with its jurisdiction of the case.

[Ed. Note.—Cited in McKenzie v. Sifford, 52 S. C. 395, 29 S. E. 811; Empire Mining Co. v. Propeller Towboat Co. of Savannah, 59 S. C. 552, 38 S. E. 156; Carpenter v. Lewis, 65 S. C. 403, 43 S. E. 881; Jones v. Charleston & W. C. Ry. Co., 65 S. C. 418, 43 S. E. 884.

For other cases, see Appeal and Error, Cent. Dig. §§ 4717, 4718; Dec. Dig. ⇐1217.]

[3. *Appeal and Error* ⇐1219.]

The filing in this court of a petition for rehearing does not, of itself, operate as a stay of remittitur. There must be an order of stay from one of the justices.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4720; Dec. Dig. ⇐1219.]

[4. *Appeal and Error* ⇐1190.]

Clerical errors in the title of a case and the misspelling of a word—mistakes which were not misleading—do not invalidate a remittitur.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4645; Dec. Dig. ⇐1190.]

[5. *Appeal and Error* ⇐833.]

A party loses his right to a rehearing in this court, where he fails to make his applica-

tion at the proper time and in the proper manner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3214, 3229–3240, 3244–3246; Dec. Dig. ⟸833.]

[6. *Appeal and Error* ⟸832.]

Where a petition for rehearing is based upon alleged errors committed by this court in the conclusions drawn from the testimony, or upon after-discovered evidence, the petition will be refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215–3228; Dec. Dig. ⟸832.]

[7. *Appeal and Error* ⟸832.]

This court cannot, under the constitution, consider a question of rehearing upon the ground of after-discovered evidence, until the matter has been passed upon on Circuit and brought here by appeal.

[Ed. Note.—Cited in Ex parte Knox, 17 S. C. 207, 217.

For other cases, see Appeal and Error, Cent. Dig. §§ 3215–3228; Dec. Dig. ⟸832.]

Petition for rehearing of the case of Brooks v. Brooks, 12 S. C. 422, filed by R. G. M. Dunovant for himself and as guardian ad litem for his children, and by J. C. Lark and James Mansfield, creditors of J. C. Brooks. The reporter has been furnished with a copy of the points of counsel, but not with a copy of the petition. At the same time at which this petition for rehearing was argued, the main case was again argued in this court on its second appeal. See "Notes of Causes" at the end of this volume, No. 1119, Brooks v. Brooks. [16 S. C. 621]

Messrs. A. J. Norris and H. W. Addison, for petitioners.

Messrs. Simonton & Barker, contra.

November 21st, 1881. The opinion of the court was delivered by

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*McIVER, A. J. This is a petition for rehearing, (filed May 10th, 1881,) in which the petitioners ask that the judgment of this court, rendered at a former term, be opened and the cases be reheard upon certain points mentioned in the petition.

The former judgment of this court was filed on October 3d, 1879, and the remittitur in the usual form was issued by the clerk of this court on October 16th, 1879, and on December 17th, 1879, the full copy of the opinion of this court was filed in the office of the clerk of the Circuit Court, in which, however, there were some clerical errors in stating the names of the parties in the title of the case and in the spelling of the word "remittitur," the letter "n" being substituted for the letter "m." At a previous term of this court the petitioners herein filed a petition for rehearing, to wit, on December 13th, 1879, which was dismissed upon the ground that, the remittitur having been sent down, this court had lost its jurisdiction of the case. It is now alleged that this court was then misled as to the fact of the remittitur having been sent down. It is true that at the time the first petition for rehearing was filed the full copy of the opinion of this court had not been sent down to or filed with the clerk of the Circuit Court, but the remittitur in the usual form had been sent and this court had thereby lost its jurisdiction, as has been repeatedly decided. Pringle v. Sizer, 3 S. C. 335; Whaley v. Bank, 5 S. C. 262; Adger & Co. v. Pringle, 13 S. C. 33; Ex parte Dial, 14 S. C. 584.

The mere filing of the petition for rehearing in this court could not have the effect of staying the remittitur, even if it had not been previously sent, without an order to that effect. Rule XX. of this court provides for a stay of the remittitur for ten days after the final determination in this court, for the very purpose of enabling parties to apply to either one of the justices at chambers for a further stay in case they may desire to file a petition for rehearing; but if no such application is made and no order granted for a further stay, then it is the duty of the clerk of this court, at the expiration of the ten days, to transmit the remittitur to the court below, whereupon this court parts with its jurisdiction in the case and can no longer grant any order therein. The fact that the remittitur may not have been filed in the

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Circuit *Court does not affect the question of the jurisdiction of this court. When this court, through its proper officer, the clerk, acts by issuing the remittitur, it parts with its jurisdiction, and the failure of the clerk of the Circuit Court to file it there, or the failure of the parties to obtain an order from the Circuit Court making the judgment of this court the judgment of that court, cannot affect the question of the jurisdiction of this court.

But even if the paper first sent down to the Circuit Court should not be regarded as a proper remittitur, yet as it appears that the full copy of the opinion of this court was filed in the office of the clerk of the Circuit Court on December 17th, 1879, before there was any order of this court or of any of the justices thereof staying the remittitur, it is clear that this court then, if it had not before, lost its jurisdiction of the case.

The objection based upon the clerical errors in the title of the case and in the spelling of the word "remittitur," cannot be sustained, for it is quite manifest that these purely clerical errors were not such as would be calculated to mislead the parties.

It is very manifest, therefore, that this court had lost its jurisdiction of the case, not only when the present petition was filed, but also when the previous one was presented.

It is always a matter of regret that parties should lose the opportunity of showing

what they honestly believe to be errors of the court, and if we believed that we had the power to do so we would gladly extend to the petitioners the privilege of pointing out what they believe to be errors in the former decision of this court. But remedies in a court of justice must be administered according to the laws granting them, and we have no power to dispense with the rules of law. Every party to a cause is entitled to his right of appeal from a judgment which he may think erroneous, but unless he takes his appeal within the time and in the manner prescribed by law, he loses this right, even though the judgment against him may be manifestly erroneous. So here, every party considering himself aggrieved by what he regards an erroneous decision of this court may apply for a rehearing upon certain well-established grounds; but if he fails to make this application within the proper time and in the proper manner, he loses the right to have his application heard.

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*We have, however, looked into the grounds relied upon in this petition and are satisfied that even if the application for a rehearing had been made within the proper time and in the proper manner, it could not be granted. In Hunt v. Smith, 3 Rich. Eq. 541, it was held that a rehearing could be granted on only two grounds: First. For error of law apparent on the face of the decree. Second. Because of newly-discovered testimony, which must be such as the party seeking a rehearing was not only not aware of before the trial, but such as he could not, by proper diligence and inquiry, have discovered in time for use at the former trial. In Simpson v. Watts, 6 Rich. Eq. 364 [62 Am. Dec. 392] it was held that it was not enough that the new matter came to the knowledge of the party after the fit time for the use of it, but he must show that he could not have acquired knowledge of it in time for effective use by the exercise of reasonable diligence. Again, it is said in Hunt v. Smith, supra: "The ground set down in this petition for a rehearing is nothing more than alleged error of judgment on the part of the court in deciding a question of fact. This is a very good ground of appeal, if well founded, when an appeal is taken from a lower to a higher tribunal, but I am not aware of any precedent for such cause being considered a ground for rehearing after a cause had been finally adjudicated." In support of this doctrine the case of Johnson v. Lewis, 1 Rich. Eq. 390, was cited by the learned chancellor delivering the opinion of the court, in which it was held that a petition for rehearing should not be granted for a supposed error in the conclusion drawn by the court from doubtful or equivocal evidence. This will be found to be a very strong case, for in it the rule above stated was applied when the cause was decided by two chancellors, in opposition to the opinion of one of the members of the court and of the absent chancellor who heard the case on circuit—the Court of Appeals at that time consisting of four chancellors.

We may say, however, in order to avoid misapprehension, that we do not see how this court could, in any case, grant a rehearing upon the ground of after-discovered evidence. With the exception of certain specified powers, which have no relation to cases of this kind, this court has no original juris-

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diction, but *has "appellate jurisdiction only in cases of chancery" and is a court "for the correction of errors at law." Hence, when a case is brought here by appeal from the Cicuit Court we are confined to the consideration of alleged errors committed by that court, and, of course, therefore, we are restricted to the consideration of the case as made in the Circuit Court. If, therefore, after a trial in the Circuit Court a party wishes to avail himself of the benefit of after-discovered evidence, his application should be made, in the first instance, to that court, as we have no jurisdiction to consider the question until after it has been passed upon by the Circuit Court and brought here by appeal from the determination of that court.

Now, upon looking into the petition in this case it will be seen that the various grounds relied upon are based either upon alleged errors committed by the court in the conclusions drawn from the testimony or upon after-discovered testimony, which it is not even alleged that the parties could not, by the use of due diligence, have obtained in time for use at the former trial, and under the authorities above cited, these grounds would not be sufficient to warrant this court or the court below in granting a rehearing.

The judgment of this court is that the petition for rehearing be dismissed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 303

(Case No. 1122.)

MENDENHALL v. MOWER.

(April Term, 1881.)

[1. *Deeds* ⇨120; *Wills* ⇨614.]

The rules governing limitations in wills, deeds and other instruments are now generally the same, whether the property affected be real or personal.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 375–393, 401, 407–412, 416–454; Dec. Dig. ⇨120; Wills, Cent. Dig. §§ 1393–1416; Dec. Dig. ⇨614.]

[2. *Deeds* ⟸120; *Wills* ⟸614.]
Some differences between limitations in a deed and will, stated.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 375–393, 401, 407–412, 416–454; Dec. Dig. ⟸120; Wills, Cent. Dig. §§ 1393–1416; Dec. Dig. ⟸614.]

[3. *Deeds* ⟸123.]
The effect of a limitation to issue in a deed, and whether confined to the issue living when the particular estate determines, depend upon the intent of the grantor to be gathered from the whole instrument.

[Ed. Note.—Cited in Fuller v. Missroon, 35 S. C. 330, 14 S. E. 714; Folk v. Hughes, 100 S. C. 225, 84 S. E. 714.

For other cases, see Deeds, Cent. Dig. §§ 345–374, 413–435; Dec. Dig. ⟸123.]

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[4. *Deeds* ⟸123.]
*The word issue may describe (1) a class of persons to take as joint-tenants with other parties named; or (2) a class who are to take at a definite period as purchasers; or (3) an indefinite succession of lineal descendants who are to take by inheritance.

[Ed. Note.—Cited in Williams v. Gause, 83 S. C. 268, 65 S. E. 241; Porter v. Lancaster, 91 S. C. 303, 74 S. E. 374.

For other cases, see Deeds, Cent. Dig. §§ 345–374, 413–455; Dec. Dig. ⟸123.]

[5. *Deeds* ⟸132.]
Where there is a direct gift to the issue in the first instance with a limitation over, on the death of the first takers without lawful issue, to the survivor of such takers who, at the death of testator, are persons in esse, and there is no further limitation to issue, the first takers hold for life, the limitation over not being too remote; and in the absence of words showing an intention that the survivor shall take a transmissible interest, the presumption will be that he is to take personally.

[Ed. Note.—Cited in Mangum v. Piester, 16 S. C. 328; Powers v. Bullwinkle, 33 S. C. 301, 11 S. E. 971.

For other cases, see Deeds, Cent. Dig. §§ 366, 367, 372, 373; Dec. Dig. ⟸132.]

[6. *Deeds* ⟸136.]
Hence, where a purchaser of real property (which was sold under execution against D.) made a declaration of trust in 1847, that after the repayment to him of the purchase-money, he would hold the property in trust "for the use of A. (wife of D.) for life, and after her death for the use of B. and C., and their respective issue, or the survivor of them (the said B. and C.), if either of them should die without issue, and if both should die without issue, then for the use of D." &c.—neither B. nor C. then having issue. *Held*, that B. and C. took a life-estate, after the death of A., with remainder to their respective issue as purchasers.

[Ed. Note.—Cited in Selman v. Robertson, 46 S. C. 266, 24 S. E. 187; Still v. Creech, 95 S. C. 370, 78 S. E. 1039.

For other cases, see Deeds, Cent. Dig. § 433; Dec. Dig. ⟸136.]

[7. *Conversion* ⟸6.]
Under proceedings had in the Court of Equity, subsequent to the act of 1853 (12 Stat. 262), a portion of this land, acquired by A. through inheritance, previous to the sheriff's sale, was sold, and the proceeds were applied first to a debt due by A., and the balance was ordered to be held subject to the same trusts as before declared. *Held*, that the result is the same as above stated, for the property so sold was converted into personalty and settled by this order of court, and is governed by the legislative construction given to the words "dying without issue," contained in the act of 1853.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 6–12, 16; Dec. Dig. ⟸6.]

[8. *Trusts* ⟸169.]
The original trustee being dead, a new trustee should be appointed to preserve the estate for the remaindermen.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 222–224; Dec. Dig. ⟸169.]

[This case is also cited in Roundtree v. Roundtree, 26 S. C. 466, 2 S. E. 474, as to the distinction formerly existing between real and personal property and the rules applicable in constructing instruments by which they are transferred, and in Mangum v. Piester, 16 S. C. 325; Selman v. Robertson, 46 S. C. 266, 24 S. E. 187, and distinguished therefrom.]

Before Wallace, J., Newberry, May, 1880.

This was an action instituted in February, 1880, by James K. Mendenhall and his sister, Pauline Eliza Scott, against George S. Mower, trustee, Nancy Mayes, as administratrix of William G. Mayes, deceased, and all the children and heirs of deceased children of the plaintiffs.

The case called for the construction of the following instrument:

"The State of South Carolina.—I, John Belton O'Neall, having, on yesterday, pur-

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chased at the commissioner's sale, the *lands and mills, in Newberry district, known as Mendenhall's the said tract of land containing 1,050 acres, subject to the inheritance of Mrs. Phœbe Mendenhall, on 400 acres on which are the mills and houses, at and for the sum of $2,600, and the following slaves, viz.: Frank, at $600; Jordan, at $500; John, at $610; Allen, at $510; Peter, at $360; Bob, at $250; Jupiter, and wife, Ritta, and their children, Tilda, Alsey, Frank, Eliza and Minerva, at $2,405; Calvin, at $580; Jacob, at $600; Tilda, at $400; Abbey, at $350, and Siller, at $150, making a total for the said slaves of $7,540. And, whereas, the said land and slaves so purchased were once the property of Dr. M. T. Mendenhall, and at his request, I have consented to hold the same upon the following trusts: 1. For the payment of $1,900, the balance of the purchase-money of the land and mill, ($700 having been to-day paid,) and of $7,540, the aggregate price of the said slaves. If these sums be paid by Mrs. Phœbe Mendenhall, Pauline Eliza Mendenhall, or James K. Mendenhall, the wife and children of Dr. Mendenhall, or by the said Dr. Mendenhall as their agent, at the several times at which my bond to the commissioner, and notes in the bank, shall be severally due; then, in the second place, I am to hold the said land, mills and slaves for the use of Mrs. Phœbe Mendenhall for life, and after her death for the use of Pauline Eliza Mendenhall and James K. Mendenhall, and their respective issue, or the survivor of them (the said Pau-

line and James), if either of them should die without issue; if both should die without issue, then for the use of the said Dr. M. T. Mendenhall, or such person as he may direct and appoint; but if failure should be made in such payments, then I am to sell the said property or so much of it as may be necessary to make the payments. If at any time it be thought advisable by myself and Dr. Mendenhall to sell part of the said property, real or personal, it will be perfectly consistent with the trust intended that such sale should be made. The said land and property are placed in the hands of Dr. Mendenhall as my agent until the purchase-money be paid as hereinbefore stated, and after that as agent for his family.

"Witness my hand and seal this 5th January, 1847.

"John Belton O'Neall. [L. S.]

"Signed and sealed in our presence,

"G. W. Garmany,

"D. M. Cole."

In January, 1863, Judge O'Neall conveyed all of this land, (except the 400 acres and 157 acres, afterwards sold,) in two tracts,

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*to the two plaintiffs in this action, to each one tract, to him and her for life, with remainder to their children, respectively. Subsequently, the 400 acres and 157 acres were sold, as stated in the opinion of the court, which also states other material facts.

The Circuit decree was as follows:

On hearing the pleadings and evidence herein, and argument of counsel thereon, it is ordered, adjudged and decreed that the plaintiffs are only entitled to the net income of the trust-estate in question in this action jointly and equally for and during their natural lives, and then, upon the death of either, leaving no issue at the time of his or her death, the survivor shall take the whole income for and during his natural life; and if either shall die, leaving issue at the time of his or her death, the survivor shall take one moiety of said income and the issue of the deceased the other moiety for and during the said remainder of the said survivor's life; and that upon the death of such survivor, the respective issue of the plaintiffs living at the time of the death of each, shall be absolutely entitled to said trust-estate per stirpes free and discharged from all trusts. It is further ordered that George S. Mower be and is hereby appointed trustee, in whom the said trust estate shall vest, to be administered by him for the purposes and upon the terms and limitations hereinbefore set forth, upon his entering into a bond to the clerk of this court, &c.

From this decree plaintiffs appealed upon the following exceptions:

1. Because the Circuit judge held that the appellants, James K. Mendenhall and Eliza P. Scott, have only a life-estate in the property in question; whereas, it is submitted, he should have held that they have an absolute fee-simple estate in it.

2. Because the Circuit judge erred in holding that the appellants have only a life-interest in the said property; whereas, it is submitted, he should have decided that they had at least a fee-conditional in the lands, and should have that estate in any lands in which the funds may be invested, and an equivalent estate now in the funds.

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*3. Because, whatever estate the appellants may have in the property, there is no necessity for a trustee to hold and administer the property perpetually.

4. Because the Circuit judge erred in holding that the said estate should be kept together until the death of both appellants before division; whereas, it is submitted, he should have held the property divisible at the death of either of them, allowing that they have only life-estates.

Messrs. Y. J. Pope and J. F. J. Caldwell, for appellants.

Mr. T. S. Moorman, contra.

November 21st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. In 1847, the property, real and personal, of Dr. Mendenhall, then of Newbury county, was sold at public sale, we suppose at the instance of his creditors. The Hon. John Belton O'Neall became the purchaser, paying part of the purchase-money in cash, and securing the remainder by his notes.

The object of Judge O'Neall in making the purchase was to befriend the family of his friend, Dr. Mendenhall, and, to this end, immediately after the sale, he executed an acknowledgment of trust embracing the entire property purchased, to wit, a large tract of land and a number of slaves. In this acknowledgment he stated that he held the property in trust: First. for the payment of the purchase-money by Mrs. Phœbe Mendenhall, Pauline Eliza Mendenhall and James K. Mendenhall, the wife and children of Dr. Mendenhall, or by Dr. Mendenhall, their agent. Second. For the use of Mrs. Phœbe Mendenhall for life, and after her death, for the use of Pauline Eliza Mendenhall and James K. Mendenhall and their respective issue, or the survivor of them, the said Pauline and James, if either of them should die without issue; if both should die without issue, then for the use of the said Dr. M. T. Mendenhall, or such person as he might appoint.

Some time after this, and after the death of Judge O'Neall in 1863, but at what time is not stated, proceedings were instituted

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*by a judgment creditor of Mrs. Phœbe Mendenhall, the life-tenant, to make a portion of the real estate embraced in the acknowl-

edgment of Judge O'Neall, to wit, four hundred acres, claimed to be the inheritance of Mrs. Phœbe Mendenhall, liable to his judgment.

As the result of this proceeding, an order was passed by the court directing this land and also an additional quantity, to wit, one hundred and fifty-seven acres, part of said trust-estate, to be sold, the proceeds to be applied first to the payment of the judgment debt of Mrs. Mendenhall, and out of the remainder, after payment of expenses, &c., $1,000 was directed to be paid over to Mrs. Mendenhall, the balance to be held by a trustee, thereafter to be appointed, on the same trusts declared and set forth in the second clause of the deed made by the Hon. John Belton O'Neall, dated January 5th, 1847; and on June 1st, 1871, William G. Mayes, in the same proceeding, was appointed trustee, to wit: "For the use of Mrs. Phœbe Mendenhall for life, and after her death for the use of Pauline Eliza Scott and James K. Mendenhall and their respective issue, or the survivor of them, if either of them should die without issue."

Mrs. Phœbe Mendenhall died in 1874, her husband, Dr. Mendenhall, having died long before. The appointment of W. G. Mayes, as trustee, was revoked in 1878, and George S. Mower, one of the defendants, was appointed in his stead by the Probate Court for Newberry county. The amount of the trust fund has not been ascertained, but it is supposed that the corpus will not fall short of $5,500.

The plaintiffs, appellants, claim the property as an absolute estate, and that it should be turned over to them without the intervention of a trustee. The defendants, respondents, who are the children—one of the plaintiff, Pauline Eliza, and the others of James K. Mendenhall—claim that plaintiffs are entitled to a life-estate only, and that they, the children, are entitled in remainder to the property upon the death of the plaintiffs, and that a trustee is necessary.

Upon the hearing below, Judge Wallace sustained the view of the defendants in so far, at least, that the plaintiffs, appellants, were adjudged to be entitled to a life-estate

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only. As to the *remainder, he held that such issue as might be alive at the death of appellants would take per stirpes. From this decree, the plaintiffs appealed. The grounds of appeal, though several in number raise but two questions:

1. What estate or interest did the parties, appellants and respondents, take respectively under the settlement made by order of the court of the fund in question?

2. How far is a trustee necessary?

It seems to have been assumed in the argument that the property in question, though, as matter of fact, in its present shape it is money, and, therefore, personalty, yet, having been converted into money by the sale of realty, should be regarded as realty, and that the questions involved should be discussed as if in fact it was realty.

Formerly there was a wide distinction between these two species of property, especially as to the limitations in instruments, deeds and wills by which they were transferred and conveyed. This distinction, however, growing less and less marked, as personal property in the course of years rose in value as compared to realty, has at length almost passed away, until now the rules governing the construction of limitations as to the two are generally the same. Hill v. Hill, Dudley Eq. 83. It will not be necessary, therefore, to determine positively whether the property in contest is to be regarded as personal or real property. And especially is this unnecessary in this case, when we find that we are remitted in the order of the court settling this property to the acknowledgment of trust executed by Judge O'Neall, in 1847, as to the terms upon which the settlement was made.

The question, then, before the court, must turn upon the construction of this acknowledgment of trust. In taking up this instrument for consideration, emanating as it did from the mind of Judge O'Neall, under the promptings of that noble generosity which was one of the great characteristics of his nature, and which so often moved him in private life to the rescue of falling friends, remembering how long and how steadily that mind shed its luster upon the pages of our judicial history and how ably it assisted in building up and establishing the very prin-

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ciples upon *which questions like this now before the court should be decided, as appears in many cases which arose during the period of his distinguished judicial career in this State, awed as if I were in his very presence, I feel great reluctance in confessing the hesitancy and doubt by which we have been embarrassed in endeavoring to reach the true intent of this paper. Nevertheless, from whatever cause it may spring, we are compelled to admit that the questions involved have been unusually difficult and perplexing. We have, however, reached a conclusion sustained, we think, by the authority of decided cases, and one which we hope will not defeat the benevolent purpose of the author of this paper.

The plaintiffs contend for a construction that will vest this property absolutely in them, dispensing with the necessity of a trustee. The defendants claim that they should be adjudged, as issue, to take as purchasers at the death of plaintiffs, by way of remainder, after the life-estate of their parents, and that the trustee should continue to hold to carry out this trust.

The terms of the deed are: "After the death of Phœbe Mendenhall, for the use of

Pauline Eliza and James K. Mendenhall and their respective issue, or the survivor of them, the said Pauline and James, if either of them should die without issue. If both should die without issue, then for the use of Dr. Mendenhall, or such person as he may direct or appoint."

Now it has been well established as to personal property, where an estate is given to one and his issue, with a limitation over, to take effect at the death of the first taker, that the first taker has a life-estate only, and his issue living at his death will take in remainder as purchasers. It has also been well established that where a fee in real property has been devised to one with limitation over at his death without issue at that time, the limitation will be good as an executory devise. Thus it will be seen that the turning point in both deeds and wills is the fact whether the time fixed for the limitation to take effect is the death of the first taker. If so, in a deed, the limitation over is good as a remainder, unless it should clearly appear that a fee had been given in the first instance to the first taker. In such case the limitation could not take effect in a deed as a remainder, because, the whole estate having been granted, there would be

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*nothing left to be embraced in a remainder. But in a will or devise a fee may be limited after a fee; the essential requirement being that the period fixed for the limitation should not be beyond a life or lives in being and twenty-one years thereafter. If fixed within that time the original fee will be defeated by the happening of the contingency specified, and the second fee will spring into existence at that moment by executory devise.

The paper under consideration is a deed, and if the terms used had been to Pauline Eliza and James, and their "heirs," they would have conveyed a fee beyond all doubt, and in that case no remainder could have been limited, because, the whole having been conveyed, there would have been nothing remaining to be made the subject of a remainder. But the term used in this case is the word "issue." This, as to real property, is not the apt word of inheritance, and does not in itself convey a fee in a deed.

Hence, when this word is used in a deed, the question is open as to the intent of the grantor, and whether a limitation over can take effect when this word is used will always depend upon the fact whether, from the whole instrument taken together, the court can see that the time fixed for the limitation is at or beyond the death of the first taker; the rule being as to remainders that they must take effect during the continuance of the particular estate, or eo instante that it determines, otherwise they will fail.

The word "issue" is susceptible of three meanings: 1. It may describe a class of persons who are to take as joint-tenants with the parties named. 2. It may be descriptive of a class who are to take at a definite and fixed time as purchasers; and, 3, It may denote an indefinite succession of lineal descendants who are to take by inheritance. Whenever this word is used, either in a deed or will, it must be used in one of these senses. The difficulty in most cases is to determine in which of these senses it has been employed.

We cannot suppose that it was used in the case at bar in the first sense. It does not appear that Pauline Eliza or James had issue in 1847 when the deed of Judge O'Neall was executed, and he could hardly have intended that their issue, as they might come into existence thereafter, should become

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joint-tenants with *them, especially as Pauline and James and Mrs. Mendenhall were to pay the purchase-money of the property. Was it used in the second or the third sense?

Generally, this term, when used in a will, means an indefinite succession, and, when not controlled by subsequent words in the same instrument, this interpretation will be given to it, (see remarks of Chancellor Harper in Henry v. Archer, Bailey Eq. 536;) but it may be controlled by the use of subsequent words in such way as to demand an interpretation in accordance with the second sense as descriptive of a class who are to take as purchasers at a definite and fixed time. The next step in the inquiry is, what terms are subsequently used in this deed, and will they have the effect under the decisions of qualifying the previous use of the word "issue" so as to fix the death of the first taker at the time when the issue are to take?

We find first, in this deed, the phrase "dying without issue." This is a very common phrase in such instruments. What effect does it have? It has been often decided—so often that it has become a canon of construction—that this phrase, when standing alone, not only fails to fix a definite time for the limitation over, but it denotes, on the contrary, an indefinite succession. Anderson v. Jackson, 16 Johns. 381, and the cases there cited and discussed. Such being the fact, if there were no other words of qualification in this deed, we might stop our investigation at this point; but we find also the term survivor employed, the deed providing that if either Pauline Eliza or James should die without issue, then the estate to go to the survivor.

Does this word control the generality of the previous phrase, "dying without issue?" This subject has been much discussed, both in the English courts and our own, and although it is sometimes difficult to reconcile the different decisions, yet, upon a close analysis, it will be found, we think, that they have established the principle that when the term "survivor" is used, following the gen-

eral phrase "dying without issue," and unaccompanied with other words indicating a transferable interest to the heirs of the survivor, that that term will always have the effect of controlling the generality of this phrase and of changing it from an indefinite failure, which it would mean when standing

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*alone, to a failure at a definite time, to wit, the death of the first taker, thus cutting down his estate to a life-estate, and giving a remainder to such of his issue as may then be living, or, in case he leaves no issue alive, then the remainder to go to the survivor.

One of our first cases on this subject is the case of Guery v. Vernon, 1 N. & McC. 69, decided in 1818. In that case there was a bequest by a father to his daughter of two slaves, but in case she died without issue, then to return to his son, Isaac. The whole court, Judge Cheves delivering the opinion, held the limitation too remote and, therefore, void. That case differs from the case before the court in the facts that there was no direct gift to the issue of the daughter, and the limitation over was to a person named, his son, Isaac, instead of to a survivor. No doubt the court concluded that Isaac was entitled to a transmissible interest, and, therefore, his being named did not indicate that he should be in existence at the death of the first taker to become invested with the remainder.

The next case we find is Henry v. Felder, 2 McC. Eq. 335, decided in 1827. The bequest there was of a girl to Elizabeth Conlietle, to her and the heirs of her body forever, but on failure of issue to go to the oldest child of his daughter, Nancy. The Court of Appeals, in an elaborate opinion, held the limitation void for remoteness. That case turned on the construction of the words failure of issue.

In Manigault v. Deas, Bailey Eq. 292, decided in 1829, a bequest was made of slaves to two of testator's daughters, and if either should die without leaving issue, then to the survivors. It was held that the daughters took an absolute estate. It will be observed that there was no direct gift to the issue, and the court could raise none by implication.

In Postell v. Postell, Bailey Eq. 390, decided 1831, a testator bequeathed his personal estate to his two sons, to them and their legal issue, and should either die without lawful issue, the said property to revert to the surviving brother and his lawful issue. Held, That the limitation was too remote and void, and that an absolute estate vested in the first taker. The word "survivor" employed in the case failed to limit the generality of the phrase dying without issue, because it

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was followed by the words "and *his lawful issue," showing that a transmissible interest was intended in case the brother did not survive.

In Murray & Buchanan v. Walker, 1 Strobh. Eq. 193, decided in 1846, there was a deed to grandchildren then alive, and also to those who might afterwards be born, with a limitation over to the survivors of the share of either that might die not leaving lawful issue. The court held that the issue of an unborn grandchild could not take under the deed, the limitation being too remote. And there are numerous other cases where the limitation, as to its remoteness, tested by other words employed, was held too remote even where the term "survivor" was also used.

On the other hand. In the case of De Treville v. Richard & Ellis, Bailey Eq. 37 [21 Am. Dec. 518], decided in 1827, in a devise of both real and personal property, the indefinite failure of the heirs of the body was controlled by the term survivors, and the devise over was held good both as to the realty and the personalty. So, too, in the case of Stevens v. Patterson, Bailey Eq. 42, decided in 1829, where a bequest was of personalty to a daughter, to her and the heirs of her body; but should she die without lawful issue, then to go back and be equally divided amongst the survivors of testator's children, the limitation was held good as an executory devise, the word "survivor" being held to indicate the death of the first taker as the event when the limitation should take effect.

In Cordes v. Adrian, 1 Hills Eq. 154, the words "surviving children" had the effect of controlling the generality of the phrase "dying without issue," and of fixing the death of the first taker as the time when the limitation was to take effect. See, also, cases Hill v. Hill, Dudley Eq. 71; Terry v. Brunson, 1 Rich. Eq. 79; Yates v. Mitchell & Porter, Id. 265; Lowry v. O'Bryan, 4 Rich. Eq. 263 [57 Am. Dec. 727]; McCorkle v. Black, 7 Rich. Eq. 407. In this last case there was a devise of land to several, to be equally divided between them, and after their death to their lawful issue, followed by a provision that if any of the devisees should die leaving no lawful issue, then their portion to be equally divided between the survivors. Held, that the first takers took a life-estate and the issue a remainder, as purchasers;

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the term "sur*vivors" having the effect of controlling the phrase "dying without issue."

Without referring to other cases, we say that the general principle to be extracted from all the cases is that where, in the first instance, there is no direct gift to the issue, nor any mention of issue, then the word "survivor" will not restrict the generality of the previous phrase: but where there is a direct gift to the issue in the first instance, and a limitation over to a survivor or survivors of persons in esse on the death of the first taker, without lawful issue, the limitation

will not be held too remote, unless it should appear from the will that the survivor was intended to take a transmissible interest without reference to the time of vesting in possession, and in the absence of words to show such intention the presumption is that the survivor was to take personally and not a transmissible interest. Stevens v. Patterson, Bailey Eq. 42; Knight v. Ellis, 2 Bro. 570; Lampley v. Blower, 3 Atk. 396, commented on in Carr v. Porter, 1 McC. Eq. 60. Now, in this case, there is both a direct gift to the issue and a limitation over to the survivor. There is nothing showing that a transmissible interest was intended; on the contrary, the terms of the deed are: "To the survivor of the said Pauline and James," showing that it was the intention of the grantor that the survivor of Pauline and James, whichever it might be, should take personally.

Under the operation of this principle, we are of the opinion that the time fixed by the declarant for the issue to take, if alive, was at the death of the first taker, and the effect of this intent was to cut down the estates of Pauline and James to a life-estate, with remainder to their respective issue, such as might, at their death, be in existence, as purchasers.

Such being the interest of the parties, we are further of the opinion that a trustee is necessary, so that the estate may be preserved for the remaindermen.

This case thus far, and for the reasons already stated, has been considered as if the property in question was real property and embraced in the deed of Judge O'Neall, executed in 1847. But the fact is, it is personal-

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ty and and settled by the order of court *referred to above. When considered with reference to this order we think the result will be the same.

Although the precise date of the order is not given, yet there is no doubt that it was after the act of 1853, in reference to limitations. This act provides that the phrase "dying without issue," both in deeds and wills, where either personal or real property is disposed of, shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of the first taker.

If this act is applied to the case, it gives a legislative construction to the words under consideration, and fixes indisputably the event for the limitation over to be the death of the first taker, thus cutting down their estate to an estate for life, with remainder to such of their respective issue as may at that time be living.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

16 S. C. 316

(Case No. 1123.)

MANGUM v. PIESTER.

(April Term, 1881.)

[1. *Perpetuities* ⇐4; *Wills* ⇐733, 747.]

Testator (who died in 1833) devised his real estate to his widow for life, with remainder to his son W., and, "if W. should die without issue, all the interest he has in my estate to go to H., and if both W. and H. should die without issue, then" over. *Held*, that the event fixed for the limitation to H. to take effect was not the death of W. without living issue during the life-time of the widow.

[Ed. Note.—Cited in McCreary v. Coggeshall, 74 S. C. 48, 53 S. E. 978, 7 L. R. A. (N. S.) 433; Bischoff v. Atlantic Realty Corp., 95 S. C. 288, 78 S. E. 988.

For other cases, see Perpetuities, Cent. Dig. § 25; Dec. Dig. ⇐4; Wills, Cent. Dig. §§ 1829, 1929; Dec. Dig. ⇐733, 747.]

[2. *Wills* ⇐545.]

But an indefinite failure of issue to W. is the well-ascertained meaning of the words used by testator, and hence the limitation to H. is void for remoteness.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171–1176, 1310–1318; Dec. Dig. ⇐545.]

[3. *Wills* ⇐545.]

The phrase "die without issue" considered, particularly in the light of the rules governing contingent remainders and executory devises, and when restricted by qualifying words. Some differences between contingent remainders and executory devises stated, and the reasons upon which founded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171–1176, 1310–1318; Dec. Dig. ⇐545.]

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[4. *Wills* ⇐545.]

*Neither the limitation to H. by name nor the use of the adverb "then" restricts the generality of the phrase "die without issue" to a failure of issue at the death of W.

[Ed. Note.—Cited in Bischoff v. Atlantic Realty Corp., 95 S. C. 283, 78 S. E. 988.

For other cases, see Wills, Cent. Dig. §§ 1171–1176, 1310–1318; Dec. Dig. ⇐545.]

[5. *Estates* ⇐10.]

The widow of testator conveyed all of her interest in these lands to her son W., who conveyed to P., and P. held adversely under his deed. W. died, and, afterwards, his mother. *Held*, that by the conveyance to W. the life-estate was merged in W.'s greater estate and was thus extinguished, and if the limitation to H. was good as an executory devise, the statute of limitations would commence to run against him under P.'s adverse claim, from the death of W., and would not be postponed until the death of the life-tenant.

[Ed. Note.—Cited in St. Philip's Church v. Zion Presbyterian Church, 23 S. C. 307; Rutledge v. Fishburne, 66 S. C. 159, 44 S. E. 564, 97 Am. St. Rep. 757.

For other cases, see Estates, Cent. Dig. § 12; Dec. Dig. ⇐10.]

[This case is also cited in St. Philip's Church v. Zion Presbyterian Church, 23 S. C. 315; Boykin v. Ancrum, 28 S. C. 498, 6 S. E. 305, 13 Am. St. Rep. 608; Youmans v. Wagener & Co., 30 S. C. 303, 9 S. E. 106, 3 L. R. A. 447; Michalson v. Myrick, 47 S. C. 305, 25 S. E. 162; Lipscomb v. Goode, 57 S. C. 188, 35 S. E. 493, as to the doctrine of merger.]

Before Wallace, J., Newberry, May, 1880.

This was an action commenced June 21st, 1874, by the children of Hillary R. Mangum against the executors and devisees of David B. Piester, and against Thomas M. Neel, Henry Koon and John R. Leavell—the last-named as a creditor of David B. Piester—for the recovery of a tract of land. The plaintiffs claimed under the will of C. Griffin, which was as follows:

In the name of God, amen. I, Christopher Griffin, being of sound and disposing mind and memory, but weak in body, and calling to mind the uncertainty of life, and being desirous to dispose of all my worldly estate God has blessed me with, do make and ordain this my last will in the manner following, that is to say: I desire that shortly after my decease all my personal estate shall be sold at public auction on a credit of one and two years, and out of the moneys arising therefrom all my just debts and funeral expenses be paid. After my debts and funeral expenses are paid, I will and bequeath unto my beloved wife, Phœbe Griffin, all my plantation now in cultivation, also, one-third part of the proceeds of my personal estate, after the debts and funeral expenses are paid, during her natural life-time, to be disposed of after her death as will be hereafter mentioned—my wife, Phœbe Griffin, being bound to board, clothe and educate my son, Wm. B. Griffin, or in failure or not performing the above requirements to my son, my wife, Phœbe, is to be charged with two-thirds of the rent of the plantation.

I will and bequeath unto my son, Hillary R. Mangum (or Griffin), the sum of five hundred dollars when he arrives at the age of twenty-one years. If he should die not having any issue, the above legacy to become part of my estate.

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*I will and bequeath unto my beloved son, William B. Griffin, the balance of my personal estate, and at the death of my wife, Phœbe, all my real estate, with the above-mentioned one-third of my personal estate bequeathed to the above-mentioned Phœbe during her life-time.

If the before-mentioned William B. Griffin should die without issue, all the interest he has in my estate is to go to my son, Hillary R. Mangum (or Griffin); and in case the above-mentioned William B. Griffin and Hillary R. Mangum (or Griffin) should die without issue, then all my estate, real and personal, to be equally divided between my four sisters, namely, Elizabeth Pitts, Sarah Griffin, Martha Barksdale and Lucinda Griffin; and, further, I constitute and appoint my friend, Bluford F. Griffin, executor of this my last will and testament, revoking all former wills.

In testimony whereof, I have hereunto set my hand and affixed my seal this twenty-second day of January, 1832.

Christopher Griffin. [L. S.]

This will was properly attested.

All the issues of law and fact were referred to J. F. J. Caldwell, Esq., who, in an able report, held that Mangum's heirs were not estopped from asserting their claim; that no one but Mrs. Griffin and W. B. Griffin, could object to the provisions of the will in favor of the bastard, Mangum; that the limitation over to Mangum was upon the death of W. B. Griffin without issue in the life-time of his mother, which was not too remote, and which had occurred; that D. B. Piester did not hold adversely for ten years, nor had his alienee, Neel, nor his devisees, and while the possession of ancestor and heir might be tacked together to make up the full statutory bar, that of devisor and devisee could not, the devisee being a purchaser, and not holding by descent.

Exceptions were taken by defendants to this report, and the case was heard by the Circuit judge upon these exceptions. He sustained the referee in his conclusions as to the estoppel, and the excessive provision for Mangum; but sustained the exceptions to his other findings, holding that the limitation over to Mangum was too remote, and that the Statute of Limitations commenced to run in favor of Piester and his assignee, Neel, at

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*the death of W. B. Griffin, and continued to run in favor of the devisees, who were also the heirs-at-law of Piester.

From this decree, appeal was taken to this court, by the plaintiffs, who urged their appeal upon the following exceptions:

1. Because his Honor erred in holding that the limitation over to Hillary R. Mangum, created by the will of Christopher Griffin, was too remote.

2. That his Honor erred in holding that the right of Hillary R. Mangum to bring this suit accrued to him upon the death of William B. Griffin, whereas it is contended that such right did not accrue to him until the death of Phœbe Wallace, and that, therefore, the Statute of Limitations did not run against Hillary R. Mangum until then.

3. That his Honor erred in holding that the Statute of Limitations did not cease to run at the death of David B. Piester, (to wit, August 20th, 1873,) but that it continued to run until the death of Hillary R. Mangum.

4. Because his Honor erred in holding that the plaintiffs are barred by the Statute of Limitations from bringing their action, whereas it is contended that the statute does not bar the plaintiff's action against any of the defendants.

5. Because the decree is contrary to the law and evidence in this case.

Mr. J. Y. Culbreath, for appellant.

In cases of great doubt the expression of the legislative desire might incline the balance. 11 Rich. 489. The act of 1853 construes the meaning of the phrase "dying without issue." But in this case, there was

a precedent life-estate, and, therefore, testator was providing for the contingency of W. B. Griffin's death without issue, before his mother died, or, if with issue, the death of such issue before the termination of the life-estate. This view is sustained by the cases in 7 Rich. Eq. 105; 6 Id. 26, 83; Spears Eq. 312, 402; 10 S. C. 56; 1 Hill Ch. 265; and by 2 Jarm. Wills *693. Any words which indicate an intention in the testator to confine a failure of issue to a dying without issue living at the death of the first taker, will

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be sufficient to rebut *the construction of an indefinite failure of issue. 14 N. H. 215; 6 Harris 72; 3 Md. Ch. 257. As to the Statute of Limitations, plaintiffs were minors when their father died, and still are. Mangum took under Griffin's will an executory devise. 2 Bl. Com. 172. His interest could not be affected by deed of Phœbe Griffin to W. B. Griffin, nor by deed to Piester; for this latter deed was not recorded until February, 1867, and the former, never. Mangum could not bring action until Phœbe's death, for until then he was not entitled to the possession, and Piester had her life-estate. His rights were not affected by these conveyances. 2 Minor Inst. 375. The conveyance to Neel by a disseisor carried no right. Rice 10. Piester's devisees obtained no right from Piester, who had not matured title. A devise is only an alienation by purchase. 2 Bl. Com. 287. These devisees have held by purchase and not by descent cast.

Mr. J. W. Ferguson, on same side.

Argument of Mr. J. M. Baxter, deceased, and Messrs. Geo. S. Mower and T. S. Moorman, contra.

November 21st, 1881. The opinion of the court was delivered by

SIMPSON, C. J. Christopher Griffin, late of Newberry county, died in 1832 or 1833, leaving a last will and testament, in which, among other things, he devised his real estate to his widow for life, and at her death to his son, William B. Griffin, with the further provision that if his son, William B. Griffin, should die without issue, "that all the interest he has in my estate is to go to my son, Hillary R. Mangum (or Griffin); and in case the above-mentioned William B. Griffin and Hillary R. Mangum (or Griffin) should die without issue, then all my estate, real and personal, to be equally divided between my four sisters, Emily Elizabeth Pitts, Sarah Griffin, Martha Barksdale and Lucinda Griffin."

Mrs. Phœbe Griffin, who afterwards intermarried with Bennett Wallace, conveyed her life-estate in the land in January, 1854, to W. B. Griffin, who, on the same day, for

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valuable con*sideration, conveyed said land to D. B. Piester, who then conveyed ninety-two acres thereof to Jacob R. Schumpert, who, on December 6th, 1871, conveyed to defendant, T. M. Neel. D. B. Piester continued in possession of the remaining 522 acres from the date of the deed of W. B. Griffin to him, in January, 1854, until his death, having, during his life, mortgaged 521 acres to defendant, Henry Koon, to wit, on January 9th, 1872.

Piester died in 1873, leaving a will, in which he directed his executors to sell any portion of his estate, real or personal, sufficient to pay debts; and after the payment of his debts he gave the whole estate to his wife and children. Under this will his family have remained in possession. W. B. Griffin died in November, 1861, his mother, the life-tenant, surviving him until January 24th, 1864, when she died. Hillary R. Mangum died in February, 1874.

This action was commenced June 21st, 1874, by the children of Hillary R. Mangum, claiming the land in question on the ground that William B. Griffin, having died without issue living at his death, their father became entitled to said land, and their father having since died, the land descended to them as his heirs-at-law. The claim of the plaintiffs was resisted below on several grounds:

First. It being admitted that Hillary R. Mangum was a natural son of Christopher Griffin, the testator, the defendants relied upon the act of 1795 prohibiting a father, having a lawful wife or child, giving by deed or will more than one-fourth of the clear value of his estate to a concubine or to his illegitimate child. Second. They relied on the doctrine of estoppel, insisting that Hillary R. Mangum, having stood by and silently permitted Piester, after his purchase, to put up valuable improvements on his land, he and those claiming under him were thereby estopped from now setting up claim to the land. Third. They set up the remoteness of the limitation to Mangum, and claim, on that account, that it was void; and, Fourth, They interposed the Statute of Limitations. Judge Wallace, who heard the case below, overruled the two first grounds of defense, but sustained the two last.

The plaintiffs have appealed, their excep-

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tions involving the *two questions decided for the defense below, to wit: Was the judge in error in holding that the limitation to Hillary R. Mangum was void for remoteness, and also in allowing the Statute of Limitations to be successfully interposed?

The first point made in the argument in behalf of the appellants is: That the event fixed for the limitation to Mangum was the death of W. B. Griffin during the life of the life-tenant, Mrs. Phœbe Griffin. And W. B. Griffin, having died during the life of the life-tenant, it is contended that this limitation took effect at his death, and the cases of Evans v. Godbold, 6 Rich. Eq. 26; Schoppert

v. Gillam, Id. 83; Anderson v. Smoot, Speers Eq. 312; Vidal v. Verdier, Id. 402, and Blum v. Evans, 10 S. C. 56, are relied on to sustain this proposition.

We do not think that these cases are applicable to the case at bar. In the case of Vidal v. Verdier, supra, which is the strongest case in this direction, it is true that the court did construe the will as intending to fix the death of the first taker in remainder before the death of the life-tenant as the event for the limitation over to take effect, but that case, as will be found upon examination, turned upon the construction of the words "in case of the death," which were embraced in the phraseology used. These words do not appear, in the case now before the court, in connection with the limitation to Mangum.

Besides, Vidal v. Verdier was fully discussed afterwards by Chancellor Harper in the case of Yates v. Mitchell, decided in 1845, and found in 1 Rich. Eq. 265, where that able chancellor defines and limits the principle laid down there within its proper boundary, and which excludes its application here. He says that Vidal v. Verdier was decided on the principle "that when a testator, giving in remainder after a life estate, uses one set of expressions denoting that the remainderman is to take an absolute estate, and another set of expressions limiting him to an estate for life, with remainder to his issue, and a limitation over in the event of his not having issue, this apparent repugnancy may be reconciled by restricting the dying without issue to the life-time of the tenant for life, thus permitting every part of the will to have its proper effect. If he dies during the life-time of the tenant for life, leaving issue, the

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issue will take as purchasers *under the will; if without issue, the limitation over will have effect; but if he survives the tenant for life, the estate is absolute in him." But he said, further, that this had nothing to do with the case he was then discussing, because, in that case, there was not a double set of expressions, indicating different estates conveyed, as in Vidal v. Verdier.

So we say here, as to the case now before the court, and for the same reason. Had W. B. Griffin left issue, beyond doubt they would have taken by inheritance, and not by purchase, showing that a fee was conveyed by way of remainder to him, which vested in right at the death of his father, to be enjoyed in possession at the death of his mother. There is not a word in the will which indicates that the testator intended his son, W. B. Griffin, should take an estate for life with remainder to his issue in any event.

In the case of Blum v. Evans, 10 S. C. 56, the will was executed after the act of 1853 on the subject of words of limitation, and the last constitutes a wide distinction between that case and this, and no doubt had much to do in controlling the judgment of the court.

We do not think that this point, though earnestly and ably presented by the junior counsel of appellant, can be sustained either upon principle or upon the authorities cited. We will proceed then to the consideration of the case as dependent upon the other questions raised.

First. Is the limitation over to Hillary R. Mangum void for remoteness? The limitation to Mangum is dependent upon the event that William B. Griffin should "die without issue." Do these words import an indefinite failure of issue, or can they be restricted to a certain time competent, within the rules of law, upon which a limitation over can take effect by way of executory devise? Did the testator use these words indicating that if, at any time in the future, the issue of William B. Griffin should become extinct, then the estate should go over to Mangum? or did he mean only that if, at the death of Griffin, there should be no issue, then the limitation should take effect? These questions must turn upon the construction of the phrase "dying without issue," as interposed

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by their own inherent meaning, or *as controlled, if they may be, by their connection with other expressions in the will.

These words, and words of similar import, have been a prolific source in the past of numerous and bitter legal contests, reaching far back into our judicial history. They have given rise to some of the most profound and abstruse discussions in our books, and they have formed the basis of numerous learned opinions of the law and chancery courts, both of England and America. Our own reports are full of such opinions, and they are found in the reports of all the States. It would seem, then, that all difficulty surrounding this subject ought to have been dissipated long since, and the way through these words made so clear that no one at this day should err therein: but such is not the fact. Notwithstanding all the lights afforded by the decisions of the past, and the profound special discussions of this subject by eminent and most able text writers on real property and estates therein, legal minds still fail frequently to agree as to the true intent and meaning of instruments in which these words are found, and especially in their application to a case in hand, and, as a consequence, almost every paper in which such terms have been employed, even at the present day, sooner or later appears in a court of last resort for adjudication. We are not much surprised, therefore, to see this case before us.

Without referring at this time to the different text-books and numerous decisions which we have examined, and through which we have reached our conclusions, we feel authorized to say, in the beginning, that

there are two classes of cases in which these words constitute the pivotal point, and upon the construction of which they depend. The first class embraces all those cases in which the question arises whether the term "issue," as used in the instrument, was employed to denote an indefinite line of succession of descendants to take the estate by inheritance, or to denote a class of persons to take as purchasers at a fixed time. In other words, whether the term "issue" is a word of limitation, indicating that the first taker has the whole interest conveyed, descendible to his lineal descendants ad infinitum, or whether it is a word of purchase indicating that the first taker is only entitled to a life-estate

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with remainder to such persons as may *answer the description of the term "issue" at the death of the first taker.

The second class embraces all those cases in which it is admitted that the fee in the first instance is conveyed to the first taker, but an effort is made to transfer this fee upon the happening of a specified contingency from him to another by way of executory devise. In other words, those cases where the attempt is made to mount a fee upon a fee, which can be done only by executory devise. The difference between the two classes is that the first involves the law of contingent remainders and the second that of executory devises. The case now before the court belongs to the second class; the case of Mendenhall v. Mower, ante p. 303, belongs to the first class. These two cases will fully illustrate the different character of the two classes, and the principles of law applicable to each.

The precise question then, in this case, when brought down to its last analysis, is: Does the will of Christopher Griffin contain a legal executory devise, by which a fee in the land in dispute was devised to Hillary R. Mangum, after a fee already devised to W. B. Griffin—the fee to Hillary R. Mangum to take effect in him upon the defeat of the fee in Griffin upon the contingency specified? Or, to state it in another and shorter form, Can the will of Christopher Griffin be regarded as an executory devise in favor of Hillary R. Mangum?

An executory devise is a limitation by will of a future contingent interest in lands contrary to the rules of limitation of contingent estates in conveyances at law. If the limitation by will does not depart from those rules prescribed for contingent remainders, it is in that case a contingent remainder and not an executory devise. 4 Kent 265. For instance, among the rules governing contingent remainders is one which forbids an estate to be limited over to another after a fee already granted. In such case there can be no such thing as defeating the fee already granted and transferring it to another by way of remainder, because a remainder implies something left, which cannot be the case after the whole has once been disposed of. Yet, while this cannot be done by way of contingent remainder, it may be done by an executory devise, which, according to the

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definition above, *allows a departure from the rules of law governing contingent remainders. And this being an effort to create a fee after a fee, is a case of departure denied by contingent remainders but allowed by executory devises.

So, too, under the common law conveyances, a freehold interest in real property could not be limited to commence in futuro, because such interests were established under the feudal system, and under that system livery of seizin was necessary to the creation of a freehold, and as livery could not be given in futuro, a future freehold could not be created at common law. Neither at common law could a fee be mounted on a fee. In conveyances at law, it is true, a provision may be made for the defeasance of a fee, but not then for its transfer to another at some future period and upon some specified contingency.

These, and some others, being difficulties which our legal ancestors found surrounding conveyances at common law, which, in their opinion, demanded remedy, the executory devise was intended for that purpose. Hence it allows a freehold to be created in futuro without a particular precedent estate to support it, and by it a fee may be created after a fee. But at the same time the common law abhored a perpetuity, and to prevent perpetuities in executory devises, to which they would have inevitably led if left unguarded, it was established as a part of the machinery of executory devises that the contingency upon which the limitation intended was to take effect should not be postponed longer than a life or lives in being and twenty-one years and a fraction of another year thereafter. So that in all these cases, involving the validity of an executory devise, the main point to be considered is, has the contingency upon which the limitation is to take effect been fixed within the period of a life or lives in being and twenty-one years and a fraction after? If so, the executory devise is good and the limitation valid. If not, it is bad, and the limitation void for remoteness.

Now, was the event upon which Christopher Griffin intended the limitation in favor of Hillary R. Mangum should take effect, fixed by him to happen within the prescribed period? The exact language of the will is: "If the before-mentioned William B. Griffin should die without issue, all the interest he

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has in my *estate is to go to my son Hillary R. Mangum (or Griffin); and in case the above-mentioned William B. Griffin and Hillary R. Mangum should die without issue,

then all my estate to be equally divided between my four sisters," naming them.

From this language it will be seen that the event upon which the limitation to Hillary R. Mangum was to take effect was the non-existence of William B. Griffin's issue after his death. This non-existence of William B. Griffin's issue might be found to be the fact at an indefinite period after his death when the last of his lineal descendants died, or it might be the case at the moment of his death.

If Christopher Griffin intended that the limitation should take effect at either of these periods—whenever it was found that William B. Griffin had no issue living—after his death, this would include an indefinite failure as well as a failure at a definite time, to wit, the death of W. B. The first, having a tendency to perpetuity, would be too remote, and therefore void, and the second being embraced in the first could not save the limitation. If he, however, intended to restrict this period to the time of the death of W. B. Griffin alone, and then the limitation to take effect if there was no issue, this would be within the life or lives in being, and therefore valid.

Which of these did he intend? This must be determined by the language used, interpreted according to the rules of law. It is well established that the phrase "dying without issue" or "die without issue," when standing alone, before the act of 1853, denoted an indefinite failure, and a limitation over, upon such terms unqualified, has ever been held void for remoteness. There can be no case found contrary to this. See Anderson v. Jackson, 16 Johns. 382, and the numerous cases there discussed. See, also, 2 Fearne 443; Graham v. Moore, 13 S. C. 119, and the cases there cited. But it has also been held, on the other hand, that these terms may be qualified by subsequent words, and when thus qualified, so as to be restricted to the death of the first taker, the limitation over will be preserved.

The last and precise point, then, in the case is: Are there any qualifying words in this will which restrict the limitation to Mangum to the death of William B. Griffin?

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The words most *usually relied on as sufficient to restrict the generality of the phrase dying without issue, are such as these: "Leaving no issue," "issue living," "survivors," and words of like import. It is admitted that there are no such words in this will.

But it is contended that while this is true, yet, inasmuch as the limitation here is to one in existence, and to him by name, that the testator could not have intended an indefinite failure. On the contrary, he must have intended some period when the party named would probably be in existence, to wit, the death of Griffin, the first taker, without issue then living.

There is a class of cases in our reports in which it is held that, where the limitation over can be construed as a personal benefit alone to a party named, then the effect of such construction will operate as a restriction upon the generality of the phrase. And the term "survivor," when unaccompanied with words indicating a transmissible interest, should the survivor not be in being at the happening of the contingency, will generally have this effect. See case of Mendenhall v. Mower, ante, and the cases there referred to. But where the limitation also embraces a transmissible interest, even the term "survivor" will be impotent to this effect.

Now, have we any reason here to conclude that the limitation to Hillary R. Mangum was intended simply as a personal benefit to him alone, and, in case he had died before Griffin, that all claim as to him would have ended? Is there anything to show that the testator did not intend to convey to him a transmissible interest, to attach at the falling in of the estate of the first taker, either to Mangum or his heirs, as the facts at that time might require? We see nothing in the case which can demand this construction, except that the limitation is to Mangum by name.

There are numerous cases in the books where the limitation over has been held too remote, although one in esse is named as the party to take. In fact we have found no case where the naming of one as the party provided for has in itself restricted the generality of the previous words. Lyon & Norwood v. Walker, 8 Rich. 307. There is no reason, therefore, why the well-established meaning of the phrase dying without issue

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should *be changed in this case from an indefinite failure of issue after the death to a failure at the death of the first taker.

Mr. Ferguson, in his very clear argument, made a point on the use of the adverb "then," which deserves notice. This word, as an adverb, means "at that time," referring to a time specified, either past or future. It has no power in itself to fix a time. It simply refers to a time already fixed. The question here is: What time do the words "dying without issue" unqualifiedly fix? Do they fix an indefinite period when there shall be no issue, or do they fix a definite period, to wit, the death of W. B. Griffin? They must have been used with reference to the one or the other, and, having been thus used, the adverb then following them would refer to the one or the other, as their proper construction might indicate as the time intended. To assume that the use of the word would, in itself, fix a certain time, and then refer to it, would be giving it a double significance, of which it is not susceptible.

Our conclusion is, that the testator having used in his will those words which, according to well-established principles found in many decisions bearing expressly upon such words, could, before the act of 1853, have no other meaning but an indefinite failure of issue, and this will having been executed before the passage of that act, the limitation over to Mangum is too remote, and, therefore, void. We concur, therefore, in the decree of Judge Wallace on this branch of the case.

Next, as to the Statute of Limitations. Having determined the first question involved against the appellants, which ends all of their interests in this case, it would not be necessary, as a practical question, to consider the exceptions as to the plea of the Statute of Limitations; but this being one of the questions raised in the case, it is perhaps proper that we should decide it.

The Statute of Limitations begins to run at the moment a right of action accrues, and not before. To determine, then, whether the statute is a bar in this case, we must first ascertain when the right of action accrued, if any, to Mangum, and, second, whether the statutory period has elapsed since.

It will be remembered that Mrs. Phœbe Griffin had a life-estate. The life-estate, how-

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ever, she conveyed to her son, W. *B. Griffin, in 1854, who had at that time a vested fee in remainder in the same land. Thus, W. B. Griffin became possessed in his life-time of both estates. He died in 1861, some three years before his mother, who died in 1864. Now, the question raised is: Did a right of action accrue to Mangum at the death of W. B. Griffin, in 1861, or was he to await the death of Mrs. Phœbe Griffin, the original life-tenant, before he could claim? If the former, then it is admitted that he is barred, more than ten years having elapsed. If the latter, then there may be some doubt.

Under the terms of the will, Hillary R. Mangum's interest could not attach until the expiration of both the life-estate to Mrs. Griffin and the estate in remainder to W. B. Griffin. Now, did the purchase by W. B. Griffin of the life-estate of his mother merge this life-estate into his remainder in such way as that it became extinct, when his remainder expired upon his death? or did it continue to exist after the death of W. B. Griffin, in 1861, up to the death of Mrs. Phœbe Griffin, in 1864?

Merger, as a general rule, takes place whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate. In such case the less is immediately annihilated, or, in the law phrase, is said to be merged—that is, sunk or drowned in the greater—but they must come to one and the same person, in one and the same right, else, if a freehold be in his own right, and he has a term in right of another, there is no merger. 2 Bl. Com. *178. Here the greater and the less were united in the person of W. B. Griffin when he procured the life-estate of his mother. The two then came to one and the same person, in one and the same right, and merger took place.

It follows, then, that at the death of W. B. Griffin, there was no life-estate in the way of Mangum. And if the executory devise to him was a good devise, he could have commenced action at that time. Not having done so, and ten years having elapsed since then up to his death, without action, the statute is a bar.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. *331

*(Case No. 1124.)

COOPER v. SMITH.

(April Term, 1881.)

[*Judgment* ⇐=360.]

Action was brought for the recovery of a tract of land purchased from A.; defendant admitted plaintiff's deed, but alleged a possession under a prior contract to purchase made with A. The cause was called on calendar 1, and, without objection, submitted to a jury, who found for defendant. Upon this verdict, judgment was entered for defendant, and the next day plaintiff paid the costs, and the judgment was marked satisfied. More than two years afterwards, motion was made by plaintiff to vacate this judgment. *Held*, that the defense was equitable, and should have been passed upon by the judge, and that not having been done, the judgment was erroneous, and should be vacated.

[Ed. Note.—Cited in DuPont v. DuBos, 33 S. C. 397, 11 S. E. 1073; In re Bugg's Estate, 71 S. C. 439, 443, 51 S. E. 263; Keenan v. Lesiie, 79 S. C. 476, 60 S. E. 1114.

For other cases, see Judgment, Cent. Dig. § 698; Dec. Dig. ⇐=360.]

Before Mackey, J., Charleston, March, 1881.

Motion by plaintiff to vacate judgment in case of Ransom Cooper v. William Smith. The opinion states the case.

Messrs. Lord & Inglesby, for appellant.

Messrs. Simonton & Barker, contra.

November 25th, 1881. The opinion of the court was delivered by

SIMPSON, C. J. This action was brought to recover possession of a tract of land—the plaintiff claiming through a deed from Dr. O. C. Rhame. The defendant admitted the execution of plaintiff's deed, but denied his right to recover, alleging that the defendant was in possession under an agreement to purchase from Dr. Rhame, made prior to plaintiff's deed.

The case was found by Judge Kershaw on

calendar No. 1, and was submitted by him, without objection from either side, to a jury as a law case. The jury returned a verdict for the defendant. Upon this verdict, the clerk, after the adjournment of the court, entered judgment for defendant and for costs.

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*The judgment was entered on December 4th, 1878, and the next day the plaintiff paid it, whereupon defendant entered satisfaction.

Thus the matter stood until February 21st, 1881, when the motion below, after notice, was made before Judge Mackey, in open court, to set aside the judgment, as having been entered by the clerk without authority of law, and to have the case placed by the clerk upon the proper calendar. Judge Mackey refused the motion, and the plaintiff has appealed upon the following grounds:

1. "That the defense, being equitable in its nature, belonged to the equity side of the court, and could only be determined by the judge in the exercise of his chancery powers.

2. "That the verdict of the jury was merely to ease the conscience and enlighten the understanding of the judge, and, together with the judge's notes of evidence, should have been sent over to the chancery side of the court, where the judge himself should have considered the evidence and rendered a decree thereon.

3. "That this not having been done, the judgment entered by the clerk upon the verdict of the jury was without authority of law, and should be vacated and set aside."

There is no doubt but that the defense in this case was an equitable defense, and one which, formerly, could only have been adjudicated in a court of equity. The plaintiff's title having been admitted by the defendant, it could not have been assailed before the adoption of the code, in the law courts, by setting up an equitable defense there. Such defense could then have been made available for defendant by a distinct proceeding in equity only, to restrain the action at law, and for such relief in this court as the defendant's equity might warrant him in demanding.

The forms of action heretofore prevailing in the different courts, however, having been abolished, and the powers of the Court of Chancery and Common Pleas having been combined and vested in one court, and one form of action prescribed for all cases, whether equitable or legal, a change as to the mode of defense also became necessary.

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Hence, by the code, Section 173, *it was enacted that a defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. Under this section of the code, the defense, in this case, was set up, and the case went to the jury under the issue raised by this defense, the defendant having admitted plaintiff's deed, and, therefore, his legal title.

The question that the case upon the pleadings was an equity case, involving an equitable issue only, was not raised. Nor after verdict was there any motion made, either by the plaintiff or defendant, for decree or judgment by the judge. Under these circumstances it is not surprising that the clerk, in pursuance of Section 288 of the code, which makes it the duty of the clerk, in the absence of other instructions, to enter up judgment in conformity with the verdict, did enter this judgment. The next day after it was entered, the plaintiff paid the costs, whereupon it was properly marked satisfied, and thus it has slept until this motion.

The plaintiff, to sustain his appeal, relies upon Adickes v. Lowry, 12 S. C. 108; Gadsden v. Whaley, 9 Id. 147, and Sloan v. Westfield, 11 Id. 447. These cases are strong to the point that where an equitable defense—such as formerly could only be heard in a court of equity—is set up in an answer to a law case, such defense must be tried by the judge, either personally or through the aid of a jury acting under his order and for his enlightenment. And if the defendant had objected at the trial to this case being submitted to the jury as a law case, no doubt these authorities would have controlled Judge Kershaw; but, no objection being made, the case went to the jury. This, however, did not legalize the judgment subsequently entered by the clerk, as the two latter of these cases decide that where judgment is entered on a verdict in such case, without decree of the judge, such judgment is erroneous and illegal, and may afterwards be set aside on motion. Under these authorities we think it was error on the part of the Circuit judge not to vacate the judgment.

This disposes of the third ground of appeal. The first two grounds, while it is true they

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contain correct legal propositions, *yet they assign no error on the part of the Circuit judge, and, consequently, raise no question for the judgment of this court. They seem to be rather in the nature of an argument by appellant, intended to sustain the third ground of appeal, to wit, "that the Circuit judge erred in refusing to vacate the judgment in question." This, in our opinion, being the only question before us, we have confined our judgment to that.

It is the judgment of this court that the order of the Circuit Court, in so far as it refused the motion of appellant to vacate the judgment, be reversed, and that the case be remanded.

McIVER and McGOWAN, A. J.'s, concurred.

16 S. C. 334

(Case No. 1125.)

PRESSLEY v. KEMP.

(April Term, 1881.)

[1. *Appeal and Error* ⇐1000.]

The question at issue is an equity case, being the validity of a deed, alleged not to be genuine, or, if executed, to have been obtained by fraud and undue influence, certain issues of fact were submitted to a jury, whose findings adverse to the executor of the grantor were approved and adopted by the Circuit judge. These findings not being opposed to the weight of the testimony *held*, that this court must affirm them.

[Ed. Note.—Cited in Asbill v. Asbill, 24 S. C. 360.

For other cases, see Appeal and Error, Cent. Dig. § 3927; Dec. Dig. ⇐1000.]

[2. *Deeds* ⇐70.]

A maiden lady aged, deaf and feeble, a short time before her death executed a deed conveying a considerable portion of her property to a young man in whose family she had resided for two years, and between whom and herself a strong attachment had arisen. The deed was prepared by an attorney under her directions, given in the presence of the donee, and was executed by her after reading it over, and with knowledge of what she was doing. *Held*, that no coercion of the donor's will appearing, there was nothing in the relationship between the parties to raise the presumption of undue influence, or to avoid the deed for constructive fraud.

[Ed. Note.—Cited in Wille v. Wille, 57 S. C. 427, 35 S. E. 804; DuBose v. Kell, 90 S. C. 215, 71 S. E. 371.

For other cases, see Deeds, Cent. Dig. § 174; Dec. Dig. ⇐70.]

[This case is also cited in Wille v. Wille, 57 S. C. 413, 35 S. E. 804, and distinguished therefrom.]

Before Wallace, J., Greenville, July, 1880.

This was an action by Samuel H. Pressley, as executor of the will of Sarah Eliza Evans, against E. T. Kemp and Giles L. Glazener, commenced August 19th, 1879.

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*The testimony was taken, mostly, in open court, was to some extent conflicting, and was very voluminous, covering thirty-six pages of the brief; but the points at issue are clearly indicated by the questions submitted to the jury. The answers are the finding of the jury, and they make the case upon which the decision is based. These questions and findings were as follows:

1. What was the age of Miss Sarah Eliza Evans at the time of the execution of the paper referred to in the pleadings, and under which the defendant Kemp claims? Seventy.

2. What was her domicile at the date of the execution of said deed? Greenville.

3. At the date of the execution of the deed was she infirm in body? Was she not feeble? Yes.

4. Was she sick at the date of the execution of said deed? Only feeble.

5. If she was infirm, feeble and sick, how long had she been so before the execution of said deed? Twelve days.

6. Was she not helpless at the date of the execution of said deed? No.

7. Was she under the control of defendant Kemp and his family at the said date? No; but she was living with Kemp.

8. At the said date was her capacity so alive as to prevent her from executing an instrument of the contents of which she was not aware? She knew what she was doing.

9. At said date was she so languid and reduced as to acquiesce in whatever might be proposed by those around her having influence with her? No.

10. At said date was her mind in such a condition as to enable her to give free and deliberate assent to the terms of said deed? Yes.

11. Was said deed read over to her? If so, by whom and when? No.

12. Could she on the day of its execution hear it read? No.

13. In her condition could she have understood it by the motion of human lips? No.

14. Was she capable of reading it on the day of its date? Yes.

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*15. Was Kemp present and aiding in its execution? Yes.

16. At what hour of the day was it executed, and on what day of the week and month? Wednesday.

17. Did she ever read the deed? If so, when? Yes.

18. Did she ever have it in her hands, prior to the execution or after? Yes.

19. At the time of its execution was its legal effect made known to her, or did she know its legal effect? She knew its legal effect.

20. Did she know at the time of its execution that it would disappoint the charities provided for under her will? Yes; she had changed her mind.

21. Were any misrepresentations made by defendant Kemp to Miss Evans, moving her to the execution of said deed? No.

22. Were any misrepresentations made by any one in his interest moving Miss Evans to the execution of said deed? No.

23. Were any arts or stratagems used by defendant Kemp to obtain the execution of said deed? No.

24. Was any advantage taken of her age, helplessness or situation, by the defendant Kemp or any one in his interest, moving the execution of said deed? No.

25. At date of execution of deed did not Miss Evans have first cousins residing at Society Hill, in Darlington county, and elsewhere? Yes.

26. Did not these relatives manifest interest in Miss Evans before her death and up to the time of her death? But little.

27. Did not Miss Evans repose great confi-

dence in Kemp, and did he not act toward her in that confidence? Yes.

28. Was there a relation of friendly habits between Miss Evans and defendant Kemp? Yes.

29. Did Miss Evans use defendant Kemp as an agent in the transaction of any of her business? As her agent in one or two instances.

30. Did defendant Kemp act for Miss Evans in any way in the preparation and execution of said deed? Yes; but in good faith.

31. At the date of the execution of said deed, how many of the friends of her youth resided in Greenville? Two.

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*32. To how many friends of her youth did Kemp communicate her intention to make this deed to him? Not one.

33. Did Kemp fail in his duty to Miss Evans during the last three weeks of her life in any particular? No.

After the case was opened and the contested deed was, on the call of the plaintiff's counsel, delivered to them by defendant's counsel, and for the first time inspected by them, plaintiff called in question the factum of the deed; and thereupon the judge ordered additional questions to be presented to the jury.

The additional questions with their answers are as follows:

34. Did Miss Evans sign the deed offered in evidence? Yes.

35. Did Miss Evans give instructions to her attorney for the preparation of the deed? Yes.

36. Was the deed in accordance with those instructions? Yes.

The Circuit decree was as follows:

It appears that Miss Evans, the grantor, was an aged maiden lady, and entirely deaf, that she was in feeble health, and had gone from Darlington county, where she had been brought up, to Greenville, because she found the climate of the latter place better for her health. The defendant and his mother lived together, and Miss Evans, by the advice of a friend, became their lodger. She lived with them for about a year, and then the Kemps moved into and occupied a house belonging to Miss Evans in the city of Greenville. The Kemps did not, for about a year—the time they occupied Miss Evans' house, in her lifetime—pay her rent, nor did Miss Evans pay them for board and lodging.

A few days before her death, Miss Evans executed the deed in controversy. While Miss Evans lived with the Kemps, a mutual affection had grown up between them. It is sought, by this proceeding, to set aside the deed, upon the ground that it was obtained by the influence of defendant, which he was able to exert on account of the relation of confidence between himself and Miss Evans. I do not fully set out the facts in the case and discuss them, because I am satisfied with the findings of the jury upon the issues

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submitted to them, and approve and *adopt their verdict. Do these findings bring the case within the principle which would operate to destroy the deed?

In Chesterfield v. Janssen, 2 Ves. Sr. 125, Lord Hardwicke divided fraud into four heads: 1. Fraud arising from facts and circumstances of imposition. 2. Fraud arising from the intrinsic value and subject-matter itself. 3. Fraud presumed from the circumstances and condition of the parties contracting. 4. Fraud affecting third persons not parties to the agreement. It is sought to bring this case within the third division. This principle relates to transactions between trustees and cestuis que trust, attorney and client, parent and child, or other relation, connection or position, in which an undue advantage, influence or control may be obtained or exercised over the judgment of another. It does not declare absolutely void any and every transaction between parties standing in such relation to each other; but when one person stands in a relation of special confidence to another, he cannot accept a benefit from the other without exposing himself to the risk in a degree proportioned to the nature of their connection, of having it set aside as unduly obtained. A court of equity, perhaps, applies more exacting rules of proof of good faith of a transaction between parties who sustain a fiduciary relation, strictly so called, to each other, than to others outside of that class. For, between the former, it must appear that the transaction is to the advantage of the presumed weaker party, to be sustained.

There is another class of relations, not strictly fiduciary, from which the law presumes authority and control—that of attorney and client, and parent and child, for example. A transaction between persons in this class is sustained upon proof rebutting the presumption that it was obtained by influence. Descending from these conspicuous classes, there are great varieties of relations in which dominion may be exercised by one person over another, but in proportion as such relationship is less marked and distinct, the presumption of fraud is less strong. Where the actual relation from which the law presumes dominion is dissolved, notwithstanding kindly feelings which the connection may have caused may remain, no presumption of fraud arises from that fact. Confidence in, or affection for, the grantee

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*affords no ground for assailing a voluntary deed, unless it further appears that the confidence was betrayed or the affection made use of to impose constraint upon the wishes or inclination of the grantor.

It has always been held that love and affection were a sufficient consideration to

support a deed, and the statement of that consideration in a deed is not sufficient to throw upon the grantee the burden of showing that there was no fraud in the transaction. It appears, in the case in hand, that Miss Evans and defendant lived in the same house. He did not charge her for board, and she did not require him to pay rent. While she was old and deaf and in feeble health, there was no proof of mental unsoundness. Miss Evans was kindly treated by Mrs. Kemp, and affectionately treated by defendant. She had stated to some of her friends her regard for and interest in defendant. I do not see, in the relations of the parties as developed at the trial, any ground for the presumption of fraud. There was no proof that defendant ever undertook to persuade Miss Evans to do anything, or suggested to her any disposition of any part of her estate. Her kindly offices towards him, and his affectionate acts towards her, do not furnish grounds for avoiding the deed.

It is therefore decreed, adjudged and ordered, That the complaint be dismissed.

Plaintiff appealed.

Messrs. A. C. Spain and Boyd & Nettles, for appellants.

The Circuit judge erred in not holding the deed void on the ground of constructive fraud. 1 Story Eq. Jur. §§ 258, 309; 4 Myl. & C. 269; 5 Rich. Eq. 458; 9 Hare 534; 73 N. Y. 498; 54 Ala. 510; 14 Ves. Jr. 287; 2 Mad. Ch. R. 105; 4 Moak Eng. R. 692; 7 Beav. 551. In such cases the burden is on the donor to show that the gift was free from the bias of the confidential relation; we might go further and say, to show that the relation had been severed. 23 Moak Eng. R. 249; 27 Am. Rep. 727; 29 Id. 198; 1 Story Eq. Jur. § 309; 86 Pa. St. 512. The deed will be set aside, unless it is shown

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that its *provisions were clearly understood, deliberately determined upon, and were fair and reasonable, under the circumstances. 1 Story Eq. Jur. § 310; 2 Moak Eng. R. 263, 301; 3 Cow. 572; 11 Wheat. 125. The deed will be set aside, unless it is shown that the grantor was under protection and had independent advice. 1 Story Eq. Jur. § 318; 1 Ch. App. Cas. 256; 7 Beav. 551; 2 Ves. Sr. 627. See, also, 5 Rich. Eq. 458; 3 Desaus. 292; 4 Id. 715; Bisp. Eq. §§ 230–236. That the verdict and decree are against us, see Bailey Eq. 38; 12 S. C. 508, 609.

[The argument on the facts is omitted.]

Messrs. W. H. Perry and W. E. Earle, contra.

January 10th, 1882. The opinion of the court was delivered by

McGOWAN, A. J. This was an action in the nature of a suit in equity, brought by the plaintiff, as executor of the last will and testament of Sarah Eliza Evans, deceased, late of Society Hill, Darlington county, to set aside and have canceled a deed alleged to have been made by the testatrix, in her lifetime, to the defendant, Edgar T. Kemp, of Greenville county, on the ground that said deed is void and of no effect by reason of fraud and undue influence.

Miss Evans had made her will March 11th, 1874, with codicil January 10th, 1876, by which she disposed of her whole estate. After certain devises and bequests, she gave the rest and residue to be sold to the best advantage, and the proceeds paid over to the Rev. James Furman, of Greenville, South Carolina, to be used by him in aid of Foreign and Domestic Missions, &c. She owned a house and lot in Greenville, which she leased to Edgar T. Kemp. She boarded with him, and died thereon December 9th, 1878. After her death, said Kemp produced a deed, which purported to have been executed by the testatrix on December 4th, five days before her death, by which was conveyed to him "the house and lot in Greenville, two notes made by Giles L. Glazener, and secured by a mortgage, and one undivided half of a tract of land at Florence, S. C., containing one hundred and thirty acres."

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*The appellant, as her sole qualified executor, commenced the action in Darlington county, but to promote the convenience of witnesses, the venue was changed from Darlington to Greenville county. The case came on to be heard before Judge Wallace, and an issue was sent to a jury, consisting of thirty-six questions as to facts, about which it was supposed there would be conflicting testimony. It would unnecessarily encumber this judgment to set out these questions and answers at length. The answers were almost without exception favorable to the respondent, and, taken together, in reference to subject-matter, make a connected finding substantially as follows: "Miss Evans was seventy years of age when she executed the deed to Kemp. At that time her domicile was Greenville. The deed was executed on Wednesday. She instructed her lawyer, Governor Perry, to prepare the paper, which was prepared in accordance with her instructions. She was not sick at the time; not helpless, but feeble, and had been so for twelve days before the execution of the paper. She was living with Kemp, but not under his control. There was a relation of confidence between Miss Evans and Kemp. She reposed great confidence in him, and he acted towards her in that confidence. He acted as her agent in one or two instances. He was present aiding in the execution of the deed. He acted for her in the preparation and execution of the deed, but in good faith. She was not in condition to acquiesce in whatever might be proposed by those having influence with her. She knew what she was doing. The deed was not read over to her.

She could not have heard it read nor understood it by the motion of human lips, but she read the paper herself, and knew its legal effect. She had changed her mind as to 'the charities' without any misrepresentations or arts or stratagems by Kemp, or any one in his interest. No advantage was taken of her age, helplessness or situation. Miss Evans had first cousins residing in Society Hill and elsewhere, who manifested little interest in her before and up to the time of her death. At the date of the paper, only two of the friends of her youth resided in Greenville, and Kemp did not communicate her intention to make this deed to either of

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them. Kemp did not fail in his *duty to Miss Evans during the last three weeks of her life in any particular," &c.

The testimony and these findings were considered by the judge, who sustained the deed and dismissed the complaint. The plaintiff appeals to this court. There seem to be no regular exceptions, but in the elaborate and learned argument of the appellant's counsel, the following grounds for reversing the judgment are insisted on:

1. "Because the Circuit judge erred in sustaining the findings of the jury as contained in answers to questions 4, 5, 6, 7, 8, 9, 10, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 33, 34, 35, 36 of issues of fact, and in answers to 29 and 30 in so far as it was found that defendant's agency was confined to one or two instances and the defendant acted in good faith in the preparation and execution of the deed in controversy.

2. "Because the Circuit Judge was in error in supposing that the plaintiff below relied alone on constructive fraud, and in confining his decision to that point; whereas the plaintiff relied strongly on the evidence of positive fraud, and now insists that the Circuit judge erred in not setting aside the deed on that ground.

3. "Because the Circuit judge erred in holding that the relations which existed between S. E. Evans and E. T. Kemp, with the circumstances in the case, at the time of its alleged execution, were not sufficient to invalidate the deed in question."

The first and second propositions complain of error of fact in the findings of the jury and in the judgment of the Circuit judge in relation to the charge of positive fraud. Notwithstanding Miss Evans had previously executed her will, giving the proceeds of the rest and residue of her estate to the purposes of religious charity, she had, as long as she lived, the undoubted right to change her mind and make a different disposition of those proceeds either by deed or will, only provided it was her own voluntary act, not induced by imposition, fraud or undue influence. The only question is: was the deed her own voluntary act? Upon this subject there was much proof. Foreseeing that there would be conflict of testimony, especially in reference to the capacity of Miss

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Evans at the time the deed purports to *have been signed, and as to her signature and the due execution of the paper, issues carefully framed so as to test the question in every possible phase and form were submitted to a jury, who, as before stated, found for the defendant in most of the questions submitted, and the Circuit judge concurred in these findings, saying that "he was satisfied with the findings of the jury upon the issues submitted, and approved and adopted their verdict."

Under these circumstances this court will generally accept as established the facts thus found. Inquiry must end somewhere. A jury of the vicinage, acquainted with the witnesses who testify in their presence, is peculiarly fitted to weigh conflicting testimony and decide contested questions of fact. When the finding of such a body of twelve men is approved and adopted by the Circuit judge, who, intelligent, disinterested and accustomed to consider the force of testimony, is also present and sees and hears the witnesses examined before him, it would seem that the verdict ought to be as near absolute truth as is attainable under imperfect human institutions. In this respect the case is analogous to that of Gadsden v. Whaley, 14 S. C. 217, in which it is said: "Being an action for equitable relief this court may reconsider all the evidence, but the safe principle upon which it generally acts is not to overrule the conclusions of the Circuit judge upon doubtful questions of fact, though the court might not have reached the same conclusion he did. The rule is more strictly adhered to when there is concurrence between a Circuit judge and a referee. As to its probable correctness the verdict of a jury is as strong as the report of a referee. In the last case upon the subject, Adger & Co. v. Pringle, 11 S. C. 548, it is said: 'The question of fact having been decided by the referee, and his decision having been confirmed by the Circuit judge, their decision must be regarded by us as conclusive unless it is without any testimony to sustain it, or is manifestly against the weight of the evidence.'" We have looked carefully through the testimony in this case and are unable to say that the judgment is against the weight of the evidence upon the charge of actual fraud.

The third proposition is that the Circuit judge erred in not holding the deed void on the ground of constructive fraud growing out of the confidential relation of the parties.

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*Undue influence is a term not very clearly defined. It is easier to say what it is not, than what it is. Perhaps it is safer not to hazard a precise definition, as the circumstances in the affairs of life in which the principle may be invoked are infinitely various and diversified. The well established

rule upon the subject, certainly as applicable to the execution of wills, is "that it must amount to force and coercion—destroying free agency. It must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act. Further, there must be proof that the act was obtained by this coercion—by importunity which could not be resisted—that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." 2 Wms. Ex., ch. I., § 2; Parfitt v. Lawless, 4 Moak Eng. R. 694; Means v. Means, 5 Strobh. 192. In our own case, last cited, it is said that "it is not influence merely, but undue influence that is always alleged —something excessive and unlawful. It is not the influence of friendship or affection that can be complained of, nor the influence of argument or entreaty, nor the impression made by kindness or prudence, nor even the effect wrought by servile compliance or mean endurance of wrong. It must be something that destroys free agency. Motives of almost every conceivable kind may be offered, and if the mind of the agent—free to adopt or reject the motives—yields its assent, the act is the act of the agent." This is beyond all doubt our law upon an issue of devisavit vel non, and, according to the principles announced in these authorities, the facts, as found by the jury in this case, would fall far short of setting aside the paper in controversy for undue influence, if it were a will. We look in vain for evidence to show anything like coercion of the will of the donor.

Lord Cranworth, in Boyse v. Rossborough, 6 H. L. C. 49, said: "One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it." If, therefore, Miss Evans had taken the advice of her attorney

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*and expressed her intention in favor of the defendant by a codicil to her will instead of a deed, there could be no doubt of the legality and validity of the donation.

Does it alter the case that the form in which she expressed her change of intention was by deed and not by will? It has been urged with zeal and learning that, as this was a deed inter vivos, and the relations between the parties were of a confidential character, the doctrine applicable to wills does not apply; but that this is one of those cases in which the Court of Equity will declare the deed void, or at least presume undue influence and set it aside, unless the donee proves affirmatively that it was not procured by undue influence. This doctrine certainly tends to reverse the rule of evidence that no one shall be required to prove a negative; but it seems that the English Chancery, in a particular class of cases, does make a distinction in this respect between a will and a deed.

The leading case on the subject is that of Huguenin v. Baseley, 14 Ves. 300, but the doctrine is stated more fully by Lord Penzance, in the case of Parfitt v. Lawless, 4 Moak Eng. R. 692, as follows: "In equity, persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, and guardian and ward, are subject to certain presumptions when transactions between them are brought in question. And if a gift or contract made in favor of him who holds the position of influence, is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, &c. * * * In the first place, in gifts or contracts inter vivos, there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took and the circumstances that brought about the gift, the court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy, under a will, the legatee may have, and, in point of fact, generally has, no part in or even knowledge of the act. A more material distinction is this: The influence

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*which is undue in the cases of gifts inter vivos is very different from that which is required to set aside a will. In the case of gifts inter vivos it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it, to obtain a benefit for themselves, is an undue influence. Gifts brought about by it are, therefore, set aside, unless the party benefited by it can show affirmatively that the other party to the transaction was placed 'in such a position as would enable him to form an absolutely free and unfettered judgment.' Archer v. Hudson, 7 Beav. 551." We think the rule, as here announced, is only applicable where there are well-defined confidential relations, such as those indicated in the cases cited.

So far as this doctrine as to deeds is supposed to spring from relations of confidence between the donor and donee, assuredly those same relations may also exist between testator and devisee. In the case before us, for example, there was involved no general disposition of the whole estate, as is usual in wills, but the gift was to one person, single and simple, and the donor died only a few days after the execution of the paper. Under these circumstances, is there any principle which requires that the rule of evidence should be different from what it would have

been if Miss Evans had acted on the suggestion to accomplish her purpose by means of a codicil to her will instead of a deed? It is difficult to say certainly what relations are and what are not within the rule, but we take it that it does not include those merely of friendship and confidence. In the case of Hunter v. Atkins, 3 Myl. & K. 113, a gift was made by a person upwards of ninety years of age, who had a wife and adopted daughter, to a confidential agent, who had for many years been in the habit of friendship with the donor—without the intervention of a disinterested third person—the solicitor who drew the deed being the solicitor of the person who took the benefit under it. The gift was declared void at the rolls, but, under all the circumstances, sustained upon appeal. Lord Brougham stated the rule in the following terms:

"The rule, I think, is, that where the known and defined relations of attorney and client,

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guardian and ward, trustee and *cestui que trust exists, the conduct of the party benefited must be such as to sever the connection and to place him in the same circumstances in which a mere stranger would have stood, giving no advantage, save only whatever kindness or favor may have arisen out of the connection; and that where the only relation between the parties is that of friendly habits, or habitual reliance, on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and often unavoidable kindness, with its effects, and of undue influence exercised, or unfair advantage taken, cannot be more rigorously defined."

The case of Huguenin v. Baseley, supra, is cited approvingly by the Chancellor who delivered the judgment of the court in our own case of Parris v. Cobb, 5 Rich. Eq. 457, but in the latter case the relation between the parties was that of grandfather and grandchild and agent. It is stated in a note to the case of Morgan v. Minett, 23 Moak Eng. R. 252, that "the principal case holds the rule relative to gifts to persons standing in confidential relations to the donor more strictly than it is held by the courts of this country. A gift to such person, when shown by direct or circumstantial evidence to have been understandingly made, by a person competent to make it, without fraud or imposition by the donee, is held valid." 1 Story Eq. §§ 311, 314.

We do not see that the donor and donee in this case held to each other such relations of confidence as are referred to in the cases. The parties were in no way related—they were not trustee and cestui que trust. Kemp and his mother lived together. Miss Evans lodged with them, and continued to do so for about two years, when she died in their house. While Miss Evans lived with them a mutual friendship had grown up between them. A few days before her death Miss Evans executed the deed in controversy. The jury found that she knew what she was doing. She read the paper herself, and knew its legal effect. She had changed her mind as to the charities without any misrepresentations, or arts, or stratagems of Kemp or any one in his interest. No advantage was

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taken of her age, helplessness or *situation. Kemp did not fail in his duty to Miss Evans during the last three weeks of her life in any particular.

In this state of facts we know of no rule of law or principle of equity which would authorize a court to declare the deed of Miss Evans invalid and thus defeat her intention in reference to her own property. In the language of Lord Brougham, in the case of Hunter v. Atkins, supra: "If, on such grounds, a deed so prepared and so executed is to be set aside, few, assuredly, of the acts of men, dealing with their own affairs, are safe; and the law which enables all who are of sound mind to dispose of their property, no longer exists but in name."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 348

(Case No. 1126.)

PARNELL v. MANER.

(November Term, 1881.)

[1. *Abatement and Revival* ⇐74.]

Action of assumpsit was brought against a sole defendant, and issue joined, after which defendant died, and in June, 1870, entry was made on the docket "abated by death of defendant." The estate of the deceased was unrepresented until 1879, when respondent qualified as executor, and, in 1880, motion was made by plaintiff for leave to file a supplemental complaint, which motion was refused. *Held*, that the refusal was proper, as no leave to file was necessary, and that plaintiff had not, by lapse of time, lost his right to revive the action.

[Ed. Note.—Cited in Arthur v. Allen, 22 S. C. 444; Bryce v. Massey, 35 S. C. 140, 14 S. E. 768; Rabb v. Patterson, 42 S. C. 535, 20 S. E. 540, 46 Am. St. Rep. 743.

For other cases, see Abatement and Revival, Cent. Dig. § 429; Dec. Dig. ⇐74.]

[2. *Appeal and Error* ⇐854.]

An order of the Circuit judge sustained, the result being correct, although based upon an erroneous ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3408; Dec. Dig. ⇐854.]

Before Thomson, J., Beaufort, November, 1880.

Motion by H. M. Parnell for leave to revive action by serving and filing a supplemental complaint. The opinion states the case.

Messrs. J. C. Davant and W. S. Tillinghast, for appellant.

Mr. Jeff. Warren, contra.

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*January 10th, 1882. The opinion of the court was delivered by

McIVER, A. J. In this case, the plaintiff commenced an action on a promissory note on March 5th, 1868, against J. W. Lawton, and the case being at issue remained on the docket undisposed of until June Term, 1870, when it was marked on the docket, "abated by the death of the defendant," Lawton having died on March 8th, 1870, leaving of force his last will and testament, whereby he appointed the present defendant, S. P. Maner, executor, who, however, did not qualify as such until some time in the year 1879. On October 27th, 1880, the plaintiff gave notice to the said Maner of a motion for leave to file a supplemental complaint continuing the action against him as executor of the original defendant. Judge Thomson refused the motion, without prejudice, apparently upon the ground that where a sole defendant dies, pending an action against him, the plaintiff has no right to continue the action against his executor or administrator, as the case may be, by a supplemental complaint, but that a new original complaint is the proper proceeding.

This action having been pending, and the original defendant having died since the adoption of the Code of Procedure, its provisions apply to all subsequent proceedings. Code § 465. In Section 144 of the code, it is provided that "no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue." Hence, as the cause of action here certainly did survive when Lawton died, the action did not abate, and the entry on the docket to that effect, at June Term, 1870, was clearly erroneous and should be disregarded. The plaintiff, under the provisions of the section just cited, had the right, at any time within a year, to have the action continued against the representative of the deceased defendant by a mere motion, but after the expiration of a year the action could only be continued by supplemental complaint. It will be observed that the provision made in Section 144 of the code for continuing an action by or against the representatives of a deceased party by supplemental complaint, does not require or contemplate that leave

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*should be obtained from the court to file such complaint as in case of the provision in Section 200 of the code for filing a supplemental complaint for other purposes. Accordingly, we find that the rule in New York is, that while it is necessary to obtain leave to file a supplemental complaint under Section 177 of the code of that State (corresponding with Section 200 of our code), it is not necessary to obtain leave to file a supplemental complaint under Section 121 of the New York code (corresponding with Section 144 of our code), but, on the contrary, the filing of a supplemental complaint in such a case is a matter of right; and, hence, in one of the cases, it was held that a motion to that effect should be denied, because leave was not necessary. 2 Wait Pr. 469, and the cases there cited.

The authority cited by the Circuit judge, from the notes to Wait's Annotated Code, appears to be the case of Johnson v. Snyder, 7 How. Pr. 395, which does not decide the proposition which it is cited to sustain, viz., that where there is but one defendant, and he dies, a new original complaint is the proper proceeding, and that the action cannot be continued against his representative by a supplemental complaint. On the other hand the cases cited in 2 Wait Pr. 468, show that even in cases where there is but a single defendant, and he dies, the action may be continued against his representative by a supplemental complaint where more than a year has elapsed since the death of such defendant.

While, therefore, we agree with the Circuit judge in the result which he reached, we cannot concur in the reasoning by which such result was attained, and, on the contrary, are of opinion that the motion should have been refused because it was unnecessary to apply for leave to file a supplemental complaint for the purpose of continuing an action against the representative of a deceased defendant, the filing of such complaint being a matter of right. Of course, when such complaint is filed, the defendant will have the opportunity, by answer or demurrer, to raise such objections and interpose such defenses as he may be advised are maintainable.

It was argued here, that, by lapse of time, the plaintiff has lost the right which he once

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may have had to continue the *action by supplemental complaint against the representative of the deceased defendant. To say nothing of the fact that a large part of the delay was occasioned by the failure of the present defendant to qualify as executor of the deceased defendant, it will be observed that while Section 144 does limit the time within which an action may be continued by motion to one year, it does not prescribe any limit to the time within which it may be continued by supplemental complaint after the expiration of one year. In New York it has been held in the case of Bornsdorff v. Lord, 41 Barb. 211, that the supplemental complaint provided for by section 121 of the code of that State stands in the place of the bill of revivor under the old system of equity pleading; and in a note to the case of Pendleton v. Fay, 3 Paige 205, the case of

Lyle v. Bradford, 7 Monroe 115, is cited to sustain the proposition that "lapse of time from filing the original bill, omission to serve the original defendant with process, and a final disposition of the cause as to the other defendants, are no grounds of objection to the bill of revivor in such case." In addition to this, Section 144 of our code contains a provision by which a defendant may protect himself from unreasonable delay on the part of the representatives of a deceased plaintiff in continuing the action by supplemental complaint; and while there is no express provision in that section of the code by which the representatives of a deceased defendant can protect themselves from unreasonable delay on the part of the plaintiff in continuing the action, yet it has been held in New York, that, in such a case, the representatives of a deceased defendant may prevent unreasonable delay on the part of the plaintiff in continuing the action against them by moving for an order discontinuing the action unless the plaintiff shall, within a specified time, consent to an order continuing the action. Keene v. LaFarge, 16 How. Pr. 377.

The judgment of this court is that the order of the Circuit Court be affirmed, without prejudice to the right of the plaintiff to file his supplemental complaint.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. *352

*(Case No. 1127.)

KAPHAN v. RYAN.

RYAN v. KAPHAN.

(November Term, 1881.)

[1. *Evidence* ⇐460.]

A judgment is valid, although not filed until more than sixty days after the last day of the term of court at which the cause was heard.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2128; Dec. Dig. ⇐460.]

[2. *Appeal and Error* ⇐1008.]

Parol testimony may be received to prove an agreement in which a written instrument originated and of which it constituted only a part. Thus, where a note was given for a sum certain, payable at a day certain, secured by mortgage, but no money passed, and it is admitted by both parties that these instruments were a security for future advances, it may be shown by parol what the agreement was, and what the bond and mortgage were intended to secure.

[Ed. Note.—Cited in Moffatt v. Hardin, 22 S. C. 26; Moses v. Hatfield, 27 S. C. 329, 3 S. E. 538; Bulwinkle & Co. v. Cramer & Blohme, 27 S. C. 380, 3 S. E. 776, 13 Am. St. Rep. 645; Lindsay v. Garvin, 31 S. C. 261, 9 S. E. 862, 5 L. R. A. 219; McAteer v. McAteer, 31 S. C. 320, 9 S. E. 966; Lipscomb v. Lipscomb, 32 S. C. 246, 10 S. E. 929; Willis v. Hammond, 41 S. C. 163, 19 S. E. 310; Hartsfield v. Chamblin, 42 S. C. 9, 19 S. E. 959, 20 S. E. 65; Sloan v. Gibbes, 56 S. C. 488, 35 S. E. 408, 76 Am. St. Rep. 559; Millam v. Southern R. Co., 58 S. C. 288, 36 S. E. 571; Virginia-Carolina Chemical Co. v. Moore & Hughes, 61 S. C. 169, 39 S. E. 346; Whittle v. Tompkins, 94 S. C. 241, 77 S. E. 929.

For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. ⇐1008.]

[3. *Appeal and Error* ⇐1008.]

Where, by consent, a law case is tried by the judge without a jury, his findings of fact cannot be reviewed by this court.

[Ed. Note.—Cited in Aultman v. Utsey, 41 S. C. 310, 19 S. E. 617.

For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⇐1008.]

[4. *Appeal and Error* ⇐1009.]

In an equity cause the findings of fact reached by a Circuit judge from direct testimony involving the credibility of witnesses, are rarely overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⇐1009.]

[5. *Mortgages* ⇐306.]

A. and B. gave their note and a mortgage of B.'s lands, to secure advances to be made to them in their business, carried on in the name of C., and, for a balance afterwards due on account of such advances, B. gave a note payable at one day, with interest until paid—the creditor retaining the first note and mortgage. *Held*, that the mortgage was not discharged by the note of B., and that the mortgagee might foreclose for the amount stated in B.'s note, as the liquidated balance due on his account, at the date of such note, together with interest according to its terms.

[Ed. Note.—Cited in Frost & Co. v. Weathersbee, 23 S. C. 365.

For other cases, see Mortgages, Cent. Dig. § 893; Dec. Dig. ⇐306.]

[6. *Judgment* ⇐489.]

In action for foreclosure, where defendant appeared and litigated, the judge may decree foreclosure for the real amount due on the note, although, from an error in the calculation of interest, the complaint demanded judgment for a less sum. It was in substance the allowance of an amendment to the complaint in this particular.

[Ed. Note.—Cited in Scraub v. Screven, 19 S. C. 451.

For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. ⇐489.]

[This case is also cited in Shaub v. Screven, 19 S. C. 446, and distinguished therefrom.]

Before Thomson, J., Barnwell, October, 1880.

Both of the actions above stated were commenced in January, 1880, the first on the 7th, the second on the 17th. The note of April 17th, 1874, referred to in the opinion, was as follows:

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*$1,000. Allendale, S. C., April 17th, 1874.

On the first day of November next we, or either of us, promise to pay to W. K. Ryan, or bearer, the sum of one thousand dollars, value received. M. Kaphan. [L. S.]

I. Kaphan. [L. S.]

The condition of the mortgage was "that if we, the said Manheim Kaphan and Ida Kaphan, do and shall well and truly pay, or cause to be paid, unto the said W. K. Ryan

the said debt or sum of money aforesaid, with the interest thereon, if any shall be due, according to the true intent and meaning of said bond and condition thereunder written, then this deed of bargain and sale shall cease, determine, and be utterly null and void; otherwise, it shall remain in full force and virtue."

It appears, from the testimony, that Ida Kaphan was the wife of M. Kaphan and the owner of the lands mortgaged. W. K. Ryan kept on his books an account current with T. Kaphan, and made no entries whatever on his note and mortgage. The last advance was made by Ryan, September 24th, 1874.

The note of Ida Kaphan, closing the account, was as follows:

$383.60. Charleston, S. C., February 19, 1875.

One day after date I promise to pay to W. K. Ryan, or order, three hundred and eighty-three 60-100 dollars, with interest from date until paid, at the rate of twelve per cent. per annum, for value received.

Witness my hand and seal.

I. Kaphan. [L. S.]

Other facts are stated in the opinion.

Mr. A. B. Conner, for appellants.

Messrs. Mitchell & Smith and Robt. Aldrich, contra.

January 10th, 1882. The opinion of the court was delivered by

McGOWAN, A. J. On April 17th, 1874, Manheim Kaphan, and Ida Kaphan, his wife,

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executed a note to W. K. Ryan, *factor, of Charleston, for $1,000, payable November 1st, 1874, and to secure the same mortgaged certain lots in the village of Allendale, Barnwell county. It is now alleged by the mortgagors that the note has been paid in full, and the first case stated in the caption was to compel satisfaction of the mortgage and for a penalty of $500 against the mortgagee for refusing to satisfy the same under Ch. LXXXII., § 21, Gen. Stat. 428. The mortgagee insists that there is still due on the note and mortgage the sum of $404.30, with interest from January 2d, 1880, at the rate of twelve per cent. per annum, and for the collection of this balance, the second case stated was instituted to foreclose the mortgage.

The main question in both cases is, whether the note and mortgage have been paid, and, if not, how much remains unpaid. It seems that early in 1874, M. Kaphan called upon W. K. Ryan, factor, at his office, in Charleston, to obtain advances to enable him to carry on his mercantile business at Allendale, in Barnwell county. He stated that he wanted $2,000 or more; that the business was his own, but it would be conducted in the name of his brother, T. Kaphan. An arrangement was made. Ryan was to make advances, from time to time, as money was needed, and Kaphan was to forward cotton and to give certain securities to cover the advances. The note and mortgage now in controversy were executed by M. Kaphan and Ida Kaphan, in Barnwell county, and sent to Ryan, in Charleston. It appears from the correspondence of the parties, that there was also in the hands of Ryan some agricultural liens, but they were either sent back to Kaphan, at his request, or turned out to be worthless. Ryan never received anything on these liens. What Kaphan received he retained, and sent only the cotton. At the time the note and mortgage were delivered, no money passed, but soon after drafts were drawn on Ryan and cotton sent to him, as previously indicated would be done, in the name of T. Kaphan, with no other instructions than to sell and render an account of sales. No credits were directed to be placed on the note, but an account of advances and sales of cotton was opened.

Before November the drafts paid amounted

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to the sum of *$2,133.32, and the cotton shipped to $1,443.33, leaving a balance overdrawn of $689.99, which was afterwards reduced to $383.60. This account was submitted to M. Kaphan, who approved it and sent to Ryan the note of his wife, Ida Kaphan, closing the same, but making no reference to the bond and mortgage, which was still in possession of Ryan. Subsequently, March 29th, 1875, there was paid the further sum of $71.27.

In the law case for the penalty, the trial by jury was waived and it was agreed that both cases should be tried by the court at the same time. They came on to be heard by Judge Thomson, who dismissed the complaint in the case of the Kaphans for the penalty, and in that of Ryan he gave judgment of foreclosure for the balance due on the amount as fixed by the note of Ida Kaphan. The Kaphans appealed in both cases to this court on the following exceptions:

I. "That the decisions were not filed within sixty days, as is required by Article IV., § 17, Constitution of South Carolina.

II. "That his Honor Judge Thomson erred in giving judgment for the said W. K. Ryan.

1. "Because the note of M. Kaphan and Ida Kaphan for $1,000, dated April 17th, 1874, and due November 1st thereafter, and secured by their mortgage of April 17th, 1874, was for a specific purpose and had been fully satisfied and discharged by payments made to the said W. K. Ryan before November 1st, 1874, as is shown by his complaint and account thereto attached, and as was already corroborated, not only by his own testimony, but by that of M. Kaphan and Ida Kaphan.

2. "Because the said note and mortgage of the said M. and Ida Kaphan could in no way have been held as security for the additional $1,000 advanced to T. Kaphan, of which Ida Kaphan was totally ignorant.

3. "Because the refusal and neglect of the said W. K. Ryan to enforce, or to allow to be enforced, after having been repeatedly requested to do so, the liens which were given to secure the said W. K. Ryan by the said T. Kaphan, was laches on the part of the said W. K. Ryan sufficient to protect the said M. Kaphan and Ida Kaphan against any liability for the additional $1,000, if ever they had been liable therefor.

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*4. "Because the said W. K. Ryan, having accepted the second note of Ida Kaphan for $383.60, closing the account of T. Kaphan, it was a separate and distinct transaction, releasing M. Kaphan from any further liability on the original note, which was secured by the mortgage of both M. Kaphan and Ida Kaphan, thereby canceling the same, and was settlement in full of the indebtedness of T. Kaphan and in no way connected with or secured by the said mortgage.

5. "Because the indebtedness of T. Kaphan under the securities given W. K. Ryan appears by account, and interest not being recoverable on an open account, the said M. Kaphan and Ida Kaphan cannot be charged with interest, even though they be liable for balance over first $1,000 advanced, the said W. K. Ryan having first brought his action to foreclose on the account of T. Kaphan and not on the note of M. Kaphan and Ida Kaphan, secured by their mortgage, nor on the note of Ida Kaphan for $383.60 closing account of T. Kaphan.

6. "Because his Honor Judge Thomson finds 'that on the 26th day of October, A. D. 1880, there was due and owing to W. K. Ryan by the said M. Kaphan and Ida Kaphan, upon the sealed note and mortgage mentioned in the complaint, the sum of $529.77,' whilst his statement shows that his calculations are based on the note of Ida Kaphan for $383.60, which closes account of T. Kaphan and bears interest from its date at twelve per cent. per annum and includes interest on the account at the same rate. That in giving judgment upon the sealed note and mortgage mentioned in the complaint, interest is calculated from February 19th, 1875, at the rate of twelve per cent. per annum, while the said note and mortgage, upon which the judgment is given, make no provision for interest.

7. "Because W. K. Ryan only claims in his answer and complaint the sum of $404.30, with interest from January 2d, 1880, at twelve per cent. per annum, making in all, up to October 26th, 1880, the sum of $443.92 still due him, while his Honor, Judge Thomson, finds on the said October 26th, 1880, the sum due W. K. Ryan to be $529.77, and gives judgment in favor of said W. K. Ryan for that sum, the same being $75.85 more than is claimed by the said W. K. Ryan."

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*It has been decided by this court that a judgment filed more than sixty days after the last day of the term at which the cause was heard is valid. Koon v. Munro, 11 S. C. 140.

It is insisted by the appellants that the note for $1,000 secured by mortgage was paid at maturity in full and the mortgage should be marked satisfied. Whether that is so or not must depend to a large extent upon the agreement of the parties as to the purpose for which the note and mortgage were executed. Upon that subject the parties differ widely in their statements. The Kaphans contend that the note was given simply for so much money loaned, and that as soon as, in the course of business, the amount was in the hands of Ryan, it was to be considered paid, without any regard to the state of the account for advances; while Ryan insists that it was given as collateral security for any balance that might remain unpaid at the time indicated. This is a question of fact, which can only be determined by the evidence.

The note and mortgage are in the usual form and contain no indication of the purpose for which they were given, as the bond did in the case of Conway v. Cunningham, 6 S. C. 351. It was necessary to resort to parol proof to ascertain the agreement of the parties. This evidence was admitted without objection and no exception as to its admissibility is made here. But as something was said in the argument about the effect of parol proof upon the terms of the note and mortgage, it may not be improper to observe that this is not a case in which such testimony tends to vary the terms of a written instrument, but to show the whole agreement in which the instrument originated and of which it constitutes only a part. It is said in 1 Greenl. Evid. § 284a, that the rule does not apply to the admission of parol evidence "in cases where the original contract was verbal and entire, and a part only was reduced to writing." Lewis v. Gray, 1 Mass. 297; Knight v. Knotts, 8 Rich. 35; McGrath and Byrum v. Barnes, 13 S. C. 332 [36 Am. Rep. 687].

At the time the note and mortgage were given no money passed, and the fact that advances were to be made on them as a security, could only appear by parol. "A mortgage may be taken and held as a secur-

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ity for future advances and responsi*bilities to the extent of it, when this is a constituent part of the original agreement." In this case both parties agree that this was a constituent part of the original agreement, the only difference being that the one insists that "the security" was to be discharged by the first receipts in the course of business, and the other that it was to cover the final balance after deducting all other payments. In either case the fact does not appear in the note or mortgage and can only be shown by proof of the agreement of the parties.

In the case of Archer v. Hudson, 7 Beav. 556, Frances Kendray, with her uncle Daniel, signed a note for £500 to the York Union Building Company, and proof, without objection, was allowed of a verbal agreement that the note was to cover any "floating balance" which might arise for overdrafts by Daniel, and such proof appearing, it was held to be a fraud to charge the whole note as a debt without regard to the state of the accounts.

What was the agreement of the parties in this case? The only parties present when the agreement was made were Ryan and M. Kaphan, who acted for himself and as agent for his wife, Ida Kaphan. Ryan swears positively that "the securities were given as collateral security for all advances made under the agreement and to secure any balance that might be due after his accounts were rendered," and Kaphan testifies that the "agreement was to advance $1,000 upon the mortgage, and if further advances were made they were to be on liens—liens only." Under this proof and the circumstances of the case, the Circuit judge made an order dismissing the case for the penalty and rendered judgment of foreclosure in the other case, which was equivalent to a finding of fact that the note and mortgage were given to secure any balance to the extent of $1,000 which might remain unpaid upon the account for advances.

The case of M. Kaphan and Ida Kaphan v. W. K. Ryan for the penalty is a law case, and, therefore, in that the said finding must stand as the verdict of the jury upon the facts and cannot be reviewed by this court. The case of Ryan v. M. and I. Kaphan, for a foreclosure, is a suit "in Chancery," and in that this court is not limited to a correction of errors of law, but may reconsider findings of fact. In the exercise, however,

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of this *appellate jurisdiction, the court has rarely overruled the findings of a Circuit judge reached from direct testimony involving the credibility of witnesses. We cannot say that the view of the Circuit judge upon this question of fact is without evidence to support it. On the contrary, in looking through the testimony, we incline to think that the nature of the transaction and the circumstances of the case all tend to corroborate the testimony of Ryan and to sustain the judgment of the court.

It does not seem to be reasonable that Ryan would advance $2,000 upon the security of a note for $1,000 and some agricultural liens which realized him nothing, and which had to be returned to Kaphan in order to be enforced in the county where they were given. The state of the account showed that his advances were in excess of his receipts, and it is hardly probable that Ryan would have continued to make advances if he had not supposed that the note and mortgage were there to cover any eventual deficiency. An account of advances and receipts was kept separate without reference to the note and mortgage, upon which no credits were entered, and the correspondence shows that the Kaphans never directed the proceeds of the cotton sold to be applied as so many payments on the note and mortgage.

The Kaphans knew that the note was not discharged by the first proceeds of cotton, for they offered to allow Ryan to still hold it if he would make advances the next year. Mrs. Kaphan wrote to Ryan that he could "retain the mortgage in your possession for $1,000," which he could not do if it had been paid and discharged. Mrs. Kaphan, with the consent of her husband, and at his instance, closed by note the balance of the account for advances, which was an acknowledgment that Ryan was not responsible in any way for the agricultural liens, and that the balance of account was correct in amount at least.

Nearly six years elapsed before the claim was put forward that the mortgage was satisfied and did not cover the balance of the account which had been put into the form of Mrs. Kaphan's note. We cannot reverse the judgment of the Circuit judge, that by the agreement of the parties, the note and mortgage were given to secure any balance which, after crediting the proceeds of cotton sold, might remain upon the account for

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advances. *We are not called upon to give construction to the note and mortgage, but to determine from the evidence in what way and for what purpose they were to be used.

This case is not analogous to those of Sollee & Warley v. Meugy, 1 Bailey 620; Boyce & Henry v. Ewart, Rice 134, and Lawton v. Maner, 10 Rich. 323. In all of these cases the question was as to the construction of a written guaranty for the debt of another. This is not the case of a guaranty or surety at all. The only question is: What was the original agreement between a creditor and his debtors as to the nature and character of the security which was given?

But, assuming this view to be correct, it is still further urged that the judge erred in holding that the note of Ida Kaphan, February 15th, 1875, closing up the accounts, was not payment and settlement of the balance of the debt and a discharge of the mortgage.

In the view which this court takes, the real debtor was not T. Kaphan, who was manifestly a mere figurehead, but M. Kaphan and Ida, his wife. They, through and by M. Kaphan, made the arrangement with Ryan. They furnished the securities. Ida Kaphan owned the property embraced in the mortgage, and she closed the account with her note, not as surety or guarantor for any one, but in liquidation of the debt of herself and husband. It is true that the correspond-

ence was at first conducted in the name of T. Kaphan, but it does not appear that such a person ever had any interest in the business, or at any time even saw Ryan on the subject. At the very beginning of the transaction, M. Kaphan informed Ryan that the business would be conducted in the name of T. Kaphan, but that in fact it was his own. If his wife, Ida, did not manage the whole business from the beginning, she certainly finished it in her own name by giving her note. When she closed the account which, as we have seen, was secured by mortgage, by her note, did that have the effect of discharging the mortgage? Was it payment or mere substitution?

The principle applicable and the authorities are stated in the case of Gibbes v. G. & C. Railroad Company, 13 S. C. 252: "Nothing is payment but that which produces payment

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or is *received as payment. To give one security for another of equal dignity, without the intention of discharging the debt, is not payment but substitution, and, in such cases, it is well settled that a lien, such as a mortgage previously existing, is not discharged, but remains and still secures the debt in the new form." The note of the Kaphans has not produced payment, and it can hardly be supposed that it was the intention of Ryan to extinguish the old debt, secured by mortgage, for no other purpose than to discharge the mortgage and take in lieu thereof the unsecured note of one of the original debtors.

As we have held that the note of Ida Kaphan, given with the knowledge and consent of her husband, only liquidated and put in another form the balance of the account, we see no error in the judgment of foreclosure for the amount and interest due upon that note. After the balance of the account had been closed by a note, it bore interest according to its terms.

It appears that Ryan, in stating the claim in his complaint, made, in the calculation of the interest, a mistake of about $100. The mistake is patent in the record, and the judge made a correct calculation for himself, and rendered judgment for the true amount. That was, in substance, allowing the complaint to be amended in that particular, which, in furtherance of justice, he had a right to do. If such order had been made in terms, and the case referred to a referee to ascertain the amount due, according to the principles herein announced, the result would have been precisely the same. We cannot say that the judge was in error as to the amount of the judgment of foreclosure.

The judgment of this court is that the judgment of the Circuit judge in the case of M. Kaphan and Ida Kaphan v. W. K. Ryan, be affirmed; and it is the judgment of this court that the judgment of the Circuit Court in the case of W. K. Ryan v. M. Kaphan and Ida Kaphan, be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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*(Case No. 1129.)

WARREN, WALLACE & CO. v. SIMON.

(November Term, 1881.)

[1. *Judges* ⇐24.]

A Circuit judge has no power to review and reverse the action of another Circuit judge.

[Ed. Note.—Cited in State v. Price, 35 S. C. 277, 14 S. E. 490; Devereux v. McCrady, 53 S. C. 394, 31 S. E. 294.

For other cases, see Judges, Cent. Dig. § 93; Dec. Dig. ⇐24.]

[2. *Judgment* ⇐712.]

Where a Circuit judge refused to grant an order directing the sheriff to pay over money in his hands according to the terms of a verdict rendered in an action to which he was no party, and no appeal was taken from such refusal, another Circuit judge may not afterwards grant such order.

[Ed. Note.—Cited in Whitesides v. Barber, 24 S. C. 376; Hunter v. Ruff, 47 S. C. 547, 25 S. E. 65, 58 Am. St. Rep. 907.

For other cases, see Judgment, Cent. Dig. § 1233; Dec. Dig. ⇐712.]

[3. *Judgment* ⇐243.]

And the order was erroneous, independently of the former determination.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 428; Dec. Dig. ⇐243.]

Before Mackey, J., Barnwell, June, 1881.

The appeal in this case, which is fully stated in the opinion, was from the order of Judge Mackey, directing the sheriff to pay over the money in his hands.

Mr. L. B. O'Bryan, for appellants.

Mr. J. J. Brown, contra.

January 10th, 1882. The opinion of the court was delivered by

McIVER, A. J. The plaintiffs and the defendant, Simon, held agricultural liens given by S. T. Moore and others, and the defendant, Mary E. Roberts, had a claim for rent on the same parties. Warrants were issued to enforce these liens, under which the sheriff sold the crops of the lienors, and now holds the proceeds of such sale, a controversy having arisen as to which of the parties are entitled to the proceeds. It does not appear that any rule was taken out against the sheriff, but the plaintiffs brought an action against the parties who gave the liens, together with the defendants, Simon and Roberts, the other claimants of the proceeds

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of the sale, to which action, however, *the sheriff was not made a party, in which the plaintiffs prayed judgment that the proceeds of the sale, or so much thereof as may be

necessary, be applied in satisfaction of their claim and the costs and disbursements of the action.

The case came on for trial before Judge Wallace and a jury, when the following verdict was rendered: "We find fifty dollars for Mrs. M. E. Roberts, and the balance in the hands of the sheriff for Warren, Wallace & Co." The defendant, Simon, moved for a new trial, which Judge Wallace refused upon the ground "that it was useless, as the verdict was a nullity, and that judgment could not be entered thereon." The attorney for the plaintiff then applied for an order requiring the sheriff to pay over the funds in his hands according to the terms of the verdict, which motion was also refused, "as the sheriff had never been made a party, and judgment could not be entered against him, and that the court could make no such order." From these rulings of Judge Wallace there was no appeal.

Subsequently, the plaintiffs brought an action against the sheriff alone, in which the proceedings in the former action were stated, with the allegation that the sheriff has in his hands the funds in dispute, and that he declines, after demand, to pay out the same in accordance with the verdict rendered in the former action, and prayed judgment that the sheriff pay to the plaintiffs the amount in his hands.

At the next term of the court, Judge Mackey "heard the statements and arguments of the different counsel interested" on the call of the case brought by the plaintiffs against the sheriff, "and thereupon directed the attorney for Warren, Wallace & Co. to enter up judgment in the former case, there having been no order made by Judge Wallace setting aside the verdict of the jury and no motion for that purpose then made or now pending;" and also granted an order in the same case requiring the sheriff "to pay over the money in his hands in accordance with the verdict." What became of the case against the sheriff does not appear, as no further notice seems to have been taken of it, the direction to enter judgment and the order appealed from having been made in the former action to which the sheriff was not a party.

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*It seems to us very clear that the order of Judge Mackey cannot be sustained for two reasons: 1. Because it is practically a review and reversal of the action of Judge Wallace, and nothing is better settled than that one Circuit judge has no power to review and reverse the action of another Circuit judge. If Judge Wallace committed any error in refusing the motion made by the plaintiffs, which is by no means clear, their remedy was by appeal to this court. 2. The sheriff not being a party to the action in which the order in question was granted it was error on the part of Judge Mackey to make any order affecting him.

It may be, and no doubt is, entirely true, that the sheriff was fully aware of what was going on, but in order to entitle a court of justice to make any order affecting any person, it is necessary that the court should first have acquired jurisdiction of the person to be affected by such order, by service of process or by some other recognized mode of bringing a party before the court, otherwise the order would be an absolute nullity. In this case, the sheriff, as we have seen, was never in any way made a party to the action in which the right to the fund was sought to be adjudicated, and in which the order appealed from was granted, nor had he been brought before the court by rule.

While in this particular case no harm would probably result from the fact of the sheriff not being made a party to the action in which the order appealed from was granted, inasmuch as he was doubtless fully cognizant of all the proceedings, yet it would be a very dangerous precedent to establish that a party might be liable to have a judgment rendered against him, or an order granted affecting him, in a cause to which he had not been made a party in the manner prescribed by law, and one which we do not feel at liberty to sanction.

The judgment of this court is that the order appealed from be reversed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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*(Case No. 1130.)

TUTT v. PORT ROYAL & AUGUSTA RAILWAY COMPANY.

(November Term, 1881.)

[1. *Eminent Domain* ⇐268.]

In action by the owner of the fee to recover land used by a railroad company for its road-bed, where defendant claimed only a right of possession, the presiding judge charged the jury that the plaintiff had the title and they must find for him the land in dispute and damages. *Held*, erroneous, as the right of title does not necessarily carry with it the right of possession; and for such error a new trial was granted.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 697, 736–740, 742; Dec. Dig. ⇐268.]

[2. *Trusts* ⇐182.]

Under a trust deed which vested the legal title to lands in a trustee for the benefit of a married woman and her children, but which gave to the husband the absolute control and management of the land, the husband might give to a railroad company license to construct their road-bed over such lands, binding so long as he lived, or, at least, until revoked, unless such right of way injuriously affected the duties and limitations imposed upon the husband by the deed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 236; Dec. Dig. ⇐182.]

[3. *Trusts* ⟸147.]

In an action brought by the trustee for the recovery of a strip of this land used by a railroad company under such a license, *held*, that no interference with the terms of the deed being alleged or proven, the plaintiff could not recover possession or damages for its detention.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192; Dec. Dig. ⟸147.]

[4. *Eminent Domain* ⟸266.]

The proper mode of recovering damages in such cases is stated in Sams v. Railway Company (3), 15 S. C. 484.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 694–696, 702, 703, 705; Dec. Dig. ⟸266.]

Before Wallace, J., Aiken, February, 1881.

Action by C. G. Tutt, trustee, against the Port Royal & Augusta Railway Company, commenced June 23d, 1879. Tutt was trustee duly appointed in the place of G. W. Miller, deceased. The opinion gives a sufficient statement of the deed of trust, and otherwise states the case.

The appellant renewed in this court his motion for a non-suit, upon the following grounds:

1. Because under the terms of the trust deed the conveyance of the right of way over said lands, executed by said H. R. Cook to the railroad company, gave at least to the said railroad company a license to enter upon and build their road over said lands, and that until said license was revoked the defendants were lawfully upon said lands, and this action could not be maintained.

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*2. Because the conveyance of such right of way, executed by Cook to said company, taken in connection with the knowledge of the trustee of the proposed construction of a railroad over said lands, and his failure to object thereto, authorized said company to enter upon said lands for such purpose without giving the notice required by Section 75, Ch. 63, of the Revised Statutes, or was a waiver of said notice; in either case said company acquired such right of way, and the action could not be maintained.

3. Because the alleged owner of the land having permitted the railroad company to enter upon the construction of their highway over said land without previous compensation, the plaintiff could not bring this action to dispossess the defendants and for damages, but was restricted to his petition for compensation as provided by Section 83, Ch. 63, of the Revised Statutes.

4. Because Miller, the trustee, in 1870, while knowing that Cook had given the railroad company the right of way over said lands, having interposed no objection to the construction of the railroad over the same, but having permitted said company to lay out valuable improvements thereon in ignorance of his claim, and having remained silent during his life-time, and until ofter the purchase thereof by these defendants, and the same being true as to Mrs. Cook, the plaintiff is estopped from bringing this action, at least during the life-time of said H. R. and Helena Cook.

The defendants also moved for a new trial on the following ground, viz: Because the judge directed the jury to find for the plaintiff the land in dispute and damages.

[For subsequent opinions, see 20 S. C. 110; 28 S. C. 388, 5 S. E. 831.]

Mr. William Elliott, for appellants.

Messrs. Henderson Brothers, contra.

January 10th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. In this action the plaintiff, respondent, seeks to recover possession of a strip or parcel of land located in Aiken county and damages for its detention. His claim to this possession is founded upon an

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indenture executed by John Miller and *Geo. W. Miller, on January 1st, 1849, in which the said John Miller conveyed to Geo. W. Miller, his heirs and assigns, a tract of land embracing the strip now in controversy, with other property, in trust for the joint use, support and comfort of his daughter, Helena H. M., and her husband, Horatio R. Cook, and their children, during the joint lives of them, the said Helena and the said Horatio R. And in the event of the said Helena surviving the said Horatio, having a child or children living, then in trust for the joint use and support, &c., of the said Helena and her child or children during her natural life, and at her death to be equally divided, share and share alike, among her children surviving her and the children of such as may die before her, per stirpes, * * * and finally, upon the further trust and condition that during the life of the said Horatio R. Cook and until the happening of the contingency last aforesaid [which is a contingency upon the happening of which Horatio was to get half of the property in fee], the said property, real and personal, was to remain in the possession and under the control and management of the said Horatio, who shall be free from accountability for the annual rents, issues and profits thereof over and above the support of the family. Provided he shall abstain from waste and destruction thereof, * * * with the power in the said Horatio, in case the trustee therein named removed from the State or died, to appoint a successor. Under this deed the plaintiff became trustee and now seeks to recover the strip or parcel of land from the defendant, appellant.

The defendant is a body politic and corporate, and is in the use of the strip of land as a road-bed (right of way) for their railroad track through the tract of land conveyed in the indenture above, by virtue of a paper purporting to be a bargain and sale executed by the said Horatio on April 3d, 1870,

to the Port Royal Railroad Company, of which the defendant is successor. This paper is without seal and attempts to convey this strip to the said Port Royal Railroad Company, their successors and assigns forever, reserving the right to cultivate the same on both sides of the road, as near the track as may be convenient, without obstructing the use thereof by the said company.

At the trial below, the defendant, disclaim-

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ing all title to the *fee in the land, offered no testimony. At the close of plaintiff's testimony, defendant moved for non-suit, which was overruled.

The judge charged the jury as follows: "The defendants have offered no testimony in this case. I have already decided upon the plaintiff's title on the motion for non-suit, and charge you that you must find for the plaintiff the land in dispute and damages for the detention of such land as you find the defendants are in possession of. The one question submitted to you being the question of damages, you must determine the same by the testimony, considering all of it." The jury found for the plaintiff the land in dispute and $183.25 damages.

The verdict was rendered for the plaintiff as a matter of legal right under the direction of the presiding judge because the fee in the land was in the plaintiff. There can be no doubt but that the fee is in the plaintiff. He is the rightfully appointed trustee under the indenture of John Miller and G. W. Miller, in which the land is conveyed expressly to the trustee, his heirs and assigns. But it does not follow, as matter of law, that because the plaintiff proved that the fee was in him he was, therefore, entitled to recover the possession of the land. Mr. Blackstone says that a complete title to land consists of three things—1st, possession; 2d, right of possession, and, 3d, right of property. These elements are all necessary to make out complete title, and when they are united in the same person he may be regarded as the complete owner of the property. But they may exist separately; possession may be in one, while the right of possession may be in another, and the right of property still in another. So it does not follow always that the right of property or a fee-simple title carries with it the right to immediate and personal possession.

The controversy here is not as to the title—the defendant claims no title; that is admitted to be in the plaintiff—but the controversy is as to the possession. The action is brought to recover possession. The defendant denies plaintiff's right, at least in so far as it would defeat the enjoyment on the part of defendant of the right of way which it is claimed has attached to it.

Now, we think that the presiding judge was in error in holding that the plaintiff was entitled to recover on the ground of

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*title, and that in directing a verdict for the plaintiff he solved a proposition of law material to the question at issue erroneously, which, under the case of McGowan v. Lowrance, 3 S. C. 365, entitles the appellant to a new trial.

There is nothing expressed in the deed of indenture which authorizes the trustee to take possession of this land under any circumstances. On the contrary, as we have seen from the terms, Horatio R. Cook was put in possession by the deed, and by express stipulation was to continue in possession of the whole property, real and personal, during his life, the same to be under his control and management, without accountability as to all rents and profits over and above a support to himself, wife and children, provided, it is true, that he should abstain from waste and destruction thereof. The purpose of the deed seems to have been simply to place the legal title in a trustee, with no more control than was necessary to secure the property to the benefit of the cestuis que trust, those in being at the time of its execution and those who might afterwards come into being as remaindermen, possession and control being given by the deed itself to Horatio R. Cook, the husband of grantor's daughter, during his life. Cook did not obtain possession through the trustee, and in no sense can be considered as the tenant of the trustee. On the contrary, he obtained possession through the indenture—the same paper by which the trustee obtained his title—and his right to possession is as full and complete as is the right of property in the trustee.

Inasmuch, however, as no doubt it is the duty of the trustee to see that the property is used, in the first instance, for the support and maintenance of Mrs. Cook and her children, and that no waste or destruction of the property is taking place in the hands of Cook, it may be that in the event of failure of Cook as to either of these matters the trustee would impliedly be authorized to have possession, the implication arising from the character of his duties and the necessity of such possession to the full discharge of those duties—the end to be attained necessitating such possession as the only means of accomplishing it; but if possession is sought upon such grounds, these facts should have been alleged and proved. There is no allegation

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of that *kind in the complaint, nor do we see any testimony reported in the case tending in that direction. The plaintiff's case is rested entirely upon his title, and the verdict was rendered solely upon that basis, which, as we have already said, we think was error. Such being our conclusion, it will not be necessary to discuss very fully the other questions raised.

As the case, however, is to be remanded

for a new trial, it is, perhaps, proper that we should express our opinion, especially as to the right of Cook to license the Port Royal Railroad to construct their road through this tract of land.

Cook not having been invested with the absolute title to this land, of course he could make no conveyance in fee to this company or to any other person, of the land itself, nor of any portion of it. But he had the absolute control and management of the land vested in him for an especial purpose, and, in our judgment, he had the right to do anything, short of waste and destruction, necessary to that end.

If the construction of a railroad through the land would, in his judgment, add to the convenience of its cultivation or the value of its crops, either because it afforded facility for the transportation of products and fertilizers, or from any other cause, contributing to the end of supplying himself and family through this land, we see no reason why he could not have given the permission, binding so long as he lived and had control, or, at lease, until revoked. Can it be doubted that, if this land had been situated near a landing, upon some navigable stream, for the convenience of market, &c., he would have had the right to open a way to such landing, or to grant the right of way to others, if it did not interfere with the purposes of the trust? True, Cook having no right to convey the land, the paper which he executed, even although it had been executed under seal, would have been nugatory as a transfer of the land itself. The defendant seems to have understood this and disclaimed title on the trial. All the right which the defendant obtained was a right of way. The tract of land through which it ran was rightfully in the possession of Cook, and it is still in his possession, subject to this easement of ap-

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pellant, and we do not see that the *respondent can legally claim the possession because Cook has consented to this easement.

Before the appellant, as trustee, could interpose, Cook's acts should amount to a forfeiture, either because he had diminished the capacity of the land to afford his wife and children support and maintenance out of the rents and profits, or because he had committed waste and destruction. His possession, control and management were limited by these two conditions and no others, and the happening of these not having been alleged or proved the plaintiff should not have recovered possession, and, not being entitled to the possession upon the facts proved, his claim for damages on account of the detention is unfounded. As to the mode of recovering damages in such cases, see Sams v. Port Royal & Augusta Railway Company, 15 S. C. 484.

It will not be necessary to go into the question of estoppel. That question does not legitimately arise in the case, as it was decided below entirely on the point of title.

The judgment of this court is that the judgment of the Circuit Court be reversed and the case be remanded.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 371

(Case No. 1131.)

WILLIAMS v. IRBY.

(November Term, 1881.)

[1. *Justices of the Peace* ⊂⊃58, 141.]

When an action, brought in a trial justice's court, must necessarily be considered an action for the recovery of personal property, an affidavit that the property claimed does not exceed in value the sum of $100, is an essential prerequisite to the jurisdiction of that court. But, quære—Where instituted without such prerequisite, and, afterwards, on appeal to this court, the case is remanded to the Circuit Court for new trial there, would an objection to the absence of such affidavit then avail the defendant?

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 207–215, 467–476; Dec. Dig. ⊂⊃58, 141.]

[2. *Justices of the Peace* ⊂⊃174.]

Where the allegations of the summons and complaint, in a trial justice's court, are as appropriate to an action for damages for the taking and detention of personal property, as to an action for its specific recovery on appeal taken to the Court of Common Pleas, the plaintiff may then elect to treat it as an action for damages (especially when so treated in the judgment of the inferior court), and in that case, no affidavit of value is necessary to the jurisdiction. Joplin v. Carrier, 11 S. C. 327, approved.

[Ed. Note.—Cited in Richey & Miller v. DuPre, 20 S. C. 10; Holliday v. Poston & Son, 60 S. C. 111, 38 S. E. 449; Reynolds v. Philips, 72 S. C. 34, 51 S. E. 523.

For other cases, see Justices of the Peace, Cent. Dig. § 680; Dec. Dig. ⊂⊃174.]

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*Before Wallace, J., Marlborough, September, 1881.

Action by Thomas W. Williams against Harriet Irby. The opinion states the case.

Mr. R. T. Caston, for appellant.

Messrs. Townsend & Livingston, contra.

January 10th, 1882. The opinion of the court was delivered by

McIVER, A. J. This action was originally commenced before a trial justice by summons and complaint. The summons addressed to the defendant was in the following form: "Complaint having been made to me by Thomas W. Williams that you are indebted to him in the sum of $68, on account of your agent, J. B. Irby, having taken a bale of cotton—said bale being worth said sum of money—on December 9th, 1879, this is, therefore, to require you to appear before me at my office, in ——, within twenty days from

the service of this summons, to answer the said complaint, or judgment will be given against you by default." This summons was accompanied by a complaint in which the plaintiff alleged: 1. That on December 9th, 1879, he owned one bale of cotton weighing five hundred pounds. 2. That on that day, the defendant, by her agent, John B. Irby, took the same. 3. That the value of said bale of cotton is less than $100. Wherefore the plaintiff demands judgment (1) for the said bale of cotton, or for the sum of $68 in case such possession cannot be had, and (2) for $20 damages for the detention thereof.

The trial justice rendered judgment for the plaintiff for $34 and all costs, from which judgment both parties appealed to the Court of Common Pleas. The case came on for trial in that court before Judge Aldrich, who simply affirmed the judgment of the trial justice, and from his judgment the plaintiff appealed to this court, where it was heard at the last term, when the judgment of Judge Aldrich was reversed and the case was remanded to the Circuit Court for a new trial. 15 S. C. 458. Accordingly, the case came on for trial before Judge Wallace, when the de-

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fend*ant moved to dismiss the complaint upon the ground that the trial justice had no jurisdiction, inasmuch as it appeared from the record that there was no affidavit of the plaintiff, his agent or attorney, that the value of the property claimed did not exceed the sum of $100. Judge Wallace held that such an affidavit was necessary to give the trial justice jurisdiction of an action to recover possession of personal property, and, therefore, that all the subsequent proceedings were void, and that the objection to the jurisdiction could be made at any time. Thereupon he reversed the judgment of the trial justice, and from his judgment this appeal has been taken.

If the action must necessarily be regarded as an action to recover possession of personal property, we see no error in the ruling of Judge Wallace as to the necessity for the affidavit, inasmuch as Sub-division 10 of Section 74 of the code does seem to require such an affidavit. But whether such an objection would avail the defendant in the Court of Common Pleas, where such an affidavit is not necessary, after the case had been remanded to that court for a new trial, is a question which we do not now propose to consider, inasmuch as the judgment of the Circuit Court must be reversed upon another ground.

As we have said, the affidavit was only necessary in case the action could not be regarded as other than an action to recover the possession of personal property. But we think that the action is not necessarily to be regarded as an action to recover the possession of personal property, and that it may well be regarded as simply an action to recover damages for taking the property of the plaintiff, and of such an action the trial justice clearly had jurisdiction where the damages claimed did not exceed the sum of $100. The trial justice himself seems to have so regarded it, as he rendered judgment simply for damages and not for the return of the property.

The original summons did not indicate that the object of the action was to recover the possession of the bale of cotton, but, on the contrary, clearly indicated that the purpose was simply to recover damages for taking it, measured by the value of the property taken. So, too, all the allegations of the complaint were equally as appropriate to an action for

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damages as to an *action to recover the possession of personal property. It is true that the demand for relief was in the form suited to an action for the recovery of personal property, but it is well settled that the demand for relief forms no part of the cause of action, and does not even give character to it, inasmuch as the true theory of the code is to give a party such a judgment as his allegations and proofs entitle him to, no matter what may be the form of the demand for relief. Pom. Rem. 630 § 580; Balle v. Moseley, 13 S. C. 441.

In the case of Joplin v. Carrier, 11 S. C. 327, the action was originally commenced before a trial justice and a verdict was rendered in favor of the plaintiff in the following form: "For $50 for wagon and harness, or wagon and harness returned to plaintiff, and damages for plaintiff for retention of wagon and harness, $20." Upon appeal to the Court of Common Pleas, that court rendered judgment for $70, with interest, in favor of the plaintiff. In reference to this judgment, this court used the following language: "It is alleged that the judgment is erroneous, as it should have been for the return of the property, and that the value of the property should not have been included in the damages awarded, but assessed separately, so that the value would become part of the damages only in case the property was not returned. The plaintiff had a right to demand either damages for the taking and detention, as in trover for conversion, or the return of the property with damages. The code has not changed the rights of parties in this respect. The provisions of Section 301 of the code apply to a judgment awarding possession of personal property, not to a case where the plaintiff is entitled to general damages. It is for the plaintiff to elect which form of remedy he will pursue. It cannot be objected that the plaintiff's demand in the trial justice's court being for the recovery of a wagon and harness and damages for the detention thereof, it therefore bound him as an election as to the form of judgment. Whether a complaint in a court of record could have that effect need not be considered, but no such effect can be claimed for informal pleadings in a trial

justice's court. The case then should proceed to judgment according to the rights of the parties."

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*This case, it will be observed, is stronger than the one now under consideration, for here the trial justice evidently treated the case as simply an action for damages, and rendered judgment accordingly, and not for a return of the property, while in Joplin v. Carrier the action seems to have been treated as one for the recovery of personal property and judgment rendered accordingly, and yet the court held that the plaintiff might elect to treat it as an action for damages merely after it had been brought into the Court of Common Pleas by appeal, for the purpose of enabling him to maintain a judgment of that character rendered by that court. So here, we see no reason why the plaintiff could not elect to treat the case as an action for damages merely, after it had been carried into the Court of Common Pleas by appeal, especially as it seems to have been so treated by the trial justice, notwithstanding the form of relief demanded by the complaint; and if it be so regarded, then, clearly, there was no foundation for the objection to the jurisdiction.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 375

(Case No. 1132.)

STATE v. CLYBURN.

(November Term, 1881.)

[1. *Jury* ⟸110.]

By reason of the non-attendance of one juror and the excusing of three others, only thirty-two jurors were present when two prisoners charged with murder were put upon their trial. To this the defendants made no objection, although apprised of the fact before the drawing commenced, and a jury was empaneled without exhausting their peremptory challenges. *Held*, that they could not afterwards object to the alleged deficiency of jurors.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 520; Dec. Dig. ⟸110.]

[2. *Jury* ⟸66.]

It is not necessary that thirty-six jurors should be present in court. The statute fixes that number as a maximum, not as a minimum. State v. Stephens, 13 S. C. 285.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 290; Dec. Dig. ⟸66.]

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[3. *Criminal Law* ⟸680, 686.]

*After the State had announced that it had closed its testimony, and a witness for the defense had been called and sworn, the trial judge permitted the solicitor to recall a witness to prove a single fact. *Held*, that in this there was no error—the time when testimony may be introduced must be left to the discretion of the presiding judge.

[Ed. Note.—Cited in Hornsby v. South Carolina Ry. Co., 26 S. C. 190, 1 S. E. 594; Petrie v. Columbia & G. R. Co., 27 S. C. 70, 2 S. E. 837; Dobson v. Cothran, 34 S. C. 532, 13 S. E. 679; Wingo v. Caldwell, 35 S. C. 609, 14 S. E. 827.

For other cases, see Criminal Law, Cent. Dig. §§ 1609, 1620; Dec. Dig. ⟸680, 686.]

Before Cothran, J., Kershaw, September, 1881.

Indictment against James Clyburn and Ella Sheorn for murder. When put upon their trial, defendants were informed that only thirty-two jurors were present, one juror not having been sworn and three having been excused by the presiding judge. Other facts are stated in the opinion. From the sentence of the court, Clyburn appealed.

Messrs. J. D. Kennedy and T. H. Clarke, for appellant.

Mr. Solicitor Bonham, contra.

January 10th, 1882. The opinion of the court was delivered by

McIVER, A. J. The appellant and one Ella Sheorn were jointly indicted for murder and the jury rendered a verdict of guilty as to the appellant and not guilty as to Ella Sheorn. From the judgment rendered on this verdict an appeal has been taken by the defendant Clyburn upon two grounds:

1. "Because his Honor the presiding judge erred in permitting the jury which tried the defendant to be empaneled from a list of thirty-two jurors instead of thirty-six jurors, which he was entitled to have, and which the law requires.

2. "Because his Honor the presiding judge erred in permitting the State, after it had closed its testimony, and the first witness for the defense had been sworn, and was on the stand, to recall and examine one of its witnesses, Dr. A. A. Moore."

It appears from the report of the Circuit judge that, before the empaneling of the jury was commenced, the counsel for the defense were apprised of the deficiency in the number of the jurors, and that no motion or request

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that the panel should be *filled up was made, and that, notwithstanding the fact that the prisoners were entitled to forty peremptory challenges, a jury was obtained from the number present without exhausting the right of peremptory challenge, and this, of itself, would be a sufficient answer to the objection taken by the first ground of appeal, even if it were otherwise well founded. State v. Price, 10 Rich. 356; State v. McQuaige, 5 S. C. 429.

We do not, however, think that there is any foundation for the position taken in the first ground of appeal: that the law requires that there should be thirty-six jurors. The Act (Gen. Stat., Ch. CXI., Section 18, p.

522,) does not require that there must be that number of jurors present. On the contrary it simply declares that: "No more than thirty-six persons to serve as petit jurors shall be drawn and summoned to attend at one and the same time at any court, unless the court shall otherwise order." So, too, the act of December 24th, 1878, (16 Stat. 802,) entitled "An Act to regulate the number of jurors who shall be in attendance on the courts of Common Pleas and General Sessions," does not require that any particular number should be in attendance. It provides that the number of petit jurors actually in attendance at the court at any one time shall not exceed thirty-six, except where jurors are drawn and summoned to fill up deficiencies occasioned by challenges in a case, in which event it is provided that those so drawn shall serve only until the verdict is rendered in such case. It is manifest, therefore, that these acts prescribe a maximum and not a minimum, and hence the prisoners did not have a right to have the panel filled up to the number of thirty-six, and for this the case of State v. Stephens, 13 S. C. 285, is express authority.

The facts out of which the second ground of appeal arises are as follows: After the solicitor had announced that he had closed the case for the State, and the first witness for the defense had been sworn and placed upon the stand, but before any question had been propounded to her, the solicitor asked permission to recall Dr. Moore, a witness who had been previously examined, for the purpose of proving a single fact which he had omitted to prove. The court granted permission to re-examine the witness, and this is assigned as error in the second ground of appeal.

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*The conduct of a case in the Circuit Court, so far as relates to the time when testimony may be introduced, must be left to the discretion of the Circuit judge, to be governed by the particular circumstances of each case. Matthews v. Heyward, 2 S. C. 247. Indeed the courts of this State have gone so far as to hold that a Circuit judge may, in his discretion, permit a plaintiff to introduce other evidence even after a motion for a nonsuit has been made and argued. Browning v. Huff, 2 Bailey 179; Poole v. Mitchell, 1 Hill 404; and these cases have been recognized and followed by this court in the recent case of Kairson v. Puckhaber, 14 S. C. 627. So in Colclough v. Rhodus, 2 Rich. 78, it was held that a Circuit judge might, in his discretion, permit a witness to return to the stand and testify after the case had been submitted to the jury and they had been addressed by counsel. It is true that these were civil cases, but the rules of evidence, with certain exceptions not applicable here, are the same in both civil and criminal cases. 1 Greenl. Evid. 65; State v. Rawls, 2 N. & McC. 331.

In the case now under consideration there is not the slightest reason for supposing that there was any abuse of his discretion on the part of the Circuit judge, and, therefore, it is quite clear that the second ground of appeal cannot be sustained.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 378

(Case No. 1133.)

CONEY v. TIMMONS.

(November Term, 1881.)

[1. *Taxation* ⇐743.]

Land of A. was sold under legal process and purchased by B., who took titles in his own name, but verbally promised to hold the same in trust for Mrs. A.'s benefit, when paid the amount of his bid, and also certain other sums due by A. to B. Before this sale, B. stated that he would purchase for Mrs. A., and, in consequence of such representation, he obtained the property for less than its value. Mrs. A. took possession of the land and retained it, until sold under execution against B., when it was pur-

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chased *by C., with full notice of these facts. *Held*, that no time being specified for Mrs. A. to make these payments, and no demand being made by B. for compliance, the contract remained of force, and C., having notice, was bound by its terms.

[Ed. Note.—Cited in Cooper v. Rutland, 99 S. C. 88, 82 S. E. 995.

For other cases, see Taxation, Cent. Dig. § 1487; Dec. Dig. ⇐743.]

[2. *Frauds, Statute of* ⇐129.]

The change of possession was sufficient to take the agreement out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 303; Dec. Dig. ⇐129.]

[3. *Taxation* ⇐743.]

The representation made by B. was calculated to stifle competition at the sale, which, on that account, under the charge of fraud made in the complaint, might be avoided; but as no party to this cause objects, and A. admits the trust and asks that it be carried into effect, the court will so decree.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1487; Dec. Dig. ⇐743.]

[4. *Limitation of Actions* ⇐182.]

The Statute of Limitations cannot avail the defendants, as it was not pleaded, and less than six years had elapsed since Mrs. A. was ousted by C. of her possession.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676–680, 682, 695, 705; Dec. Dig. ⇐182.]

[5. *Trusts* ⇐375.]

The decree of the court should fix a time within which Mrs. A. must make the stipulated payments, with an alternative provision for its payment out of the land, in case of her failure to do so.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 613, 615, 616; Dec. Dig. ⇐375.]

Before Pressley, J., Darlington, March, 1881.

In this case, Honorable JOSEPH B. KERSHAW, of the Fifth Judicial Circuit, sat in the place of Mr. Justice McIVER, who had been of counsel in the cause.

Action commenced in September, 1876, by C. J. Coney and Mary A., his wife, against W. B. Timmons and R. B. Garner, and afterwards, upon the death of Garner, revived against his administrator and heirs-at-law. The case is fully stated in the Circuit decree, which was as follows:

In September, 1867, H. E. P. Sanders, the United States Internal Revenue Collector, sold for taxes seventy-five acres of land, near Timmonsville, as the property of C. J. Coney, and it was bought by W. B. Timmons for $97.50.

J. B. O'Neall Divver was at the sale and had requested Mr. Keith to bid for said land, in behalf of Divver, to the amount of $150. He did not do so, because Timmons told them that he wished to buy the land to secure it to Mrs. Coney, and his statement to same effect is proven by other witnesses. None of them prove the terms of the arrangement between Coney and Timmons for securing the land to her. On that point, there is

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no *testimony but that of Coney and Timmons, who differ widely in their statements. Coney says he paid the purchase-money, and that Timmons was to hold the land in trust for Mrs. Coney. Timmons says that he, himself, paid the purchase-money; that Coney was to repay that, and also a confidential debt due to Timmons by Coney; also an amount due by him for store rent—the sum not stated. The confidential debt arose thus: Timmons, as sheriff, had sold certain mules to Coney, and delivered them to him, on his promise to pay his bid or return the mules. He did not pay, but, after considerable delay, he returned mules which Timmons says were not those he had sold, but were inferior. Coney says he returned the right mules, except one, which he kept, placing another in its stead. His bid for mules was $485. They brought only $185 at the resale, and Timmons was compelled to pay the $300 difference to the execution creditor. This $300, the store rent, and $97.50 bid for the land, Timmons says, was to be paid by Coney before his wife was to have the land. He waited a month or more for Coney to fulfill his promise, and then being pressed and required by Sanders to comply with his bid, he (Timmons) paid the same and received an absolute title to himself. He allowed Mrs. Coney to take possession of the land, rent it out and receive the rents, because he still expected Coney to comply with his promise.

In November, 1870, the sheriff of Darlington levied on and sold the said land to R. B. Garner, under an execution against Timmons, and at the end of that year Garner got possession and has held the land ever since. He had notice, at the sheriff's sale, of Mrs. Coney's claim, and previously knew that she was in possession of the land.

Being compelled to rely either on the testimony of Timmons, or on that of Coney, in settling the most material point of the case, I choose that of Timmons, partly because he is less interested than Coney, who testifies in behalf of his wife, and partly because the statement of Timmons is more consistent with the unpleasant relations then pending between him and Coney about the mules.

I therefore find that Mary A. Coney was in possession of said land under a valid con-

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tract, that it was to be held by Timmons *in trust for her, whenever he should be paid the items before stated, and that R. B. Garner has succeeded to the rights and the obligations of Timmons in that matter. Garner and his heirs have had possession from January, 1871, until now. He greatly improved the land by the yearly use of fertilizers and high cultivation, and the rental value thereby is greater now than it was before he improved it. Since this suit began, Garner died, and his administrator and heirs-at-law have been made parties thereto.

It is adjudged and decreed, That Mary A. Coney is entitled to an account from Garner's administrator and heirs-at-law respectively, of the rents and profits of the said land from the first of January, 1871, until the end of this year, the said rent to be estimated, not according to the present improved condition of the land, but according to its condition at the time Garner got possession. If the said rent, estimated and applied annually, shall fully pay the said sums of $300 and $97.50, and the store rent testified to by Timmons, with interest thereon, at the end of this year, the said land is to be conveyed to Mary A. Coney in fee. If the rents do not pay the said debts, with interest, then the land is to be conveyed to her whenever, after the end of this year, she shall pay the balance due thereon. And if the said rents shall exceed the said debts, with interest, then the amount of the excess is to be paid to the said Mary A. Coney, by the administrator of Garner, out of the assets of his intestate in due course of administration.

It is further ordered, That the clerk of the court take the testimony, and report the value of said rents, according to this decree; also the amount of the store rent, and the date from which it and the $300 should bear interest. That he also state the account, showing the amount of the balance on either side after applying the rents to the said debts.

To this decree, exceptions were filed by all parties, and appeal taken to this court.

Plaintiffs' exceptions were as follows:

1. Because the evidence showed that the defendant, Timmons, bid off the land at the

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sale by Sanders, at far below its value, *on representations that it was for the benefit of M. A. Coney; that thereby an express technical trust was created in favor of said plaintiff, and his Honor erred in holding that the same was in any way affected by any arrangement subsequently made between the said Timmons and C. J. Coney.

2. Because of error on the part of his Honor, the presiding judge, in holding that M. A. Coney was chargeable for anything more than $97.50, the amount of the bid of said Timmons, on his construction of the evidence, which is excepted to as an error of fact (the evidence establishing that he had received $100 from C. J. Coney to pay such bid).

3. Because, from the evidence, the plaintiff was entitled to the land, with the rents of the same from January 1st, 1871, and his Honor should have so decreed.

4. Because his Honor should have ordered an account between the parties to ascertain the true indebtedness of C. J. Coney to W. B. Timmons, instead of ordering a specific sum to be allowed said Timmons on his own evidence.

Defendants' exceptions were as follows:

1. Because the Circuit judge erred in stating as a conclusion of fact that W. B. Timmons allowed M. A. Coney to take possession of the land, whereas it appears from the testimony that Coney and wife were in possession of the land before the sale to Timmons, and continued to retain possession thereafter without leave or license from Timmons.

2. Because the Circuit judge erred in holding, on the facts of the case and the law applicable to the same, that M. A. Coney had rights and equities in and to the premises in question enforceable in a court of justice, at the time the same were conveyed to R. B. Garner.

3. Because, if M. A. Coney had rights and equities in and to the premises in question at the time of the conveyance to Garner, she lost the same thereafter by her laches, and the Circuit judge should have so held.

4. Because the agreement found as a matter of fact by the presiding judge, not having

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been reduced to writing, was void, *by reason of the Statute of Fraud, and his Honor, the presiding judge, should have so held.

Mr. W. W. Harllee, for plaintiffs.

Messrs. Boyd & Nettles, for defendants.

January 12th, 1882. The opinion of the court was delivered by

KERSHAW, A. A. J. We do not find sufficient reason to disturb the findings of fact upon which the Circuit judge based his decree. There is sufficient evidence to sustain them. We shall, therefore, determine the questions made by the appeals upon the state of facts so ascertained.

The case thus presented is substantially as follows: The plaintiff, Mary A. Coney, is the wife of C. J. Coney, the coplaintiff. In September, 1867, the land which is the subject of this action was the property of the said C. J. Coney. It was then sold under an execution against him for taxes due to the United States. It was bought by the defendant, W. B. Timmons, at such sale, under an agreement that it was to be held by him in trust for the plaintiff, Mary A. Coney, whenever he should be paid the price at which he purchased and certain sums of money due to said Timmons by C. J. Coney. This agreement was not in writing, but was established by parol evidence.

There was evidence in the case tending to show that Timmons represented himself, before the sale, as bidding for Mrs. Coney, and that, in consequence of such representation, he purchased the land at an under value. This evidence seems to have been adopted as true by the Circuit judge and is incorporated in his decree.

Titles to the land were duly made to Timmons, and he suffered Mrs. Coney to occupy the same and receive the rents therefor. On November 3d, 1870, Mrs. Coney still being in possession of the land, it was sold under a judgment and execution against W. B. Timmons, at the suit of G. W. Williams & Co., after due levy and advertisement by the

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sheriff, and pur*chased by R. B. Garner, the defendant, who paid the purchase-money and received titles therefor. Garner, at the time of the purchase, had notice of the rights of Mrs. Coney in the premises.

We do not regard the contract under which Mrs. Coney claims as a conditional one, to be fully performed on her part before she acquired any rights thereunder. No time was specified for the payment by her of the considerations of the agreement, and she was let into possession immediately. As stated in the decree, it was a unilateral contract, there being no express engagement by Mrs. Coney to comply with it; but an implied promise to pay the considerations arose when she assumed the possession of the land under the contract. She became bound by it when she accepted the benefits of it. There being no definite time fixed for the performance on her part, she will not be held to have lost the benefit of the contract by delay until some act was done, or notice given by the other party, requiring performance. Either party might have demanded performance within a reasonable time, and the contract might thus have been waived or forfeited by noncompliance. Seton v. Slade, 2 Lead. Cas. Eq., Pt. 2, *537, Am. Notes; Prothro v. Smith, 6 Rich. Eq. 324.

But here no such demand was made, and the agreement remained a subsidiary contract at the time of Garner's purchase, of which he had notice. He therefore became

bound by all the obligations of Timmons in relation thereto. Massey v. McIlwain, 2 Hill Ch. 426.

Aside from the fact of possession by Mrs. Coney, such a contract, not in writing, would be void under the Statute of Frauds. McDonald v. May, 1 Rich. Eq. 91.

Change of possession has long been held to take a case out of the statute on the ground of fraud. It was held that a party receiving a benefit under an agreement could not set up the statute against it, as that would be a fraud, and the statute, intended to prevent frauds, could not be employed to enable a party to perpetrate a fraud. Upon this principle many authorities held that only the party injured by part performance could set up the contract, while the other party would be precluded by the statute from insisting upon its enforcement. Rob. Fr. 138; Buckmaster v. Harrop, 7 Ves. 347. But here

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it has *been settled that a party who is in possession under a parol agreement to purchase may claim its performance, because, otherwise, he might be treated as a trespasser. 2 Story Eq. 761; Smith v. Smith, 1 Rich. Eq. 136; Kine v. Balfe, 2 Ball & B. *347.

While these authorities are sufficient to sustain the Circuit decree, we think it may also stand upon another principle. It is well established, in this State, that where land has been purchased at an execution sale, either under an agreement to purchase for the benefit of the debtor or of his family, or where the purchaser (there being no agreement) represents himself as so purchasing, and, in consequence, competition is stifled, or the land is bought at an under value, the sale cannot stand. Kinard v. Hiers, 3 Rich. Eq. 423; McDonald v. May, 1 Rich. Eq. 98; Schmidt v. Gatewood, 2 Rich. Eq. 177; Cox v. Cox, 5 Rich. Eq. 365. If, in consequence of the agreement alleged here, and his actions under it, Timmons prevented even one bidder from competing at the sale, it was a fraud upon the sale and he could not retain the title for his own benefit or transmit the same by alienation to one affected with notice.

The last case on the subject is that of Johnston v. Lamotte, 6 Rich. Eq. 347. There Chancellor Johnston gives the following summary of the law:

1. "The bill may aver a contract without time. In such case, if the defendant deny it and plead the Statute of Frauds, or, at the hearing, objects to parol proof, or if he admit the contract and plead the statute, the contract cannot be established by parol—the bill must be dismissed. 2. The bill may aver a contract, and may also charge and set out circumstances of fraud. In such cases * * * whether the defendant admit or deny the contract, it is competent for the plaintiff to waive such portion of the pleadings as relates to the contract and proceed entirely upon the fraud. 3. The plaintiff may file his bill upon the fraud alone, which is certainly the better method of pleading. In this case the defendant has no resource but to deny the fraud, and leave the issue to depend upon the proofs, unless he choose to set up the contract by way of exonerating

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himself from the *fraud charged against him, in which case he must perform the contract."

There had been some difference of opinion upon the subject between Chancellor Johnston and his brethren of the bench, and he himself tells us that he had in consequence taken "some pains" to set forth a summary of the law with much explicitness. As the whole court concurred in sustaining the decree in Johnston v. Lamotte, the law may be regarded as settled in accordance therewith. It would follow that if an agreement of this character were made, and were so acted on by the purchaser as to procure the land at an under value, in consequence of its use to stifle competition, the statute is avoided where the plaintiff proceeds upon the ground of fraud.

In this case the agreement is alleged in the complaint, and the use made of it to procure the purchase at an under value. It does proceed upon the ground of fraud, and charges it explicitly. According, therefore, to the doctrine laid down in the cases cited the plaintiffs are entitled to relief. Upon the facts which appear here the sale to Timmons might properly be avoided. If the judgment of the court went no further the effect would be to leave the title to the land in C. J. Coney. But he is a party here, and admits by his pleading that it is subject to the trust claimed, and joins with her in asking that it be carried into effect by the judgment of the court. There is no one before the court who has any right to object. There is no reason, therefore, why the court should not do that which will meet all the equities of the case as presented, and this is substantially accomplished by the Circuit decree.

The Statute of Limitations, the benefit of which is claimed by the defendants, was not pleaded, nor had six years elapsed from the time when Mrs. Coney was ousted from the possession of the land (and time did not run against her before), wherefore this statute cannot avail the defendants. We do not find anything in this case to authorize the application of the doctrines of laches, waiver, &c.

The only other matter to be mentioned is that the Circuit decree does not fix any time within which Mrs. Coney is required to pay any balance that may remain due by her up-

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on the account*ing directed. In the further orders to be taken a day should be named for such payment, if anything be due by her, with an alternative provision for its pay-

ment out of the land in case of her failure to do so.

The judgment below is affirmed, and the case is remanded to the Circuit Court to carry the same into effect.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

16 S. C. 387

(Case No. 1134.)

HOGG v. PINCKNEY.

(November Term, 1881.)

[1. *Malicious Prosecution* ⇐49; *Pleading* ⇐406.]

In action for damages for malicious arrest, under bail process, upon allegations of fraud, the plaintiff should allege and prove the absence of probable cause, and, failing to do so, the complaint might properly be dismissed on demurrer orally taken at the trial; but such demurrer having been overruled and testimony upon the question of probable cause freely admitted, and a verdict rendered for plaintiff, this court, on appeal, will not disturb the judgment.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 94; Dec. Dig. ⇐49; Pleading, Cent. Dig. § 1374; Dec. Dig. ⇐406.]

[2. *Malicious Prosecution* ⇐71.]

The existence or the want of probable cause in such case, is a mixed question of law and fact.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160–167; Dec. Dig. ⇐71.]

[3. *Malicious Prosecution* ⇐51.]

While the plaintiff should allege, in his complaint, that the order of arrest had been vacated before the commencement of his action, it was not necessary that he should also allege that the action itself, in which the arrest was made, had been ended.

[Ed. Note.—Cited in Tisdale v. Kingman, 34 S. C. 329, 13 S. E. 547.

For other cases, see Malicious Prosecution, Cent. Dig. § 98; Dec. Dig. ⇐51.]

[4. *Trial* ⇐139.]

A non-suit is only proper when there is no evidence whatever to support the material allegations of the complaint. If there is any evidence at all before the jury upon a fact at issue, the questions of law bearing upon such fact should be raised by requests to charge.

[Ed. Note.—Cited in Davis v. Columbia & G. R. Co., 21 S. C. 102; Wallace v. Columbia & G. R. Co., 37 S. C. 342, 16 S. E. 35.

For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⇐139.]

[5. *Malicious Prosecution* ⇐26.]

In actions for malicious arrest, it is not necessary (as in actions for malicious prosecutions) to prove express malice, or malice in fact. Malice in such cases defined.

[Ed. Note.—Cited in Freeland v. Southern Ry., 70 S. C. 429, 50 S. E. 11.

For other cases, see Malicious Prosecution, Cent. Dig. § 59; Dec. Dig. ⇐26.]

[6. *Malicious Prosecution* ⇐28.]

It is not necessary, in an action like this, to prove actual damage to the party arrested; deprivation of liberty, and injury to reputation, feelings and person, will support a verdict for the plaintiff.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 61; Dec. Dig. ⇐28.]

[7. *Malicious Prosecution* ⇐32.]

There was no error in the charge, that the jury might infer malice from the want of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 67; Dec. Dig. ⇐32.]

[8. *Malicious Prosecution* ⇐71.]

Upon the question of probable cause, the judge properly left to the jury the facts involved in that question.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160–167; Dec. Dig. ⇐71.]

[9. *Malicious Prosecution* ⇐58.]

In this trial, so much of the former record as proved the arrest and discharge was proper evidence; the remainder was irrelevant.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117–124; Dec. Dig. ⇐58.]

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[10. *Malicious Prosecution* ⇐25.]

*That the party who procured the arrest, acted under the advice of counsel, is a fact to be considered by the jury, but does not, of itself, shield him from all responsibility.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 57; Dec. Dig. ⇐25.]

[11. *Malicious Prosecution* ⇐72.]

The judge charged the jury that if they, as reasonable men, under the circumstances proved, would have acted as the defendants did, then they might conclude the defendants had reasonable cause for their action, but, in view of the testimony, if the jury would not have acted as the defendants did, then the jury might conclude that the defendants did not have probable cause. This was erroneous, in that it did not confine the jury to the facts and circumstances which surrounded the defendants at the time they acted in procuring the arrest. And for this error a new trial was granted.

[Ed. Note.—Cited in Caldwell v. Bennett, 22 S. C. 6; Taylor v. Dominick, 36 S. C. 376, 15 S. E. 591.

For other cases, see Malicious Prosecution, Cent. Dig. § 169; Dec. Dig. ⇐72.]

[12. *Malicious Prosecution* ⇐55.]

[Cited in Lumb v. Pinckney, 21 S. C. 473; Dowie & Moise v. Joyner, 25 S. C. 127, to the point that all the facts which the plaintiff is required to prove in an action for malicious prosecution should be alleged in the complaint.]

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 106–110; Dec. Dig. ⇐55.]

[This case is also cited in Acker v. County of Anderson, 20 S. C. 499, without specific application.]

Before Thomson, J., Barnwell, September, 1880.

Action by Thomas F. Hogg against B. G. Pinckney and R. Q. Pinckney, commenced August 5th, 1879, in Barnwell county, then transferred on defendants' demand to Charleston county, where they resided, and afterwards changed to Barnwell, by order of the judge, on account of the convenience of witnesses.

The facts are these: In February, 1877, the defendants here were doing business to-

gether in Charleston, under the firm name of Pinckney Brothers, and were engaged in selling a certain brand of fertilizers. Dr. Hopson Pinckney, as their agent, sold, at that time, to the defendant, five tons of this fertilizer, to be paid for in the next November, by the shipment of five bales of cotton. The cotton not being shipped, or other payment made for this fertilizer, the said Pinckney Brothers, in January, 1879, commenced an action against T. F. Hogg, in Barnwell, and, at the same time, made affidavit to the following effect: That these five tons of fertilizer were shipped upon the faith of Hogg's promise to give a lien upon his entire crop to secure the payment of their account for the fertilizers and cash advanced for freight, &c., without which promise the goods would not have been furnished, and that, although Hogg had been repeatedly requested to give the promised lien, he had failed and refused to do so, and had never paid for the goods; and that the defendant was guilty of fraud in contracting the debt for which this action is brought. Upon this affidavit, the clerk

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of court *issued a warrant for arrest and bail. Hogg was arrested at his home, in the county, by the sheriff. Hogg offered a surety, to whom the sheriff, with his prisoner, went, but this surety declined to justify. Hogg then mentioned other names, whom the sheriff refused to accept, and finally offered a person seven miles distant, to whose house they rode together, and, upon his signature being affixed to the bond, Hogg was released. Soon afterwards, in Barnwell, C. H., the defendant, Hogg, was told by the sheriff that he had learned that two sureties were necessary to a bail bond, and that Hogg must procure another surety, which Hogg then and there did. Hogg afterwards moved before Judge Hudson for an order vacating the order for bail. At the hearing of this motion, affidavit of Dr. Hopson Pinckney was read, which stated that the contract was as set forth in the affidavit for arrest; that five bales of middling cotton of 500 pounds weight each were to be delivered by Hogg at the nearest depot, in the fall of 1877, and that this contract was to be secured by a lien on his entire crop so soon as Hogg received the fertilizers; that a lien was sent to one Garvin for Hogg to execute, but that he had not executed it. Plaintiff's affidavit declared that Hogg had not executed the lien, shipped the cotton or made any payment on the account.

Affidavits submitted by Hogg, and in his behalf, were to the effect that the cotton to be shipped was not middling, but such as was made; that a lien was to be given on only five bales of cotton, and not on the entire crop; that the lien sent to Garvin was a lien upon the entire crop, and Garvin, knowing that the contract was for a limited lien, and other parties who had made similar contracts, having, on that account, refused to sign similar liens, had never presented this lien to Hogg nor told him of it. There was also a conflict in the affidavits upon another point: Dr. Pinckney swore that in the fall, Hogg said he was pushed for money to complete a gin-house which he was then building, and Pinckney told him to finish his gin-house and then pay the debt. Hogg and others swore that Dr. Pinckney was told by Hogg that a debt had unexpectedly been pressed, which, if not paid, would cause him to lose his land, and that he

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could *not then pay both debts, whereupon Pinckney told Hogg to pay for his land and "we will wait on you."

Upon these affidavits, Judge Hudson granted the order prayed for, and set aside the order of arrest, upon the ground that the only fraud alleged was in the failure to give the lien, whereas, the lien, if given according to the contract, would have been worthless as a security, as the goods were delivered before the time fixed for the lien to be signed; and, moreover, there was no testimony to show that the lien was ever presented to Hogg, and there was testimony to the contrary.

Thereupon this action was commenced, and the testimony at the trial was substantially as above stated.

The presiding judge charged the jury that to entitle the plaintiff to recover, malice on the part of the defendants and the want of probable cause for the arrest must both concur, but that it was not necessary to prove express malice and they could infer it from the want of probable cause. That the material points for them to consider was whether the plaintiff, at the time he agreed to give the lien to defendants, had no intention of giving the same, and that if they found he had no such intention it would go far to show probable cause for the arrest; but on the other hand, if they found that at the time he did intend to give it, it would go far to show want of probable cause. That this action was for damages, and the jury were not limited to the proof of special or actual damage shown in the case, which was not necessary for a recovery. That the jury could find as damages to the sum claimed in the complaint. They were warned, however, if they found for the plaintiff not to permit their feelings to carry them away, but, taking all the facts into consideration, to give a just compensation for the injury sustained by the plaintiff, of which they were the judges. That evidence was intended to assail or substantiate the statement contained in the affidavit and complaint. If the evidence disproves these statements, then, of course, the probable cause is overthrown. If, on the contrary, the evidence supports these statements, or pointedly increases their strength, the probable cause is sustained.

That if the jury, as reasonable men, under the circumstances proved, would have acted

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as the defendants *did, then the jury might conclude the defendants had probable cause for their action, but in view of the testimony, if the jury would not have acted as the defendants, then the jury might conclude the defendants did not have probable cause.

Defendants requested the court to charge, that the plaintiff could not recover unless he showed that the defendants acted in malice. The court said, I charge you that, gentlemen; but by malice, I do not mean an evil intent, but a gross indifference to the rights of others.

The court also failed to charge the jury as to the effect of the advice of counsel, saying not a word to them about it, although it was urged in the argument. But there was no special request to charge on this point.

The jury found for the plaintiff $1,000.

Defendants moved for a new trial on the minutes upon all the grounds contained in the notice of appeal that relate to the motion for a new trial before the Supreme Court, and his Honor overruled the motion.

The defendants appealed upon the several grounds considered in the opinion of this court; but it will not be amiss to give the full text of the last five exceptions to the judge's charge. They were as follows:

5. Because his Honor erred in instructing the jury that, if they would have acted as defendants did, they should find for defendants, otherwise they should find for the plaintiff.

6. Because his Honor erred in instructing the jury that it was not necessary for the plaintiff to prove actual damage, and that they could find any sum they thought proper, not exceeding $5,000.

7. Because his Honor erred in allowing a partial record of the cause, wherein the plaintiff was arrested, to be submitted to the jury, against the protest of defendants; the defendants were entitled to have the verdict in said cause before the jury, and this was withheld from them.

8. Because his Honor should have instructed the jury that if defendants acted under the advice of counsel in arresting the plaintiff, after a full and fair statement of the case, they were not responsible, and plaintiff could not recover.

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*9. Because the verdict is outrageous and excessive, based upon the erroneous charge of his Honor that the jury could give vindictive damages.

In explanation of the seventh exception, it should be stated that, when this record was offered in evidence, the complaint in Pinckney Bros. v. Hogg was in the hands of another jury in their room, and the verdict was not yet published—that case having been tried next before this case.

Mr. J. R. Bellinger, for appellant.

Messrs. Robt. Aldrich and H. M. Thompson, contra.

January 13th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. This is an action for malicious arrest, under civil process, for an alleged fraud in contracting a debt.

The complaint does not allege in terms that the arrest was without probable cause, nor does it allege that the suit wherein the arrest was made had been ended before the commencement of this action. The defendants below—appellants here—demurred orally at the trial, and moved the presiding judge to dismiss the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, being defective in the two particulars above mentioned. This motion was overruled below. It is now renewed here. So that the first question for our consideration is this: Is it necessary, in an action for an alleged malicious arrest on the ground of fraud in contracting a debt, that the plaintiff should allege in his complaint, in terms, that the arrest was made without probable cause, and, also, that the action in which the arrest was made had ended?

It is well understood that all the facts which the plaintiff is required to prove so as to entitle him in law to a verdict, should be alleged in the complaint, either originally or subsequently by amendment actually or impliedly made. This grows out of that first general rule of evidence laid down by Mr. Greenleaf, that the testimony must correspond with the allegations and be confined to the points in issue. It is not necessary, how-

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ever, to *allege conclusions of law in a complaint. In fact this, under the code, is considered not only unnecessary but bad pleading. Pom. Rem. § 517 et seq.

Now the questions here are: Is the want of probable cause in an arrest for fraud in a civil action a necessary element to plaintiff's recovery when he sues for such arrest, and, if so, is it a question of fact for the jury, to be alleged in the complaint, or is it a question of law for the court, arising upon the facts alleged?

It has often been held that in an action for malicious prosecution, the term prosecution being used in its technical sense, to wit, prosecution for crimes, &c., that the want of probable cause is a necessary element to plaintiff's recovery, and must be alleged and proved. And, as appears from the old forms found in Chitty, the practice prevailed in the old common law mode of pleading, of inserting in the declaration, in terms, that the prosecution was without reasonable or probable cause, as the proper mode of making this allegation, and in the absence of this the pleading was fatally defective. The reasons

for the necessity of such an allegation, and especially for the proof of it in actions for criminal prosecutions, originated in considerations of public policy. It is in the interest of good order, of the public peace and quiet, and good government, that criminals should be brought to justice, and to this end it has been held that whatever may be the motive of the prosecutor in a criminal action, he is free from danger if there be a probable cause for the accusation which he makes; and, as a greater protection to him, he is not required to prove the presence of probable cause by way of defense, but the plaintiff must show its absence as a part of his cause of action, and to do this an averment of the want of probable cause has ever been held necessary in such actions. Inclorn v. Berry, 1 Cowp. 204; Add. Torts §§ 852, 853; Given v. Webb, 7 Rob. 65; Chit. Pl. 261, note; 1 Greenl. Evid. 78, § 449.

The consideration of public policy referred to above as applicable to criminal prosecutions, may not apply as fully to arrests under civil process as to criminal, but yet it has been also held that arrests in suits at law are not actionable where probable cause exists, and that it is equally as necessary in

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actions for *malicious arrest as in actions for criminal prosecutions, for the plaintiff to allege and prove the want of probable cause. Chit. Pl. 261, note. 2 Greenl. Evid. § 449, treats of malicious arrests as governed by the same principles as malicious prosecutions. See Cooper v. Halbert, 2 McM. 419; Goslin v. Wilcock, 2 Wils. 307; Ford v. Kelsey & Deas, 4 Rich. 365.

This was the doctrine under the old law when parties could be held to bail for causes other than fraud in contracting a debt. It was founded upon the principle that every man has the right to appeal to the courts when he thinks he has been injured, and, as was said by Lord Campbell, in Goslin v. Wilcock, supra, the courts will be cautious in discouraging men from suing; and we can see no reason, since imprisonment for debt has been abolished and arrests in civil matters have been confined to fraud and to that alone, why this doctrine should not still apply, and why parties who arrest others for fraud in contracting a debt should not be exempt from action until the absence of probable cause for such arrest is alleged and proved.

Is it necessary, however, that the want of probable cause should be alleged in terms? Under the common law pleadings, as we have already stated, such was the practice. But under that mode of pleading the line between conclusions of law and the statement of fact was not very nicely drawn. As will be remembered, the old declaration usually embraced both. The code, however, has made a change in this respect, (§ 165, subd. 2,) providing that a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition, is all that is required, conclusions of law being entirely excluded. Since the adoption of the code, then, it may be contended that the old forms are unimportant as precedents; that the code in its substance must govern, and as that requires an allegation of facts simply, it is not proper to embrace in the complaint conclusions of law. This is sound doctrine, but does it apply in cases of this kind? This must depend upon whether the absence of probable cause is a question of fact or a question of law.

Upon reading the cases already cited, it will be seen that probable cause itself is a mixed question of law and fact, involving both, the question of law being whether the

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facts proved *constitute probable cause, and the question of fact whether the facts alleged are true—the first being a question for the court and the second for the jury. But whether this probable cause, as thus understood, is absent or present in a particular case, is a question of fact dependent upon the circumstances of each case; and being a question of fact and a necessary fact to plaintiff's recovery in actions both for malicious prosecution and malicious arrest, as we have seen from the authorities already cited, it must be alleged in each. There being no allegation of that character in the complaint in this case, in our opinion it was obnoxious to the oral demurrer interposed below by the appellant, and it would not have been error for the judge below to have dismissed it on that account. But this was not done, and at the trial testimony on the question of probable cause, both for and against, was fully admitted. In fact the case turned upon this as one of the facts involved. Now the code is quite liberal as to amendments and its spirit is averse to non-suits and dismissals upon technical objections, especially where it is manifest that no advantage is taken of either party by surprise.

In accordance with this spirit it has been held that amendments may be made either during the trial or after verdict, so as to make the complaint conform to the testimony received without objection. In Cade v. Perrin, 14 S. C. 1, Willard, C. J., said: "That was a case under the code for not restraining the verdict to the issue framed in the pleadings, and that it properly went to the jury upon the evidence, with or without previous amendment of the pleadings, and it was decided in that case that when it appears upon the trial of a case, by evidence admitted without objection, or properly admitted under the pleadings, that the plaintiff is entitled to a remedy upon the case exhibited, he cannot be turned out of court merely because the cause of action set forth in his complaint does not conform to such state of proof." To the same effect was

Porcelain Man. Co. v. Thew, 5 S. C. 5. In Morton v. Pinckney, 8 Bosw. 135, it was held that an objection at the trial that a complaint does not state facts sufficient to constitute a cause of action, is not available on appeal from the judgment where the defect is supplied by the evidence at the trial. Un-

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der these authorities, in *view of the testimony introduced in this case, the motion to dismiss the complaint, renewed here, must be refused.

Was the complaint defective because it did not state that the action in which the arrest had been made had ended before the commencement of plaintiff's action for this arrest? We think not.

It is true that in actions for malicious prosecution the complaint must allege that the prosecution was at an end, but this is because in criminal prosecutions the very question of probable cause is to some extent involved—so much so, at least, that it cannot be determined certainly, until the prosecution is ended, whether or not probable cause existed for the proceeding. If an action was permitted for damages before the prosecution terminated, either by acquittal, nol. pros., discharge, or in some other way, it could not be known but that the accused might be convicted, so that it is necessary in such case for the plaintiff to await the result of the prosecution before he becomes entitled to his action. But this doctrine does not apply in a case of the kind now before the court. Here an action was brought by the appellants against the respondent for debt; the cause of action was for cash advanced and goods sold. As an incident to this action the respondent was held to bail on an allegation of fraud in contracting this debt. The alleged fraud was no part of the debt, nor would the adjudication of the question whether or not the appellants were entitled to recovery in the action which they instituted, throw any light on the fraudulent conduct of respondent. That was a separate and distinct matter, and not involved necessarily in the action itself, and we can see no reason why plaintiff's right to action should depend on the termination of that suit.

It was, perhaps, necessary that plaintiff should allege that he had been discharged from the arrest. This fact he did allege in the third paragraph of the complaint. This, we think, was sufficient. See the well-considered case of Fortman v. Rattier & Hoenig, 8 Ohio St. 548. That was a case for maliciously and without probable cause issuing an attachment in aid of a civil action, in which it was held that "where the trial and judgment, in such former suit does not neces-

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sarily involve the question of *probable cause for issuing the attachment, it is not necessary that the plaintiff should aver or prove the termination of such former suit. Neither, in such case, was it necessary to aver or prove upon the trial that the attachment complained of had been discharged or otherwise terminated adversely to the claim of the party employing its aid before suit brought." In the case now before the court the arrest complained of was in aid of the civil action for debt, and in many respects similar to the case of Fortman v. Rattier & Hoenig, supra. We think there is no ground to dismiss the complaint on this ground.

At the close of plaintiff's testimony below, the appellants, defendants, moved for a non-suit on the following grounds: 1. Because no express malice on the part of the defendants being proved, the action cannot be sustained, and his Honor erred in holding that it was not necessary to prove express malice. 2. Because no actual damage to the plaintiff was proved, without which the action cannot be sustained, and his Honor erred in so holding. 3. Because the proof was abundant that the defendants did not act maliciously and without probable cause, but, on the contrary, the evidence rebutted malice and showed probable cause.

This motion was overruled below and it is renewed here. A non-suit is only proper when there is no evidence to support the material allegations of the complaint, and whether or not there is an absence of all testimony is always a question for the judge; whether the evidence is sufficient is for the jury. The two first grounds for the motion below raised questions of law, viz.: 1. Whether it was necessary to prove express malice; and, 2. Whether it was necessary to prove actual damage. These questions should have been raised strictly by request to charge and not by motion for non-suit. The judge, however, it is alleged, ruled adversely to appellants upon these questions, and, under this ruling, it made no difference whether express malice or actual damage was proved or not, so far as the motion for non-suit is concerned.

Was there error in his holding that it was not essential that either express malice or actual damage should be proved? The term "malice," as applied to torts, does not

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necessarily mean *that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. 2 Bouv. Dic. 98. "Malice," says Lord Campbell, C. J. (quoted in Broom Com. 756,) "in the legal acceptation of the word is not confined to a personal spite against individuals, but consists in a conscious violation of law to the prejudice of another. It is of two kinds—malice in law and malice of fact; malice in law being a wrongful act done intentionally without just cause or excuse; malice in fact

being a personal malice against an individual, or a general disregard of the right consideration due to all mankind, which may not be directed against any one, but is nevertheless productive of injury to the complainant." Broom Com. 736.

Malice is understood to be express when the testimony shows an express intent to commit the illegal injury complained of with the view to injure another. It is implied where it shows a disregard of the consequences of the injurious act, without reference to any special injury which he may inflict on another. Express malice is expended in the commission of an intended injury; implied malice, in doing some illegal act for one's own gratification or purposes, without regard to the rights of others or the injury he may inflict on another.

In Willis v. Knox, 5 S. C. 476, it was held that it was necessary to prove both express malice and actual damage, and in the absence of such proof a new trial was granted, and, Frierson v. Hewitt, 2 Hill 499, was relied on to support this principle. Upon an examination of Frierson v. Hewitt it will be seen that although Judge O'Neall, in delivering the opinion of the court, did say that express malice was necessary in such cases, yet that question was not involved in the case and this remark was obiter. The case of Frierson v. Hewitt involved simply the question whether an action for malicious prosecution would lie where the indictment failed to charge a crime, the court holding in such case that such action would not lie. This was the only question raised or decided. The case of Willis v. Knox was an action for malicious prosecution, as was also the case of Frierson v. Hewitt.

In actions of that kind there may be good

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reasons founded on *public policy why express malice, in the sense of intent to injure the plaintiff, should be proved before the prosecutor should be held accountable. As has been already said, the public peace and safety require the punishment of law-breakers, and it may be that prosecutors should be held harmless until it appears that they have attempted to subordinate the courts to the gratification of their malignant desire to injure the accused, and for no other purpose. In the case of Ford v. Kelsey & Deas, 4 Rich. 372, decided after Frierson v. Hewitt, where an action had been brought for malicious arrest under bail process, Judge O'Neall, who also delivered the opinion in Frierson v. Hewitt, reserved the question whether express malice was necessary, saying: "Without adverting to the necessity of showing express malice to sustain a case of this kind, about which no opinion is now intended to be given on the part of the court, it is enough to sustain the non-suit if the plaintiff failed to show that the defendant held him to bail without any reasonable or probable cause." We do not find any authority for the position that in an action for malicious arrest, express malice must be proved, and we do not think that the principle which requires it in actions for malicious prosecution applies to actions for malicious arrest.

Was it necessary to prove actual damages? Mr. Greenleaf, (Vol. 2, § 456,) in discussing actions for malicious prosecutions and malicious arrest, says: "As to the damage, whether the plaintiff has been prosecuted by indictment, or by civil proceedings, the principle of assessing damages is the same, and he should be entitled to indemnity for the peril occasioned to him in regard to his life or liberty, for the injury to his reputation, his feelings and his person, and for all expenses. And if no evidence is given of any particular damages yet the jury are not therefore obliged to find nominal damages only." Referring to Tripp v. Thomas, 3 B. & C. 427, Judge O'Neall, in Frierson v. Hewitt, says: "In such cases you must not only show want of probable cause, but also express malice (this was a case of malicious prosecution) and actual injury or loss, as deprivation of liberty and money paid in defense." These authorities show that it is not necessary to prove actual damages in the sense of the objection made. See case of Rowe v. Moses, 9 Rich. 426 [67 Am. Dec. 560].

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*As to the third ground for non-suit, there was, certainly, some testimony, and enough, as it seems, for the jury to render a very heavy verdict for the plaintiff. There was no error in the judge's refusing the non-suit below, and there is no ground for this court to grant the motion now.

The appellant excepts to the charge of the presiding judge upon several grounds, which will now be considered. As to the first exception, there seems to have been a misconception on the part of the appellant. The judge, in settling the case, corrects this mistake, which renders it unnecessary to consider this exception.

2. Because his Honor charged the jury that they could infer malice from the want of probable cause. The ruling of the judge is sustained by Horn v. Boon, 3 Strobh. 309.

3. Appellant objects because the judge left the question of probable cause to the jury as a question of fact. We do not understand, from the charge of the judge, that he left this question to the jury as a question of fact; on the contrary, he said "that the evidence in the case was intended to assail or substantiate the statement contained in the affidavit and the complaint. If the evidence disproves these statements, then, of course, probable cause is overthrown. If, on the other hand, the evidence supports, * * * then the probable cause is sustained." This was, in effect, saying to the jury that, in law, whether or not probable cause existed depended upon the truth of the facts alleged in

the complaint, on the one hand, and the affidavit on the other, and that it was for the jury to determine the truth of these allegations respectively. In this he decided the question of law himself, and left the facts to the jury. This exception cannot be sustained.

4. "Because, though his Honor charged the jury that malice was necessary to sustain the action, yet he erred in saying that by malice was not meant an evil intent, but a gross indifference to the rights of others." This, and the sixth exception, as to actual damages, raises the question of express malice and actual damages already discussed above, and they need no further consideration.

The seventh exception as to admission of

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a portion of the *record in evidence is untenable. The arrest and discharge were all that plaintiff desired to prove. That portion of the record which proved these facts he introduced; the remainder was wholly irrelevant.

As to the eighth, there is nothing in the record which shows that the judge was requested to charge upon the advice given to appellant by his counsel, and, therefore, this exception cannot properly be considered; but even if it was before us, we do not think that the judge could have charged as desired where defendant acted under the advice of counsel. That is a fact which, if it exists, should always go to the jury, as it did in this case, with the other facts and circumstances bearing upon the questions of malice and want of probable cause, but it could not, in itself, shield the party from all responsibility.

The fifth exception has been reserved for the last, because, upon this, a new trial must be ordered. The judge seems to have charged the jury that if they, as reasonable men, under the circumstances proved, would have acted as the defendants did, then they might conclude the defendants had probable cause for their action; but, in view of the testimony, if the jury would not have acted as the defendants, then the jury might conclude the defendants did not have probable cause. If the judge had confined the jury to the facts and circumstances which surrounded the defendants at the time they acted, then his charge would not have been objectionable. But he went further than this and permitted them to consider all the facts developed on the trial, whether they were present before the defendant at the time of the arrest or not. This, we think, was error.

It may be that the minds of the jury were not influenced by any additional facts elicited at the trial other than those surrounding the defendants when the arrest took place: but we do not know this. Under the charge of the judge, they were at liberty to consider all the testimony offered at the trial bearing upon the question of probable cause, whether known to the defendants at the arrest or not, and their verdict may have been founded, in part at least, upon these subsequent facts. This exception must, therefore, be sustained.

It is the judgment of this court that the

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judgment of the Cir*cuit Court be reversed upon the fifth exception and the case be remanded for a new trial, with the privilege, on the part of respondent, to amend his complaint so as to allege distinctly the want of probable or reasonable cause.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 402

(Case No. 1135.)

McLAURIN v. WILSON.

(November Term, 1881.)

[1. *Acknowledgment* ⇐33; *Husband and Wife* ⇐15.]

The interest of a husband, in his wife's land, was sold under execution in 1840, and purchased by C., and a year afterwards the wife executed a deed to C., in which a valuable consideration was stated and its receipt acknowledged; but the husband did not join in this deed, and no reference whatever was made to the sheriff's deed. Upon this latter deed was indorsed a certificate dated eight days afterwards, signed by the wife and a proper officer, but not under his seal; this certificate was in the usual form prescribed for the renunciation by married women of their inheritance, with the omission, however, of the declaration "that she did, at least seven days before such examination, actually join her husband in executing such release." *Held*, that the interest of the wife in this land was not conveyed to C., for the double reason, that the omitted declaration was essential, and so was the officer's seal.

[Ed. Note.—Cited in Wingo v. Parker, 19 S. C. 13; Gaffney v. Peeler, 21 S. C. 66; Moseley v. Hankinson, 25 S. C. 522.

For other cases, see Acknowledgment, Cent. Dig. § 170; Dec. Dig. ⇐33; Husband and Wife, Cent. Dig. § 99; Dec. Dig. ⇐15.]

[2. *Husband and Wife* ⇐198.]

The finding of referees and Circuit judge—that the alleged consideration was not, in fact, paid—sustained; but if paid, it would not estop the married woman, or those claiming under her, from asserting their title to this land.

[Ed. Note.—Cited in Brown v. Pechman, 53 S. C. 6, 30 S. E. 586.

For other cases, see Husband and Wife, Cent. Dig. § 733; Dec. Dig. ⇐198.]

[3. *Witnesses* ⇐160.]

The proviso to Section 415 of the Code of Procedure does not prevent a party to the cause from testifying to a communication between his deceased wife (under whom he claims the land in controversy as heir-at-law) and the ancestor (now deceased) of the defendants to the action.

[Ed. Note.—Cited in Colvin v. Phillips, 25 S. C. 232; Kennemore v. Kennemore, 26 S. C. 255, 1 S. E. 881; Sloan v. Hunter, 56 S. C. 390, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

For other cases, see Witnesses, Cent. Dig. § 696; Dec. Dig. ⇐160.]

[4. *Depositions* ⇐90.]

A party has the right to require that testimony taken before the clerk under the act of February 15th, 1872, (15 Stat. 41,) shall be read at the trial, notwithstanding the attendance of the witness so examined, and his examination in open court.

[Ed. Note.—Cited in Providence Machine Co. v. Browning, 70 S. C. 158, 49 S. E. 325.

For other cases, see Depositions, Cent. Dig. § 259; Dec. Dig. ⇐90.]

[5. *Appeal and Error* ⇐1056.]

But the court will not grant a new trial for error in excluding such testimony where it related to a matter wholly immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4188; Dec. Dig. ⇐1056.]

[This case is also cited in Johns v. Charlotte, C. & A. R. Co., 39 S. C. 169, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709, without specific application.]

Before Aldrich, J., Sumter, June, 1880.

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*Action by D. B. McLaurin, widower, and Henry J. McLaurin and others, children and grandchildren of Mrs. Agnes D. McLaurin, who died in 1863, against J. Harvey Wilson and others, heirs-at-law of Isaac James Chandler, commenced in 1872. The deed of Mrs. Chandler, mentioned in the opinion, was not produced, nor the certificate endorsed, and the record in the register's office was introduced. In this copy, a flourish of three curves was below and attached to the last letter in the officer's name: and this, the defendants insisted, was intended for a seal. This certificate was as follows:

"South Carolina, Sumter District—I, Mason Remes, one of the justices of the quorum for said district, do hereby certify unto all whom it may concern, that the within-named Agnes D. McLaurin did this day appear before me, and, upon being privately and separately examined by me, did declare that she did actually sign and execute the within release, and that the same was positively and bona fide executed at least seven days before this examination, and that she did then and still does, at this time, freely, voluntarily, and without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish all her estate, interest and inheritance to the premises mentioned in the within release, unto the said Isaac J. Chandler and his heirs and assigns forever.

"Given under my hand and seal this second day of February, 1841.

Agnes D. McLaurin.

Mason Remes, Q. U.

Other facts are stated in the opinion.

The Circuit decree, omitting its statement of the case, was as follows:

The first and main question is: Does the release and the renunciation of inheritance thereon convey the estate of Mrs. Agnes McLaurin to Isaac James Chandler?

Since the cases of Hillegas and Wife v. Hartley, 1 Hill Ch. 106, and Kottman and Wife v. Ayer, 1 Strobh. 552, I had supposed the question as to the manner of conveying the wife's estate of inheritance in land settled and no dispute could hereafter arise on that subject. The mode of conveying the es-

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tate is regu*lated by act of assembly: the object is to protect it against the husband and preserve it to the wife and children. Although the law allows the use of the estate to the husband during coverture and gives him one-third of it after the death of the wife, yet he cannot alien it unless she conforms substantially to the terms of the act permitting her to alienate. What are those terms? She must join her husband in the release, and seven days after go before a judge or justice and declare that she has joined, &c. Has this been done? The sheriff sold McLaurin's interest in his wife's estate which was the usufruct during coverture. A year after, Mrs. McLaurin made a title in fee of this land to her brother and trustee, Mr. Chandler, in which she is not joined by her husband, and not one word of reference is made to the sale by the sheriff. From all that appears on the fact of the deed, the husband had no interest in the land conveyed. It is not described as the land heretofore sold by the sheriff, nor is she alluded to as a married woman, the wife of D. B. McLaurin. From all that appears it is the deed of a feme sole. More than this, the renunciation on the back of the deed does not describe her as the wife of D. B. McLaurin. If it be true, as Chancellor Dunkin said in Kottman's Case (p. 577), the deed of a feme covert is a mere nullity—she has no legal existence: and if the object of the act was to protect the wife and secure her inheritance to her and her children against her own extravagance or the imprudence or misfortune of the husband, the wisdom of the rule is manifest that insists on a substantial compliance with the terms of the act before such a release can be effected. These papers are so defective—fall so far short of what the law requires, that to uphold them is impossible.

As to the payment of the $1,911, the consideration for the purchase, while I am free to say that the finding of a referee on a question of fact is not binding on the court, yet, like the verdict of a jury, it will not be disturbed unless against the weight of the testimony. The referees who made this finding, are intelligent gentlemen, learned in the law; they had the witnesses before them, and every opportunity to judge the value of their testimony; they live in the same county; know them personally or by reputation.

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I cannot say I have come to a *different opinion in reading the evidence. This finding is supported by the consideration that Mr. Chandler was the brother of Mrs. McLaurin. She was very poor; he a man of fortune. As trustee, he made returns, as appears from the report, and yet not one dollar of the receipt or disbursement of this $1,911 can be found in his returns. It is said he expended it in the support of his sister and her family, but we are not allowed to resort to conjecture. As trustee, it was his duty, not only to account for her estate, but, when required, to exhibit his vouchers for expenditures. This was his sister's inheritance; so far as I can see, it was all she had left of her paternal estate. With a large family struggling against poverty, duty and affection alike combined to induce him to save to her this remnant. And if we are allowed to resort to conjecture, the more charitable construction would be that he was saving this pittance to his less fortunate sister and her children.

It is not necessary to consider the other exceptions.

It is ordered, adjudged and decreed that the exceptions be overruled, and the report confirmed and made the judgment of the court.

The points made by the exceptions are sufficiently stated in the opinion.

Messrs. Moise & Lee, for appellants.

The release was effectual to convey Mrs. McLaurin's interest. We must consider the purpose, intention and object of the act. Sedgw. Stat. & Const. L. 230, 246, 260; 1 Bl. Com. 61. The act does not say one deed, but requires a joint release, so that there may be, as here, two deeds. The husband, after the sheriff's deed, had nothing left to convey. There was a substantial compliance with the law. 1 Strobh. 570; 2 Kent 154; Tyler Inf. & C. 396, 513. The scroll here was a sufficient seal. 7 S. C. 153; 8 Id. 129. The office copy is not conclusive, and cannot negative the presumption that the magistrate affixed his seal. 14 Pet. (U. S.) 448; 1 Greenl. Evid. 127. If no seal, it would not have been recorded. Mrs. McLaurin received the money, and the land cannot be recovered

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without a repayment of this *money. The concurrent finding of referees and Circuit judge is manifestly against the weight of the evidence. The acknowledgment of payment in the deed may not be contradicted. 2 Hill Ch. 335. Payment is presumed from the great lapse of time. 1 Hill Ch. 376; 3 Strobh. 448. [After commenting on the evidence, counsel continued.] These facts operate as an estoppel. 51 N. H. 287; 13 Wall. 233; 2 Sm. Lead. Cas. 743–754; 4 S. C. 45; 1 Story Eq. § 385; 11 Rich. Eq. 574. This doctrine of estoppel applies to married women and infants. 79 Ill. 164; 24 Ind. 385; 6 Wait Ac. & Def. 686; 2 Rich. Eq. 120.

Messrs. Haynsworth & Cooper, contra.

A married woman was incapable of contracting, and could bind herself only to the extent and in the manner authorized by statute. 5 Rich. 38; 14 Rich. Eq. 289; 2 Kent. 168. The act of the legislature was not here complied with. 3 Hill 199; 11 Rich. 121; 2 Mill. Const. R. 12. A power must be strictly observed. 1 Sugd. Pow. 210–245; Sm. R. & P. Prop. 252; Stark. Ev. 508. Powers under a statute are more strict. 1 Story Eq. § 96. The two transactions here were wholly distinct. And there is no seal affixed by the officer. 9 Rich. Eq. 34. Independent of the statute, the deed was utterly void. 17 Johns. 167; 2 Kent 168. No recital in this improperly executed deed could affect her; her recital of payment cannot bind her. 11 Rich. 121. The testimony shows that it was not paid. But if paid, neither she nor her heirs would be estopped; otherwise the safeguards of the statute would be effectually destroyed, and the inheritance of a married woman might be conveyed away even without the husband's knowledge. 5 Rich. Eq. 439; 4 Sand. 374; Big. Estop. 443. McLaurin was a competent witness to the conversation between his wife and Chandler. 11 S. C. 49; 9 Id. 279; 3 Id. 423; 26 N. Y. 264; 33 How. Pr. 347.

January 16th, 1882. The opinion of the court was delivered by

McIVER, A. J. This was an action to re-

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cover possession of *real estate, the title to which, it was conceded, was at one time in Mrs. Agnes D. McLaurin. The plaintiffs claim as heirs-at-law of Mrs. McLaurin, and the defendants, who are the heirs-at-law of Isaac J. Chandler, claim under an alleged conveyance from her to him. The land in question being the estate of inheritance of Mrs. McLaurin prior to her marriage with the defendant, D. B. McLaurin, his interest in it was sold, after the marriage, under executions against him, and bought by said Chandler, who took a deed for the same from the sheriff dated January 4th, 1840.

On January 25th, 1841, Mrs. McLaurin, while still a feme covert, executed a paper purporting to be a deed conveying the tract of land in question to the said Chandler. This paper is in the usual form of a conveyance of real estate, with covenant of warranty, and recites, as a consideration, "the sum of one thousand nine hundred and eleven dollars to me paid or secured to be paid by Isaac J. Chandler." There is nothing in the paper indicating that Mrs. McLaurin was at the time a married woman, and no allusion is made to the fact that her husband's interest in the land had been previously sold by the sheriff and bought by Chandler, but, on the contrary, it appears to be simply the independent deed of a feme sole. Upon this instrument there is endorsed

a certificate signed by Mrs. McLaurin and by Mason Remes, one of the justices of the quorum, substantially in the form prescribed by the act of 1795, for the renunciation of the wife's inheritance, with the important exception, however, that it contains no declaration "that she did, at least seven days before such examination, actually join her husband in executing such release." Whether this certificate was under the seal of the justice is one of the questions of fact in the case.

Two defenses were set up: 1. That Chandler took a legal title under the papers above stated. 2. That if the court should hold that there was no valid release of Mrs. McLaurin's estate of inheritance, then the payment of the purchase-money, acknowledged by the paper purporting to be the deed of Mrs. McLaurin, operates as an equitable estoppel, and prevents her and those who claim under her as heirs-at-law from disputing the title of Chandler, under whom the defendants claim.

The case was referred to three referees

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"to hear and determine *the whole issues in the action," and they made a report finding, in substance, as matters of fact: 1. That the certificate of the justice was not under seal. 2. That the consideration mentioned in the deed had not, in fact, been paid; and, as matter of law, that the estate of Mrs. McLaurin had never been conveyed to Chandler, and that upon the termination of the coverture by her death, her estate descended to the plaintiffs as her heirs-at-law. They also found that the purchase-money mentioned in the deed having never, in fact, been paid, there was no foundation for the equitable estoppel insisted upon by the defendants. Accordingly they found that the plaintiffs were entitled to recover the land described in the complaint, with five dollars damages, and, also, the costs of the case. This report, upon exceptions thereto, was heard by the Circuit judge, who overruled the exceptions and confirmed the report of the referees, and from his judgment this appeal has been taken.

The questions raised by the appeal are: 1. As to the sufficiency of the alleged release of inheritance. 2. As to the equitable estoppel. 3. As to the competency of certain testimony, of which a more particular statement will hereinafter be made.

As the law stood at the time of the transactions now brought in question, there can be no doubt that a married woman was not capable of binding herself by deed unless vested with power so to do by some act of the legislature or by some will or deed, and then only in the manner and to the extent prescribed by such act, will or deed. Brown v. Spand, 2 Mill Con. R. 12; Hays v. Hays, 5 Rich. 38. These and other cases cited in respondent's brief show with what rigid exactness our courts required that all the provisions of the statute providing the mode by which a married woman might release her inheritance in real estate should be complied with. As is said in Pitts v. Wicker, 3 Hill 199: "The right of inheritance of a married woman is protected with jealous vigilance by the law. She cannot be deprived of it but by a scrupulous adherence to the statute providing the mode in which a married woman may part with her inheritance in land." The real inquiry, therefore, in this case is whether the papers claimed to operate as a release of Mrs. McLaurin's inheritance are in compliance with the act of

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1795 (5 *Stat. 257). That act provides, amongst other things, that a wife may bar herself of her inheritance "by joining with her husband in a release to the purport of the one hereinbefore prescribed," provided she will go before some judge or justice and declare, amongst other things, "that she did, at least seven days before such examination, actually join her husband in executing such release," and that a certificate to this effect signed by the woman and under the hand and seal of the judge or justice "shall be endorsed on the release, or contained in a separate instrument of writing to the same effect."

It is very manifest that the terms of this act were not complied with. The wife did not join her husband in executing the release which is expressly required by the act, and the certificate does not contain the declaration of the wife, which the act likewise expressly requires, "that she did, at least seven days before such examination, actually join her husband in executing such release," and indeed could not, consistently with the fact, contain any such declaration. There is not even the semblance of any concurrence of action on the part of husband and wife in conveying away her estate. The paper purporting to be a deed, signed by Mrs. McLaurin, makes no allusion to her husband whatever. It does not even purport to be the deed of a married woman, but, on the contrary, appears on its face to be the deed of a feme sole. It cannot be connected with the deed from the sheriff conveying the interest of her husband, for it does not even allude to such a conveyance. The two papers purport to convey separate and distinct interests—one the interest of the husband, the other the interest of the wife—and there is nothing whatever indicating any connection between them.

In Page v. Page, 6 Cush. 196, citing Powell v. Monson, 3 Mason 347, and Shaw v. Russ, 2 Shep. 432, it was held that the deed of a married woman, executed by her alone, relinquishing her dower in land previously conveyed by her husband, by his separate deed, did not bar her of her dower. And although this was a case of dower, yet as the statutes

of Massachusetts prescribing the mode of releasing dower are very much the same as our statute in reference to the mode of releasing inheritance—requiring the wife to join with her husband in executing the deed

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—*the principles there decided would apply to the case now under consideration. The paper purporting to be the deed of Mrs. McLaurin must, therefore, be regarded as a nullity.

There is also another fatal objection to the alleged release of inheritance. The act expressly requires that the certificate shall be under the hand and seal of the justice, but the fact as found by the referees and by the Circuit judge, is that there was no seal affixed to the name of the justice, and we see no ground to impeach such finding of fact. In addition to the fact that the act expressly requires that the certificate shall be under seal, it has been distinctly decided that the want of a seal is fatal to the validity of the release. McCreary v. McCreary, 9 Rich. Eq. 34.

As to the equitable estoppel relied upon as a defense, it would be quite sufficient to say that the fact upon which it is based, viz., the payment of the purchase-money, has been found against the appellants by the referees, and their finding has been concurred in by the Circuit judge. This, according to the well-settled rule of this court, is conclusive here, unless such finding is without any evidence to support it, or is manifestly against the weight of the evidence. It certainly cannot be said that there was no evidence to support the finding, and we cannot say that it is manifestly against the weight of the evidence. We may add, however, that even if this fact were established we do not think that it would work an estoppel. For, as was well argued by respondent's counsel, such a proposition, if adopted as a rule of law, would effectually destroy all the safeguards provided by statute for the protection of the rights of married women. The statute prescribes certain formalities which must be observed in order to render the release of a married woman's inheritance valid; but if the mere fact that the purchase-money has been paid to the married woman be sufficient to divest her or her heirs of the estate, then the provisions of the statute might, in every instance, be very easily defeated, and the protection which the statute was designed to throw around the rights of married women would become a mere delusion, and the provisions of the statute rendered wholly nugatory.

The next inquiry is whether D. B. McLaurin, a party to the action, was a competent witness, under Section 415 of the code,

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*to testify to a conversation between his wife and Chandler, the deceased ancestor of the defendants. It will be observed that the exception to the general rule established by that section of the code is "that no party to the action or proceeding * * * shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased * * * as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law," &c., when the interest of such witness can in any way be affected by such examination, but it does not preclude a party from testifying to a transaction or communication between such deceased person and another. Hence, while D. B. McLaurin would not have been competent to testify as to any transaction or communication between himself and Chandler, the terms of the statute do not prevent him from testifying as to a conversation between his wife and Chandler. Roe v. Harrison, 9 S. C. 279; Hughey v. Eichelberger, 11 S. C. 49. It is clear, therefore, that there was no error in admitting the testimony of D. B. McLaurin as to what passed between his wife and Chandler.

The only remaining inquiry is whether there was error in excluding the deposition of Henry Spann, taken by the clerk under the act of February 15th, 1872, (15 Stat. 41.) It seems that the testimony of this witness had been taken by the clerk, under that act, some time before the hearing by the referees. At that hearing, Spann was present, and was examined and cross-examined orally, and after the conclusion of the examination the defendants offered in evidence the deposition of Spann taken before the clerk, which, upon objection, was ruled inadmissible upon the ground that the testimony of the witness, taken ore tenus, superseded the deposition of the witness taken by the clerk. This ruling seems to be in accordance with the rule in regard to testimony taken de bene esse, but this deposition was not so taken; but, on the contrary, it was taken under the provisions of a special statute, and we must look alone to the provisions of that statute for the rule to govern us in regard to such testimony. The statute, after providing for taking the deposition of any witness, not simply such as could have been examined de bene esse under the old law, declares as follows: "And the

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deposi*tions so taken shall be certified by the clerk before whom such examination was had, and shall be read in evidence at the trial of the said cause or proceeding, subject, nevertheless, to the right of either party to require the personal attendance and viva voce examination of the witness or witnesses at the trial of said cause or proceeding." Under the imperative language of this statute we think the defendants had the right to have the deposition of Spann read in evidence at the trial, which, however, did not preclude the viva voce examination of the witness if either party desired it. The statute does not

assimilate the taking of such depositions to the taking of testimony de bene esse, but, on the contrary, expressly requires that such depositions "shall be read in evidence at the trial," with the privilege to either party to have the witness examined ore tenus, if his attendance can be procured without delaying the proceedings.

But, while there was error in this respect, we think it was wholly immaterial and that it could not affect the result. For, as we have determined that the alleged release of inheritance by Mrs. McLaurin was an absolute nullity, and that neither she nor those who claim under her would be estopped by the payment of the purchase-money to her even if such fact had been fully proved, we cannot conceive how the testimony improperly excluded could affect the result. This, therefore, affords no ground for reversing the judgment below. Susong v. Vaiden, 10 S. C. 247 [30 Am. Rep. 50].

The judgment of this court is that the judgment of the Circuit court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 412

(Case No. 1136.)

STATE ex relatione RICHLAND COUNTY v. COLUMBIA.

(November Term, 1881.)

[1. *Courts* ⇐207.]

The writ of prohibition not being one of the writs specified in Article IV, § 4, of the constitution, the Supreme Court has original jurisdiction in prohibition, only when that writ is to be directed to one of the courts of the State

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*for the purpose of enabling the Supreme Court to exercise a supervisory control over the court to which directed.

[Ed. Note.—Cited in Ex parte Bacot, 36 S. C. 130, 15 S. E. 204, 16 L. R. A. 586; Hunter v. Moore, 39 S. C. 395, 17 S. E. 797.

For other cases, see Courts, Cent. Dig. §§ 499, 501–504, 507–509, 512, 521; Dec. Dig. ⇐207; Prohibition, Cent. Dig. ⇐65.]

[2. *Courts* ⇐207.]

Hence, the Supreme Court has no jurisdiction of an original application for a writ of prohibition to restrain a municipal corporation from issuing licenses.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 736; Dec. Dig. ⇐207.]

[This case is also cited and followed in Hunter v. Moore, 39 S. C. 394, 17 S. E. 797.]

Original application for writ of prohibition.

This application was in the name of the State on the relation of Richland county against the City Council of Columbia, heard December 19th, 1881.

[For subsequent opinion, see 17 S. C. 80.]

Mr. J. R. Abney, for relator.

Mr. F. W. McMaster, contra.

January 16th, 1882. The opinion of the court was delivered by

McIVER, A. J. In this case the relator invokes the original jurisdiction of this court for the purpose of obtaining a writ of prohibition to restrain the city council of Columbia from issuing certain licenses for the sale of spirituous liquors.

The question which confronts us at the outset is whether this court has the power to issue the writ prayed for. The powers of this court are derived from the constitution, and the only portion of that instrument which could be supposed to confer the power in question is Section 4 of Article IV., which reads as follows: "The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law, under such regulations as the General Assembly may by law prescribe; provided, the said court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in this State." It will thus be seen that this court has power to issue certain specified writs in any case where such a remedy may be appropriate, (Wallace v. Hayne and Mackey, 8 S. C. 374,) and that it also has power to issue such other original and remedial writs

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as may be necessary to give *it a general supervisory control over all other courts in the State. Accordingly it has been held that when this court is asked to issue a writ which is not among those specifically named in the above cited section of the constitution, it must be made to appear that the writ is asked for to enable this court to exercise some supervisory control over some one of the courts of this State, as this court has no power to issue such a writ except to some one of the courts of this State for the purpose above indicated.

In the case of Ex parte Carson, 5 S. C. 117, an application was addressed to the Supreme Court, in the exercise of its original jurisdiction, "for a writ of certiorari [which is not one of the writs specifically named in that section of the constitution] to the board of commissioners of elections of the city of Charleston, to remove into that court the plaint and record, together with the testimony taken by them, in a certain case in which an election for mayor and aldermen of the city of Charleston had been contested." The application was refused upon the ground that this court had no power to issue a writ of certiorari, except to some one of the courts of the State, in which, by the constitution, the judicial power of the State had been vested, and the board of commissioners of elections was not a court. In that case,

Moses, C. J., in delivering the opinion of the court, after stating that the authority of the Supreme Court to issue the writs specifically named in the section of the constitution above quoted is not limited, either as to subject-matter or as to the persons or bodies to whom they are to be addressed, uses this language: "This unrestrained right, as to the writs specified, does not attach to 'other original writs,' in which that now sought is included. The very qualification which is annexed shows that the power is restricted, and that a more limited jurisdiction was intended."

In Ex parte Childs, 12 S. C. 117, it is said that: "The jurisdiction of this court is defined in Section 4, Article IV. of the constitution, and, as there defined, it embraces four distinct classes of powers: 1. Appellate jurisdiction in 'cases of chancery.' 2. The correction of errors at law under such regulations as the General Assembly may prescribe. 3. The power to issue certain specified writs. 4. The power to issue such other original and remedial writs as may be necessary to give

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it a general super*visory control over all other courts in the State;" and after showing that the fourth class of powers conferred are not general and absolute, but can only be exercised in such cases where they may be necessary to give this court some supervisory control over some one of the courts of this State, holds that, whenever this court is asked to issue one of the writs not specifically mentioned in the above-cited section of the constitution, it is necessary to make it appear: 1. That the writ is to go to one of the courts of this State. 2. That such writ is demanded for the purpose of enabling this court to exercise some supervisory control over the court to which the writ is to be directed.

In the case now under consideration, the application, as we have seen, is for a writ of prohibition, which is not one of the writs specifically named in the clause of the constitution above referred to, but falls under the general denomination of other original and remedial writs embraced in the fourth class of powers above stated. Hence, the first inquiry is whether the writ asked for is to go to one of the courts of this State; and, 2d. Whether such writ is demanded for the purpose of enabling this court to exercise some supervisory control over the court to which it is to be directed.

The body to which the writ is to be directed is the body in which the municipal authority of the city of Columbia is vested, called in the act incorporating said city "The mayor and aldermen of the city of Columbia," and the questions are: Whether that body is such a court as is contemplated by the constitution, and, if so, whether the writ is demanded for the purpose of enabling this court to exercise some supervisory control over such body acting in its judicial capacity? For if the writ is demanded for the purpose of controlling or supervising the action of the municipal authorities when acting otherwise than in their judicial capacity, it could not properly be said that the writ was issued for the purpose of enabling this court to exercise a supervisory control over one of the courts of this State.

The mayor and aldermen are invested with various powers by the charter of the city—legislative, executive, judicial and administrative—but they certainly cannot be regarded as one of the courts of this State except

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when acting in a judicial capacity, *and this court, therefore, has no power to issue a writ of prohibition for the purpose of supervising or controlling their action, unless such action be taken in their judicial capacity. Here the application is to restrain them from issuing certain licenses for the sale of spirituous liquors, and as that is an act which they would not perform as a court, we have no power to issue the writ asked for.

Inasmuch, therefore, as we have no original jurisdiction of the matter, we do not propose to consider the merits of the application, regarding it as improper for us to prejudge the questions which should, in the first instance, be determined by a tribunal having original jurisdiction.

The judgment of this court is that the petition be dismissed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 416

(Case No. 1137.)

WARING v. CHERAW & DARLINGTON RAILROAD COMPANY.

(November Term, 1881.)

[1. *Limitation of Actions* ⇐73.]

The charter of a railroad company provided that, in the absence of contract, it should be presumed that the land on which the road was built had been granted to the company unless the owners of the land made application for an assessment of damages within ten years thereafter, saving the rights of femes covert and infants until two years after the removal of their disabilities. The company, in 1854, constructed its road on land which had been devised to a feme covert executrix and her heirs in trust for her married sister for life, and after her death "to the issue which she may leave living at the time of her death." The executrix and her husband qualified in 1850; the husband died in 1869, and the executrix still survives as his widow. The married sister died in 1880, and soon thereafter her surviving issue brought action against the railroad company to recover compensation for the land so appropriated. *Held*, that the legal estate being in the executrix and her husband for more than two years after the road was built, and then in the executrix, as trustee, for more than two years after she became discovert, with contingent remainders to

the children, the action was barred by the terms of the charter.

[Ed. Note.—Cited in Tutt v. Port Royal & A. Ry. Co., 28 S. C. 401, 5 S. E. 831; Ragsdale v. Southern Ry., 60 S. C. 389, 38 S. E. 609.

For other cases, see Limitation of Actions, Cent. Dig. § 411; Dec. Dig. ⟸73.]

[2. *Statutes* ⟸200.]

The word "hereinafter," in the seventeenth section of the charter of the Wilmington & Manchester Railroad Company (11 Stat. 408), was intended for hereinbefore, and must be so construed; the manifest intention of a statute will control the use of an inappropriate and senseless word.

[Ed. Note.—Cited in Kitchen v. Southern Ry., 68 S. C. 567, 48 S. E. 4.

For other cases, see Statutes, Cent. Dig. § 278; Dec. Dig. ⟸200.]

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[3. *New Trial* ⟸108.]

*A motion for new trial will not be granted on the ground of newly-discovered evidence, where such evidence could not avail the moving party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. ⟸108.]

[4. *Eminent Domain* ⟸288.]

Proceedings to obtain compensation for right of way, instituted in 1859, and then suspended, without assessment made, cannot operate to prevent the bar of the Statute of Limitations from running against such claim, or from defeating action brought eleven years afterwards for the same purpose, unless a continuance of the former action can be shown.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 783; Dec. Dig. ⟸288.]

Before Pressley, J., Darlington, March, 1881.

In this case, the Honorable JOSEPH B. KERSHAW, presiding judge of the Fifth Circuit, sat in the place of Associate Justice McIVER, who had been of counsel in the cause.

This was an action instituted in February, 1880, by Paul H. Waring and others, surviving issue of Frances Irene Quirk, against the Cheraw & Darlington Railroad Company to recover compensation for the use by the defendant corporation of their road-bed through the lands of the plaintiffs, such compensation to be fixed by commissioners, and, if not paid, for the recovery of the land itself.

This land was devised by James Hunter, who died in 1850, to his daughter, Mary Ann McClenaghan, and her heirs forever, in trust, for the sole and separate use of his daughter, Frances Irene, for and during the period of her natural life, free and discharged from the control, &c., of her husband: and after the death of the said Frances Irene, the land was devised "to the issue which she may leave living at the time of her death." Frances Irene married Mr. Waring during her minority, by whom she had two children, and after his death, married Mr. Quirk, by whom she had two other children. She died in January, 1880, leaving these four children surviving her. She and her husband, Waring, took possession of this land in 1858, and she continued in possession until her death.

Mrs. McClenaghan and her husband qualified as executors in 1850. McClenaghan died in 1869, and Mrs. McClenaghan is still living, with one child. The road was built in 1854. No contract or agreement was made with the

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road when it was being *built or afterwards. Mrs. McClenaghan and her husband made no demand upon the railroad company for compensation; it was not shown that Mrs. Waring ever did, until after the war, when some compromises were offered, but nothing was done.

The Circuit decree was as follows:

Plaintiffs are the children of Irene Hunter by her marriages with Paul H. Waring, and after his death with William Quirk. They apply for an assessment of damages arising from the use of right of way through their lands by the railroad of the defendant. Their title is derived through the will of their grandfather, who devised the land to his executors and executrix in trust, for the sole and separate use of the said Irene, for life, and after her death, by a valid limitation over to the plaintiffs. None of the executors qualified. The executrix, Mary A. McClenaghan, in connection with her husband, George McClenaghan, only qualified in 1850. The railroad of defendants passed through the land in 1854, without any assessment of damages or compensation to the owners. George McClenaghan died in 1869: Irene Quirk (Hunter) died in January, 1880, and in February, 1880, this action was instituted. Before that, in 1870 or 1871, Mr. Boyd was employed to press the claim, and there were negotiations between him and the president of the company in which defendant made offers of compromise, but did not at any time expressly admit the validity of plaintiffs' claim. The bar of the statute provided in the charter of said company is now pleaded. The will devising said land confers upon the trustees no power to sell the said land, or to encumber it in any manner. If this were a case of trespass to try title, in which defendant claimed the land by adverse possession, that claim would avail, because the legal estate was in a trustee, under no disability for more than ten years before commencement of this action; and adverse possession against the trustee will bar the life-tenant, though a married woman, and also the remaindermen, though minors. But it is not a case to try title unless it involved the doctrine of adverse possession. It is a claim of easement by the defendant. That can be acquired only by grant or by such possession as creates the presumption of a grant. By

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the charter of the *defendant that period is reduced to ten years, and the easement has been used for said road over twenty years. But that does not avail to bar the rights of the plaintiffs, because no presumption of grant can ever arise against cestuis que trust

who are a married woman and minor children, where the trustee has no power to grant. If defendant, in this case, had an express grant from the trustees, it would be ultra vires and void, and no one would scarcely venture to claim that a grant, by presumption, could be any better than an express one.

It is adjudged and decreed, That plaintiffs are entitled to have five commissioners appointed for the assessment of damages done to the said land by the passage of said road through the same, and it is therefore ordered that five such persons as may be agreed on between plaintiffs and defendants, be and are hereby appointed for that purpose, they to proceed according to the manner provided in said charter. If the parties fail to agree in choosing said commissioners, then plaintiffs have leave to apply before me at chambers, or before Judge Hudson, for appointment of the same.

Defendant appealed on the following grounds:

1. Because his Honor erred in holding that the defendant sets up a claim of easement; whereas it is submitted that the right to an easement is not involved, but simply the right of the plaintiffs to compensation for land appropriated by the defendant under the authority conferred by their charter.

2. Because his Honor erred in holding that this is an action to determine a claim of easement; whereas it is submitted that it is an action simply to recover compensation, according to the provisions of the charter of the defendant, for land appropriated and now used by the defendant for railroad purposes, under the express authority conferred by the legislature in the charter.

3. Because his Honor erred in holding that no presumption of grant can ever arise against cestuis que trust, who are married women and minor children, when the trustee has no power to grant; whereas it is submitted that even between private individuals such presumptions will arise when the trustee

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can assert *the rights of the cestuis que trust and sequences in the enjoyment of the easement for the requisite period.

4. Because his Honor erred in holding that no presumption of grant can arise in this case from the possession of the defendant of the land appropriated for more than ten years, when the legislature, in the exercise of the right of eminent domain, has conferred in its charter the easement to the defendant, and only gave the right to the plaintiffs' mother, or her trustee, to have compensation therefor, to be obtained according to the provisions of the charter.

5. Because his Honor erred in holding that, in this case, the legislature had no power to grant the easement to the defendant, and as the legislature had no power, then the presumption of such grant can never arise against the plaintiffs.

6. Because his Honor erred in holding that the plaintiffs are entitled to the appointment of five commissioners to make an assessment of their damages against the defendant, for land appropriated for railroad purposes by authority of their charter, and used continuously for more than twenty years.

7. Because his Honor erred in holding that the plea set up by the defendant will not avail; when it is respectfully submitted that such a motion, in this case, practically denies to the legislature the exercise of the right of eminent domain.

The plaintiffs suggested the following grounds in support of the Circuit decree, in addition to that taken by the Circuit judge:

1. The limitation in their charter relied upon by the appellant is as essentially defective in its provisions as to render it inoperative and incapable of enforcement against the respondents.

2. That the life-estate in the premises in question, held in trust by Mary A. McClenaghan, was not affected by the limitation in the charter of the appellant, by reason of the coverture of the said Mary A. McClenaghan, and by reason of a contract in relation to said premises entered into with appellant before the period of limitation was complete as against the said Mary A. McClenaghan.

3. That even if the rights of the trustee and cestui que trust of the life-estate in the premises in question were barred in the

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*charter of the appellant, the rights of the respondents, who were remaindermen and minors, were not and could not be affected thereby.

Afterwards, plaintiffs gave notice of a motion to be made in this court for a new trial on the ground of after-discovered evidence. This evidence was the copy of an order signed by Judge Whitner, in 1859, appointing appraisers to assess the damages done to this land by the defendant corporation, and the affidavits of two of the commissioners that no action was taken. This order was entitled Geo. McClenaghan and Mary Ann, his wife, trustees of F. A. Waring v. The Cheraw & Darlington Railroad Company. The motion was supported by proper affidavits.

Messrs. Townsend & Livingston, for appellants.

Messrs. Boyd & Nettles, contra.

January 18th, 1882. The opinion of the court was delivered by

KERSHAW, A. A. J. By their charter, the defendant company was vested with all the powers conferred by charter on the Wilmington and Manchester Railroad Company. By the sixteenth section of that charter, provision is made for compensation to the owners of land which should be required for a right of way, where, for the want of agreement as to value, or from any other cause, it could not be purchased from the owner.

In such case the land could be "taken at a valuation to be made by five commissioners, or a majority of them, to be appointed by any court of record," &c. The fifteenth section of the act gave the company power to enter upon and lay out any lands required for the purposes of said road. The seventeenth section is in the following words: "In the absence of any contract or contracts with the said company, in relation to land through which the said railroad may pass, signed by the owner thereof, or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land upon which the road may be constructed, together

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with a *space of sixty-five feet on each side of the center of said road, has been granted to the company by the owner or owners thereof; and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same may be used only for the purposes of the said road, and no longer, unless the person or persons owning the said land at the time that the part of the said road which may be on the said land was finished, or those claiming under him, her or them, shall apply for an assessment of the value of the said lands, as hereinafter directed, within ten years next after the said part was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply for such assessment within ten years next after the said road is finished, he, she or they shall be forever barred from recovering the said land, or having any assessment or compensation therefor. Provided that nothing herein contained shall affect the rights of femes covert or infants until two years after the removal of their respective disabilities."

It was said by the learned judge who delivered the opinion of the Law Court of Appeals in Lewis v. The Railroad Company, 11 Rich. 93, construing this act, that "the general scheme adopted to secure to the company the right of way and compensation to the landholder is manifest. For the want of agreement as to the value of the land taken, or where it cannot be purchased, the sixteenth section directs a valuation by commissioners. But in the absence of any contract, or of any valuation by commissioners, within ten years from the completion of that part of the road, the seventeenth section authorizes the company to hold the land as long as it shall be used for the purposes of the road, and presumes a grant from the owner for that purpose; and should no application for an assessment be made within ten years, then the owner is forever barred from recovering the land or having any assessment or compensation."

Instruction may also be derived, as to the construction of this act, from the dissenting opinion of that eminent jurist, Judge Wardlaw, in the same case. Speaking of a vendee of the land which was taken for the purposes of the road, he said: "If he should permit the railroad company to hold, without

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complaint, *until the expiration of ten years from the time the road was there finished, the land would become subject to the company's right to enjoy the slip occupied by them so long as they continued to use it for their road, and no longer; but if compensation should be claimed and paid, the fee-simple absolute would thereby be vested in the company."

In the case under consideration, there was no contract in relation to the land. The company entered upon it and constructed their railway in 1854, and there was no assessment of value by commissioners within ten years next thereafter, nor any application for such assessment on the part of the owner within that period. The land, therefore, became "subject to the company's right to enjoy the slip occupied by them so long as they continued to use it for their road," unless there be something in the case to bring it under the operation of the proviso in favor of infants and femes covert, in which case two years after the removal of the disability would be required to perfect the rights of the company and conclude the owner. Upon that point we agree with the Circuit judge that "the legal estate was in a trustee, under no disability for more than ten years." We do not understand that either party denies that Mrs. Mary A. McClenaghan was trustee under the will, nor that the legal estate remained in her, either as sole trustee, or in conjunction with her husband, George McClenaghan, from 1850, when she qualified (with her husband) as executrix, until the death of Francis Irene Quirk (the cestui que trust for life), who died in January, 1880.

The legal estate was devised to Mary A. McClenaghan and her heirs, and she was seized of an estate in fee subject to the trusts declared in the will. This estate became vested in her husband, as would any such estate in relation to which there was no trust. The principle is thus conveniently stated by Mr. Hill in his treatise on trustees, page *304: "Upon the marriage of a female trustee, the legal interest in the trust property will become vested in the husband, either wholly or partially, according to the nature of the estate. If it consist of chattels personal in possession, they will devolve upon him absolutely by the fact of marriage, unless it be otherwise expressly provided;

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and if it *consist of chattels real, the husband's interest in them will be subject to the title to the wife by survivorship. Where the trust property is real estate, of inheritance, the husband will take either an estate by the curtesy if he have had heritable issue, or, otherwise, a bare estate during the life

of his wife, jointly with her. * * * As the husband will be liable personally for any breach of trust committed by his wife, it must follow as a necessary consequence that she cannot act in the administration of the trust without his concurrence or consent."

The life-tenant of the use was a feme covert, and it was settled to her sole and separate use, and the remainders were contingent. Faber v. Police, 10 S. C. 385; Ex parte Gadsden, 3 Rich. 467; Bacot v. Heyward, 5 S. C. 445. Certainly, during the life-time of the tenant for life, the fee was in the trustee. No one else could have received the compensation required by the act to be paid to the owner of the land. McClenaghan and his wife could have made application for the compensation, and no one else could, and there was no disability except that of the coverture of Mrs. McClenaghan. It would have been necessary for her to join her husband in an application for the compensation, while he was yet alive, because, as has been shown, he was seized jointly with his wife of the legal estate: and as the fund to be received appertained to the inheritance, and the action would have survived to her, such joinder was necessary. She was, therefore, entitled to the benefit of the proviso which allowed her two years after the death of her husband within which to apply for compensation. These two years expired in 1871, and, though there was some negotiation in this interval in regard to the matter, it was suffered to drop. No such application was made as was required for the legal assertion of the right, and the bar of the statute was not affected thereby.

If the trustee was barred, the cestuis que trust are also barred, (Long v. Cason, 4 Rich. Eq. 69,) because the statute runs against the legal estate, which is vested in the trustee. Says Lord Chancellor Talbot: "Though the cestui que trust be an infant, yet he must be barred by the trustees not suing in time, for I cannot take away the benefit of the Statute of Limitations from the company, who are in default, and are entitled to take ad-

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van*tage thereof as well as private persons, since their witnesses may die or their vouchers be lost. And as to the trust, that is only between the administrator and the infant, and does not affect the company. So, where there is an executor in trust for another, and the executor neglects to bring his action within the time prescribed by the statute, the cestui que trust or residuary legatee will be barred." Wych v. East India Company, 3 P. Wms. 310.

Regarding, as we do, this action as involving only the right of the plaintiffs to recover against the defendant company the compensation to which they suppose themselves entitled under the act, the judgment of this court is that the claim was barred before their interests in the land vested, and that they cannot, for that reason, maintain their action.

We have said nothing in regard to the point contended for by plaintiffs' counsel: that the limitation of the charter is so defective in its provisions as to render it inoperative. In this seventeenth section of the charter the owner is required to make application for an assessment of its value "as hereinafter directed," and no directions follow. It is said that the owner cannot comply with this impossible condition, and, hence, cannot be barred by the omission to do so. Ample directions are given in a previous section, and the meaning of the act is so plain that we feel it incumbent on us to disregard this manifest error. The whole scheme of the act cannot be permitted to be destroyed by a blunder so evidently unintentional. The very word which here is supposed to destroy the efficacy of the statute was disregarded in the construction of a deed in Creighton v. Pringle, 3 S. C. 94. For the reasons given there, we are constrained to arrive at a like conclusion in this case. The same principle applies to a statute under construction, in this respect, as to a deed or will. The evident intention will control the use of an inappropriate and senseless word. Pott. Dwar. Stat. 175, 207, et seq. Construed with reference to the other sections of the act, none can doubt that the word which was intended to be used by the legislature was "hereinbefore" instead of "hereinafter," and this construction is necessary to sustain the legislation.

One other point remains to be considered—the motion for a new trial. Upon this subject, without entering into the question

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*made as to the merits of the motion, or the power of this court to entertain the same, we think the newly-discovered evidence alleged is not such as could avail the plaintiffs. It tends to show that an application was made by Mr. and Mrs. McClenaghan, as trustees, for the appointment of commissioners to assess the damages, now claimed by the plaintiffs, in 1859. That commissioners were appointed by the court, but never met, and no further steps were taken in the matter. There has been no continuance of the proceedings, and the steps taken would not take the case out of the operation of the limitation as to time unless there had been a regular continuance of the proceeding. In order to avoid the operation of the Statute of Limitations by a plea that the action was commenced within the statutory period, the plaintiff must show a continuance of that action up to the time of trial. McDowell v. Goodwyn, 2 Mill. Const. R. 441 [12 Am. Dec. 685]; Chapman v. Mayrant, 2 Speers 484.

For some reason the parties did not see fit to proceed in their attempted assessment, and it is but reasonable to suppose that they supposed themselves to have had good rea-

son for not doing so. As an account was required by the act to be taken of the benefit and advantage which had accrued to the owners of the land from the erection of the railroad, as well as the loss and damage resulting therefrom, and only the excess of loss over the benefits could be recovered, it is quite probable that the trustees considered that the pursuit of the matter would be fruitless. At all events they did not proceed, and the statutory period, to which they were limited, expired, and they lost the remedy.

The decree of the Circuit Court must be set aside and the complaint dismissed, and it is so adjudged.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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*(Case No. 1138.)

WOOD v. BABB.

(November Term, 1881.)

[1. *Judgment* ⇐201.]

Where the master's report fully states his conclusions of law and fact separately, a Circuit decree which simply confirms the report is unobjectionable in form.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 365; Dec. Dig. ⇐201.]

[2. *Appeal and Error* ⇐1022.]

Findings of fact by a master, concurred in by the Circuit judge, sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇐1022.]

[3. *Tender* ⇐9.]

A creditor to whom a debt is payable on a day certain, waives the consequences of his debtor's failure to pay on that day by then saying to the debtor, that, although the time to pay had expired, he supposed a few days would make no difference; and a tender made within such few days could not be objected to as not being in proper time.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 13–19; Dec. Dig. ⇐9.]

[4. *Tender* ⇐15.]

Where a tender of a sum, admitted by the creditor to be the amount then due, is refused solely because the time for payment had expired, all other objections to the sufficiency of the tender are thereby waived.

[Ed. Note.—Cited in Salinas & Son v. Ellis, 26 S. C. 345, 2 S. E. 121.

For other cases, see Tender, Cent. Dig. §§ 39–46; Dec. Dig. ⇐15.]

[5. *Costs* ⇐42.]

A legal tender having been made, the creditor, in action afterwards brought, is entitled to judgment for the amount so tendered, but without interest or costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 137–164; Dec. Dig. ⇐42.]

[6. *Mortgages* ⇐300.]

A wife mortgaged her separate property to secure the payment of her husband's debt. *Held*, that the property occupied the position of a surety, and a legal tender, made by the husband to his creditor, discharged such property from the lien of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 884; Dec. Dig. ⇐300.]

Before Fraser, J., Laurens, July, 1881.

Hon. J. H. HUDSON, of the Fourth Circuit, sat in the place of the CHIEF JUSTICE, who had been of counsel in the case.

Action commenced in April, 1873, by Turner R. L. Wood, against James M. Shockley and Cassie B. Shockley, his wife. Shockley and wife having died before the trial, the action was revived and continued against M. E. Babb, as administrator of J. M. Shockley, and J. D. Shockley, as executor of Mrs. Shockley, and also against her heirs-at-law. The opinion states all the material facts of the case.

Messrs. Y. J. Pope and J. W. Ferguson, for appellants.

Messrs. Holmes & Simpson, contra.

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*January 20th, 1882. The opinion of the court was delivered by

HUDSON, A. A. J. On December 29th, A. D. 1871, J. M. Shockley and Cassie B. Shockley, his wife, jointly conveyed to the appellant, Turner R. L. Wood, a tract of thirty-five (35) acres of land, situate in the county of Laurens, by deed absolute on its face. But, according to the allegations of the complaint, this conveyance was only intended to secure the repayment of three hundred dollars ($300) on January 1st, A. D. 1873, with interest at twenty-five per cent. per annum, claimed to have been loaned by Wood to Shockley and wife upon the faith of this land as a security. The object of the action below was to recover this debt and to enforce the lien on the land by foreclosure and sale.

Shockley and wife, against whom the action was originally begun, defended by alleging that the money was loaned to the husband alone, and that the wife did not become personally liable; that the land conveyed is her separate property, and was only pledged as security for the debt of the husband; that shortly after the debt became due the husband made a full tender of the amount owing, which Wood refused to accept, and that he is, and ever has been, ready to make payment. Wherefore James M. Shockley claims that he is liable only for the sum tendered, without costs; and Cassie B. Shockley contends that by refusing said tender the said Wood forfeited all claim to her land which stood pledged for this debt of her husband. The defendants, James M. Shockley and wife, Cassie, having both died pending the action, it was continued against their legal representatives and heirs aforesaid, under whose answers the points in controversy remain as before.

The cause was first heard by C. D. Barks-

dale, Esq., master for the county of Laurens, before whom all the testimony was taken and the cause fully argued by counsel. He, on April 30th, A. D. 1881, submitted to the Circuit Court his report, accompanied by all the testimony, in which report he passes separately upon all the issues of law and fact involved in the case.

His findings of fact are in substance:

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*First. That on December 29th, 1871, J. M. Shockley borrowed of T. R. L. Wood $300, payable January 1st, 1873, at twenty-five per cent. interest. Second. That the money was loaned upon the faith of a mortgage on the wife's tract of thirty-five acres of land, which was given in the form of a joint deed by husband and wife. Third. That Mrs. Shockley signed the deed reluctantly and under importunities of the husband. Fourth. That shortly after the money became due Shockley stated to Wood that the bad weather had prevented him from bringing the money, and asked if he still would receive it. Wood replied that, although the time had expired, he supposed a few days would make no difference. Fifth. That on January 6th, A. D. 1873, Shockley, accordingly, went in company with two friends to Wood's house with a view to make a tender, when he was informed by the latter that a tender was useless as the time had run out, and "a contract was a contract." Sixth. That, nevertheless, Shockley did make a tender of an amount, admitted by Wood to be in full, and in currency to which he did not object, but which he refused only because the debt was past due.

The master concludes as matter of law—

First. That the debt being that of James M. Shockley alone, the wife is not personally liable; and the land, being her separate property, occupied the relation of surety or collateral security for the principal debt, and would be discharged by anything which would discharge a surety or guarantor who was personally liable.

Second. That being subject to be thus discharged, it was in law released from the lien of the deed by way of mortgage so soon as Wood refused to accept the tender of the debt in full, although it was made after the debt was due.

Third. That although only part of the money was proved to be in legal tender notes, and the balance may have been national bank bills, yet no objection was urged by Wood on that ground, and this was a waiver of any defect of the tender arising from the kind of currency in which it may have been made.

After noticing other minor points raised in argument by counsel for the plaintiff, the master recommends that the mortgage be marked canceled and delivered up to the executor of Cassie B. Shockley; and that the

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plaintiff have judgment against *M. E. Babb as administrator of the estate of James M. Shockley, subject to the plea of plene administravit, for the sum of $375, the amount tendered, and that the plaintiff be required to pay the costs of the action.

At an extra term of the Court of Common Pleas at Laurens in July, A. D. 1881, the cause was heard by Judge Fraser on exceptions to this report of the master. The Circuit judge, without rendering a judgment based on an opinion giving reasons therefor, in addition to those given by the master, merely concurred with him in his findings of fact and conclusions of law, and made the report of the master, with its recommendations, the judgment of the Circuit Court.

This action of the Circuit judge is made the ground of the first exception on appeal to this court, the appellant contending that he should have stated in full and separately his findings of fact and conclusions of law in rendering his judgment. This had been very fully done by the master in his report, and in making that report with its recommendations the judgment of the Circuit Court, the judge, in concurring with the master, has in fact rendered a judgment in which the findings of fact and conclusions of law are separately stated. No statute nor requirement of law has been thus violated, and the judgment is not open to this exception of the appellant.

The remaining exceptions assign error in the findings of fact and conclusions of law of the master adopted by the Circuit judge.

It is the well-established rule governing this court that where the findings of fact by a referee or master are concurred in by the Circuit judge, such findings will not be disturbed unless they be against the manifest weight of testimony or without testimony to sustain them.

We see no such objection to the findings in this case. In fact there seems to be but little if any room for dispute except upon the matter of tender—whether it really was made at all, and, if so, whether Wood had so waived the time as to let in a tender six days after the debt was due. In the first interview which Shockley had with Wood after the maturity of the debt (a day or two after, according to the testimony,) we think there was that said by Wood which waived the failure

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of a tender on *January 1st, A. D. 1873, and which precluded him from raising this objection when, on January 6th, Shockley came to tender the money. On that day, according to the weight of the testimony, a tender was certainly made of the sum then due as assented to by Wood, and in currency, a part of which, if not all, was in legal tender notes, and to none of which was objection made on account of the kind of currency, and consequently all objection on that score must be taken as waived, the refusal having been solely because of the lapse of six days after maturity.

In 2 Greenl. Evid. § 601, the author says: "If a tender is made in bank notes, it is good, if the want of it being in current coin is waived; and if the creditor places his refusal to receive the money on some other ground, or even if he makes no objection to the tender on the express ground that it is in bank notes, it is held a waiver of this objection." We perceive no such want of proof upon the subject of the tender as will justify us in reversing the findings of the master and Circuit judge.

The law of the case as announced by the court below, embodied in the master's report, follows as a consequence of the findings of fact. The tender having been found to be a good tender by reason of the waiver of objections which might have invalidated it, it follows that, as against the administrator of James M. Shockley's estate, the appellant can only recover the amount which Shockley tendered and which the appellant refused to receive; the act of refusal barring him of the right to recover interest after that time, and also of the right to recover costs of defendants. It having been ascertained that the land is the property of the wife, according to the testimony, having been conveyed to her by George W. Gerald, October 25th, 1871, and that she pledged it as a security and guaranty of her husband's debt, the property stood in the relation of surety to the debt of James M. Shockley, and became discharged of the lien by whatever would in law discharge a surety.

Brandt on Suretyship and Guaranty, on page 28, Section 22, says: "While a married woman cannot usually become personally bound for the debt of her husband, she may ordinarily pledge or mortgage her separate property for his debt, and, if she does so, such property occupies the position of a sure-

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ty or guaranty, and *will be discharged by anything that would discharge a surety or guarantor who was personally liable." And on page 397, Section 295, the same author says: "If the principal, after the debt is due, offers to pay it, and tenders the amount due to the creditor, and the creditor refuses to receive it, the surety is discharged."

According to this authority (and it is in accord with all the decisions since the days of Lord Coke. See Six Carpenters' case, 8 Coke 146, and authorities cited in Tiffany v. St. John, 65 N. Y. 314, reported in 22 Am. Rep. 612,) the tender made by Shockley and refused by Wood, January 6th, 1873, was sufficient to discharge this thirty-five acres from the lien of the mortgage, even though, by lapse of time, it might not have been available to Shockley as a defense, and would not have been so available but for the waiver of Wood. His refusal, however, clearly forfeited all right on his part to further lien on the land of Cassie B. Shockley, and discharged the mortgage lien from that moment.

We see no error in the judgment of the Circuit Court, and, therefore, it is the judgment of this court that the judgment below be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 432

(Case No. 1139.)

STEVENSON v. WILCOX.

(November Term, 1881.)

[*Executors and Administrators* ⟸537.]

Pending application of a widow for administration on her intestate husband's estate, and because of her illness, a petition was filed by A. for administration pendente lite, and upon his appointment he filed a bond with sureties, in which he was styled administrator pendente lite, but the condition of the bond called for a general administration. The widow took no further steps in the matter of her application, but A. acted as general administrator, and was so recognized by creditors, distributees, ordinary and court of equity, and by the court last named was decreed to pay a balance ascertained to be in his hands. In action afterwards brought by creditors against his sureties to recover such balance, *held*, that A. was only administrator pendente lite, and that a general administrator was a necessary party to this action, and there being none such in office, a nonsuit was properly granted.

[Ed. Note.—Cited in Kaminer v. Hope, 18 S. C. 575; Strickland v. Bridges, 21 S. C. 25.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2539, 2540; Dec. Dig. ⟸537.]

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*Before Wallace, J., Marion, October, 1881.

Hon. J. B. KERSHAW, of the Fifth Circuit, sat in the place of Mr. Justice McIVER, who had been of counsel in the cause.

Action by James N. Stevenson and Mowry & Co., creditors of Samuel F. Gibson, against John Wilcox, C. D. Evans and S. A. Durham, sureties on the bond of A. L. Evans. The opinion states the case.

Messrs. C. A. Woods and J. G. Blue, for appellants.

Messrs. W. W. Harllee and Townsend & McKerall, contra.

January 20th, 1882. The opinion of the court was delivered by

KERSHAW, A. A. J. Upon the death of Samuel F. Gibson, in 1867, his widow, Constantine, applied for letters of administration on his estate. On account of ill-health she was unable to appear in the court of ordinary to complete her administration by taking the oath, giving bond, &c. Whereupon, one A. L. Evans, a stranger in blood to the intestate, applied, by petition, for administration pendente lite, assigning as a reason therefor the disability of Mrs. Gibson from illness; that there was a large crop planted

on the farms of the estate and an insufficiency of provisions to carry on the farms, and that administration was necessary immediately to prevent serious detriment, loss of crops and other damages. Letters of administration were granted to him upon this petition, and he gave bond, with these defendants as sureties. In the bond he is termed administrator pendente lite, but the condition of the bond is in the same form as though he had been made the general administrator. No further steps seem to have been taken by Mrs. Gibson to complete her administration, but A. L. Evans acted in all respects as a general administrator. In 1868, he filed a bill to marshal the assets of the estate, making the widow and creditors parties thereto; obtained an order enjoining the creditors, and accounted under an order of

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the court therein. A *large balance was found and decreed against him. The decree was enrolled, execution issued thereon, and was returned nulla bona.

The plaintiffs, a portion of the creditors of Samuel F. Gibson, have brought this action against the defendants, as sureties, on the administration bond of A. L. Evans, demanding judgment for the amount of the decree against their principal, to be paid to the clerk of the court and distributed among the creditors of S. F. Gibson according to their legal priorities. The presiding judge on Circuit granted a non-suit and dismissed the complaint, holding that the action could not be maintained without administration on the estate of S. F. Gibson, "other than that granted to A. L. Evans." The appeal is from this judgment.

The Circuit judge proceeds upon the idea that the administration granted to Evans was merely provisional and special, not general; that there was no general administrator of the estate, and the action could not be maintained in the absence of such administration. If this view be correct, the judgment below must be confirmed. We agree with the Circuit judge on this point. There was a suit pending in the court of ordinary on behalf of the widow, who had a statutory right to the administration, when Evans, a stranger, applied for administration pending that suit expressly to provide for the emergency created by the illness of Mrs. Gibson and the delay in her suit resulting therefrom. The prayer of the petition was for "administration pendente lite." Upon such an application a general administrator could not have been appointed because the nature of the two offices is entirely different. The one is an officer or agent of the ordinary, having no title to the goods of deceased, while the other is an officer of the law, in whom is vested the legal title to the goods and chattels, rights and credits of the intestate, representing and succeeding him in his relations to his personal property. Whatever the form of the letters, or of the bond, this administration could only have been especial and provisional—pendente lite. The character of it could not be changed so as to affect these sureties by the conduct of Evans, his recognition by Mrs. Gibson or the creditors, or the ordinary, or the proceedings of the court of equity ascrib-

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ing to him, erroneously, *the character of a general administrator. The defendants have a right to stand upon their rights as they existed at the time of the original contract in this respect.

If Evans was not the general administrator the plaintiffs could not maintain their action, because an administrator is a necessary party to such a suit. Kaminer v. Hope, 9 S. C. 257; Easterling v. Thompson, Rice 350; 2 Wms. Ex. 1444; 2 Dan. Ch. Pr. 251.

In order to transmit the title to the assets of the estate of an intestate to the creditors there must be an administrator, and, hence, he is a necessary party to all suits brought to recover and to distribute or administer such assets. In the present case there was no one before the court who had the legal title to demand of the defendants the sum claimed to be due by them on their bond. If it had been shown that there was an administrator, the proceedings might have been so amended as to make him a party, but there being none, the non-suit was properly ordered. Appeal dismissed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 435

(Case No. 1140.)

BURCKHALTER v. COWARD.

(November Term, 1881.)

[1. *Libel and Slander* ⇐107.]

In action of slander the jury may give exemplary damages, and in fixing the amount of their verdict, may consider the pecuniary condition of the defendant.

[Ed. Note.—Cited in Duckett v. Pool, 34 S. C. 325, 13 S. E. 542; Calder v. Southern Ry., 89 S. C. 303, 71 S. E. 841, Ann. Cas. 1913A, 894.

For other cases, see Libel and Slander, Cent. Dig. § 305; Dec. Dig. ⇐107.]

[2. *Libel and Slander* ⇐57, 59.]

While the defendant, under his plea of justification for the slander, must prove his charge to make the defense complete, the jury, in fixing their verdict, may take into consideration circumstances of aggravation or of mitigation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 157, 159; Dec. Dig. ⇐57, 59.]

[3. *Libel and Slander* ⇐112.]

In action of slander for words imputing a crime to plaintiff, the defendant, to support a plea of justification, must produce a record of conviction of the crime so imputed, or else show the plaintiff's guilt by evidence sufficient to con-

vict him if on trial for such crime; otherwise, the jury must find for plaintiff. A mere preponderance of evidence is not sufficient to sustain the plea.

[Ed. Note.—Cited in Murray v. Aiken Min. &c., Co., 37 S. C. 486, 16 S. E. 143.

For other cases, see Libel and Slander, Cent. Dig. § 334; Dec. Dig. ⟸112.]

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[4. *Libel and Slander* ⟸120.]

*Where the plea of justification fails because unsupported by evidence, the jury, in estimating the damages, may consider this as a circumstance of aggravation and of continued and express malice.

[Ed. Note—Cited in Finch v. Finch, 21 S. C. 345; Sanders v. Sanders, 30 S. C. 209, 9 S. E. 94; Addison v. Duncan, 35 S. C. 169, 14 S. E. 305.

For other cases, see Libel and Slander, Cent. Dig. § 350; Dec. Dig. ⟸120.]

[5. *Trial* ⟸25.]

To be entitled to the opening and reply, the defendant must fully admit the plaintiff's case, so that the verdict, in the absence of evidence, would be for the plaintiff. Hence, where the actionable words stated in a complaint for slander were admitted, but not to their full extent, and the malice charged was denied, the defendant is not entitled to open and reply.

[Ed. Note.—Cited in McConnell v. Kitchens, 20 S. C. 433, 47 Am. Rep. 845; Addison v. Duncan, 35 S. C. 170, 14 S. E. 305.

For other cases, see Trial, Cent. Dig. § 73; Dec. Dig. ⟸25.]

[6. *Trial* ⟸25.]

And, it seems, that in all actions for unliquidated damages for personal injuries, libel and slander, the plaintiff opens and replies.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44–75; Dec. Dig. ⟸25.]

[7. *Jury* ⟸135.]

The defendant cannot challenge talesmen drawn in place of jurors removed by the challenges of the plaintiff. The right of challenge in civil cases is given by statute, and may be exercised only upon the jury as first empaneled.

[Ed. Note.—Cited in Ward v. Charleston City Ry., 19 S. C. 524, 45 Am. Rep. 794.

For other cases, see Jury, Cent. Dig. § 606; Dec. Dig. ⟸135.]

Before Kershaw, J., Aiken, September, 1881.

Action by Hudson B. Burckhalter against Thomas W. Coward, commenced in July, 1881. The plaintiff demanded judgment against the defendant for $5,000 damages for "false and defamatory words maliciously" spoken by defendant concerning the plaintiff, to wit, that plaintiff "had broken into a store between midnight and day, and stolen goods, and that defendant could and would prove that plaintiff had done so." The answer admitted that defendant had said "that plaintiff had broken into a store in the night-time and stolen goods, and that he could and would prove that plaintiff had done so;" that defendant has been informed and believes that the plaintiff has been and is guilty of the charge; that all this was said "in full belief of its truth and verity, and not from any motive of malice towards the plaintiff."

The evidence is not reported. The request to charge, and other matters, are stated in the opinion of this court. The charge to the jury was as follows:

The words alleged by the plaintiff to have been spoken of him are substantially the same as those admitted by the defendant. They are words which impute a crime to the plaintiff, and, therefore, are actionable in themselves, without proof of special damage, and if the testimony has failed to prove their

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truth to *your satisfaction, plaintiff is entitled to recover such damages as are, in your judgment, reasonable and proper under the circumstances. If, however, the testimony satisfies you that the charges made by defendant are true, by a clear preponderance of the proof, then your verdict must be for the defendant. The charge made is substantially the breaking and entering of the store, and the stealing of goods therefrom. To find for the defendant, it is necessary that you must be satisfied that the store in question was broken and entered by the plaintiff, and that goods of the character specified in the answer were taken by plaintiff under the circumstances alleged. The proof need not be beyond a reasonable doubt. It is sufficient that you be satisfied by the preponderance of the testimony, so that you believe the charge to be true. If the question of the truth or falsity of the words spoken remain so doubtful that you cannot decide it from the testimony, and it is left equally balanced in your mind, you must find for the plaintiff, because the burden of proof is upon the defendant, and he is bound to satisfy you affirmatively of the fact of the plaintiff's guilt of the charge he has made, or his defense fails. If you find for the plaintiff you must find such damages as you think, under the circumstances, he ought to have. The amount should be apportioned according to the infamy of the charges made, and the circumstances under which they were spoken. They should be sufficient to compensate the plaintiff for the injury done him, and to punish the defendant for his wrongful act, according to the degree of wrong of which you may find him to have been guilty under the circumstances. You will take into consideration any circumstances of excuse or mitigation which you may find to exist on the one hand, or of the evil purpose, malice and aggravation on the other, and find such amount as you think proper, having relation to the pecuniary condition of the defendant. In no case can you exceed the sum claimed in the complaint.

The verdict was for the defendant, and plaintiff appealed.

Mr. James Aldrich, for appellant.

Messrs. Henderson Bros., contra, cited, on
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the first exception, *2 Speers 418; 2 Rich. 184; 15 S. C. 82, 443. 2d exception—5 Rich. 235; 1 Hill 251. 3d, 4th and 5th exceptions—60 Me. 209; 12 Bush 5; 3 Hawks 63; 5 Yerger 211; 24 Ill. 566; 9 N. H. 150; 25 Id. 122. 7th exception—9 Rich. 426.

January 24th, 1882. The opinion of the court was delivered by

McGOWAN, A. J. This was an action of slander. The case was called for trial, and was to be heard by jury No. 1, which was full. The plaintiff objected to two of the jurors peremptorily, and to one for cause. The three jurors were directed to leave the box, leaving nine upon the panel. Before the defendant exercised his right of challenge he requested the court to have the panel filled, which was done against the protest of the plaintiff. After the jury was thus filled up the defendant objected to two of the jurors who had been called as talesmen. They retired from the jury, which was filled up by a second drawing from the talesmen. The plaintiff excepted.

The defendant's answer contained a plea of justification—that he spoke the words substantially, but without malice. Upon the pleadings the defendant claimed that he was entitled to open and reply in evidence and argument, and the court so ruled. To which the plaintiff excepted.

The evidence being closed, the plaintiff requested the judge to make certain charges, which he refused. Under the charge the jury found a verdict for the defendant, and the plaintiff appeals to this court upon the following exceptions:

1. "That his Honor erred in overruling plaintiff's objection to the filling of the panel after plaintiff had peremptorily challenged two jurors and one for cause, and before defendant had exercised his right of challenge; and in allowing defendant to challenge jurors after the panel was filled from the talesmen; and in allowing defendant to challenge two of the talesmen drawn to fill the panel.

2. "That his Honor erred in allowing defendant, upon the pleadings, the right to the opening and reply in evidence and in argument.

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*3. "Because his Honor refused to charge as requested by plaintiff.

4. "Because his Honor erred in charging the jury that 'if the testimony satisfies you that the charge made by the defendant is true by the clear preponderance of the proof, then your verdict must be for the defendant.'

5. "Because his Honor erred in charging that 'the proof need not be beyond a reasonable doubt. It is sufficient that you be satisfied by the preponderance of the testimony, so that you believe the charge to be true.'

6. "Because his Honor erred in charging that 'you will take into consideration any circumstances of excuse or mitigation which you may find to exist on the one hand, or of the evil purpose, malice and aggravation on the other.'

7. "Because his Honor erred in charging the jury that in fixing the amount of the verdict they could find such amount as they think proper, having relation to the pecuniary condition of the defendant."

We will consider these exceptions in their reverse order.

As to the last. In actions of libel and slander, where the object of the plaintiff is to recover damages for aspersions cast upon him, the jury is authorized to give what is called exemplary or vindictive damages. The primary object in such cases is to obtain such a verdict as will compensate the plaintiff for the injury done him, and to operate as an example to others; but it is also allowable to add something by way of punishment to the defendant, and as the action sounds only in damages, a verdict which would punish a defendant of small means might be no punishment whatever to another of large fortune. According to our decided cases it was not error to charge the jury that in fixing the amount of the verdict they might consider the pecuniary condition of the defendant. The exact point was ruled in the case of Rowe v. Moses, 9 Rich. 426 [67 Am. Dec. 560], where it is said by Judge O'Neale, in delivering the judgment of the court: "In my long experience as a lawyer and a judge I never knew an exception taken in actions for assault and battery, slander, malicious prosecutions, and malicious torts generally, to evidence of defendant's wealth: and if such proof could now be excluded as
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a measure *of damage it would be in fact to reverse a course of justice coeval with the administration of it by the courts in this State."

The sixth exception complains that it was error to charge that the jury might take into consideration any circumstances of excuse or mitigation on the one hand, or of evil purpose, malice and exaggeration on the other. It is true that when the plea of justification is entered in an action of slander there is no complete defense except by proof of the charge, but in fixing the amount of the verdict we do not see why there may not be circumstances of aggravation or of mitigation in such case as well as in any other. Why may not the defendant say: "I spoke the words, but under great provocation, or in sudden heat and passion," or "I spoke them only once, and then only from public rumor," &c? It is true that the defendant cannot avail himself of the defense which the truth

of the charge affords without pleading justification; but it does not follow that in all such cases the verdict must be the same without regard to the facts and circumstances of aggravation or mitigation. Understood only as applying to the amount of damages, we see no error in this charge.

The fourth and fifth exceptions allege error in the charge "that the proof need not be beyond a reasonable doubt. It is sufficient if you are satisfied by the preponderance of the testimony, so that you believe the charge to be true." The judge was requested to charge that "where the words impute crime to the plaintiff, the defendant, to support a justification that the charge is true, must show the plaintiff's guilt by evidence sufficient to convict him of the crime on a trial for it, and if the defendant fails so to do, the jury must find for the plaintiff." We think it was error to refuse this request, and to hold that mere preponderance of evidence was enough to sustain the plea. Although it was not a criminal proceeding, a crime was charged, and the authorities hold in such case that it is proper to make the same proof which would be necessary to convict the party in a criminal proceeding for that crime.

"If the plaintiff has been tried and convicted, the conviction may be given in evidence in support of the plea of justification. If a man be adjudged by the Sessions to be the father of a bastard child, the adjudica-

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tion is an answer to any complaint *made by him in the spiritual court or elsewhere against any one for saying or publishing that he has had a bastard. When the plaintiff has not been actually convicted of the felony he must be tried by the jury upon the plea of justification in the same way as if he was on his trial upon an indictment for the offense in a criminal court; so that if there is a doubt of his guilt the jury are bound to give him the benefit of the doubt." Add. Torts (3 ed.) 819; Towns. Sl. & L. 613; 5 Wait Ac. & Def. 758; Richards v. Turner, C. & M. 417; 2 Greenl. Evid. § 426.

The third exception embraces a refusal to charge as requested, that "if the defendant undertakes to justify the slander and fails, because the justification is unsupported by the evidence, it is an aggravation of the charge, evinces continued and express malice, and may be properly considered by the jury to increase the damages." The judge refused to charge in the words stated; but did charge that "if the defendant undertakes to justify the slander and fails because the justification is unsupported by the evidence, it may be considered as a circumstance of aggravation and of continued and express malice, and may properly be considered by the jury in estimating the damages." We see no error in the proposition as stated by the judge.

The second exception is that the judge erred in allowing the defendant the right to open and reply in evidence and argument. Upon this subject our present rule of court, LIX., is identical with the old rule which was in force before 1868. It is in these words: "On all motions or special matters, either springing out of a cause or otherwise, the actor or party submitting the same to the court shall in like manner begin and close; and so shall the defendant when he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof, have the like privilege."

There is no doubt that the defendant is entitled to begin and close the case when he admits upon the record the plaintiff's cause of action, and takes upon himself the burden of proof; but it is insisted here that the admission in this case did not amount to the admission of the plaintiff's cause of action. The action was for slander. The complaint charged that the defendant maliciously spoke concerning the plaintiff certain false

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*and defamatory words, stating them; to which the defendant answered, admitting that he spoke the words, (nearly the identical words charged, but omitting the phrase "between midnight and day,") and adding "that he is informed and believes that the plaintiff has been and is guilty of each and every charge in the said complaint alleged to have been made against him by the defendant; and that whatever the defendant has said of or concerning the plaintiff he has said in full belief of its truth and verity, and not from any motive of malice towards the plaintiff," &c.

Was this an admission of the plaintiff's cause of action? Malice is a necessary ingredient of slander, and it was alleged in the complaint. The plaintiff's cause of action was not only that the words were spoken, but that they were spoken "maliciously." The admission that the words were spoken without malice was an admission of only a part of the cause of action. It was to this extent pleading both the general issue and justification. "Every plea of justification must meet and justify the charge or complaint set forth on the face of the declaration. If it does not do this, reasonably and substantially, it is a nullity." Add. Torts (3 ed.) 807. "The test to determine which party has the right to begin, and, of course, to determine where is the burden of proof, is to consider which party would be entitled to the verdict if no evidence were offered on either side. For the burden of proof lies on the party against whom, in such case, the verdict ought to be given." 1 Greenl. Evid. § 74, and note.

Upon proof of the allegations of the complaint in this case the plaintiff would have been entitled to recover. Did the answer, ad-

mitting the words but denying malice, shift the burden of proof upon the defendant? If the case had been submitted upon the complaint and answer, the defendant would have been entitled to a verdict, and therefore it cannot be said that the burden of proof was taken upon himself by the defendant. It was still necessary that the plaintiff should prove that part of the complaint which alleged malice. "The party who asserts the affirmative of the issue is entitled to begin and reply. If the record contains several issues, and the plaintiff holds the affirmative in any one of them, he is entitled to begin, as if, in

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an action *of slander for charging the plaintiff with a crime, the defendant should plead not guilty and a justification. For when the plaintiff is obliged to produce any proof in order to establish his right to recover, he is generally required to go into his whole case, and therefore is entitled to reply." 1 Greenl. Evid. § 74.

In the case of Mercer v. Whall, 5 Ad. & E. (N. S.) 447, it was held that whenever, from the state of the record at nisi prius, there is anything to be proved by the plaintiff, he is entitled to begin. Lord Chief Justice Denman said: "The natural course would seem to be that the plaintiff should bring his own cause of complaint before the court and jury in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damages to which he conceives the truth of such facts may entitle him. The law, however, has, by some, been supposed to differ from this, and to require that the defendant, by admitting the cause of action stated on the record, and pleading only some affirmative fact, which, if proved, will defeat the plaintiff's action, may entitle himself to open the proceeding at the trial. * * * I have never doubted that the plaintiff was privileged and required to begin whenever anything was to be proved by him. The simplicity and easy application of this mode of practice would recommend it to adoption if the question were new, and would raise a great probability that the common sense of old times had sanctioned it as a part of our system."

After much controversy on the subject, it seems to have been finally settled in the English courts that in all actions for unliquidated damages for personal injuries, the plaintiff is entitled to open and reply. Mr. Greenleaf says: "The difficulty in determining the point exists chiefly in those cases where the action is for unliquidated damages, and the defendant has met the whole case by an affirmative plea. In these it has, at length, been settled by a rule of the fifteen judges that the plaintiff shall begin in all actions for personal injuries, libel and slander, though the general issue may not be pleaded and the affirmative be on the defendant." 1 Greenl. Evid. § 76, and note.

It has been held in our case of Brown v. Kirkpatrick, 5 S. C. 267, that the question

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must be determined by the nature of the *issues rather than by the character of the evidence called for in their support. The same case also decides that error in giving the reply to the party not entitled to it is appealable.

The first exception is that the judge erred in overruling plaintiff's objection to filling the panel after plaintiff had peremptorily challenged two, and a third juror for cause; and in allowing defendant to challenge jurors called from the talesmen; and in allowing defendant to challenge two of the talesmen thus drawn. The right to challenge jurors peremptorily was confined exclusively to criminal cases down to the year 1841, when the privilege, to a limited extent, was given in civil actions by the act passed in that year, which is in these words: "In all civil cases in which a jury shall be charged with the trial of any issue, each party shall have the right to challenge, without cause therein, two of the jury so empaneled, and the place of the jurors so challenged shall be supplied as provided by law." (Gen. Stat. 523.) The right to challenge jurors in a civil case is not derived from the common law or based upon any general principle, but is conventional, and comes entirely from this statute, in the construction of which the courts have decided that the right to challenge is confined to the original jury so empaneled; and that it is not allowable to challenge peremptorily a juror who did not belong to the original panel, but was called to fill a vacancy caused by the challenge of the other party. It may be that the same reason exists for making a talesman drawn liable to challenge as well as one of the original jurors; but the statute which gives the right does not so declare. If the precise point, in form involved here, has not been decided, the principle of construction which embraces this case has been. Kleinback ads. City Council, 2 Speers 418; Durant v. Ashmore, 2 Rich. 184; Huff v. Watkins, 15 S. C. 82 [40 Am. Rep. 680]; Gunter v. The Graniteville Manufacturing Company, 15 S. C. 443.

In the case last cited it is said by the chief justice: "In a recent case (Huff v. Watkins, 15 S. C. 82 [40 Am. Rep. 680]) the exact point raised here was decided, and we need not now go beyond that decision. It maintains fully the exception of the defendant here, and must govern in the construction to be placed upon Section 26, Chap. CXI., of Gen. Stat., in reference to challenges to

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jurors in civil *cases." In that case, as in this, one of the parties was allowed to challenge a juror taken from the talesmen and not belonging to the original panel, and, upon that ground, a new trial was ordered.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case remanded for a new trial.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 445

(Case No. 1141.)

McCALL v. COHEN.

(November Term, 1881.)

[Reported and Annotated in 42 Am. Rep. 641.]

[1. *Dismissal and Nonsuit* ⟸65.]

An order dismissing the complaint, passed at the proper stage of a trial, is not erroneous because that no motion for dismissal was made by defendants.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 160; Dec. Dig. ⟸65.]

[2. *Trial* ⟸139.]

A non-suit should not be granted in invitum where there is any evidence to go to the jury; but where, in action for damages for proceedings under a void judgment of a trial justice, there is no evidence that the trial justice acted willfully or corruptly, or that the plaintiffs willfully procured or oppressively enforced the illegal judgment, the complaint was properly dismissed by the order of the judge.

[Ed. Note.—Cited in Davis v. Columbia & G. R. Co., 21 S. C. 102; Hooper v. Columbia & G. R. Co., Id., 549, 53 Am. Rep. 691; Couch v. Charlotte, C. & A. R. Co., 22 S. C. 560; Hicks v. Sumter Cotton Mills, 39 S. C. 43, 17 S. E. 509.

For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⟸139.]

[3. *Judges* ⟸36.]

The judge of an inferior court is not liable in damages for an injury resulting to a party by reason of an error of judgment committed by such officer in the discharge of his duty, where the subject-matter was within his jurisdiction—except possibly, upon proof of a willful and corrupt motive.

[Ed. Note.—Cited in Abrams v. Carlisle, 18 S. C. 243, 245.

For other cases, see Judges, Cent. Dig. §§ 165–173, 178, 179; Dec. Dig. ⟸36.]

[4. *Judges* ⟸36.]

The rule is the same where his error of judgment was as to his jurisdiction of the persons of the defendants, in a case wherein he had undoubted jurisdiction of the subject-matter. The distinction between no jurisdiction and excess of jurisdiction declared in Bradley v. Fisher, 13 Wall. 335 [20 L. Ed. 646], approved.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 165; Dec. Dig. ⟸36.]

Before Pressley, J., Darlington, April, 1881.

Action commenced in July, 1880, by L. A. McCall against D. D. Cohen and the other parties named in the opinion as defendants, and also against G. W. Brown. The opinion fully states the case.

Mr. B. O. Townsend, for appellant.

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*February 18th, 1882. The opinion of the court was delivered by

McGOWAN, A. J. This was an action to recover damages for a levy on property under a void judgment. The defendant, M. A. Huggins, being a trial justice, rendered, May 29th, 1877, a judgment in favor of Hart & Co.—namely, N. S. Hart, D. D. Cohen, P. Moran, John V. McNamee and McDuff Cohen—against McCall & Co.—namely, Stephen McCall and L. A. McCall. Under the execution issued in the case, a mule, the property of L. A. McCall, was levied on and detained some time. Afterwards the judgment was set aside, and said McCall brought this action for damages against the trial justice, who rendered the judgment, and the creditors, plaintiffs in that action. When the case was called, it was announced that two of the defendants, D. D. Cohen and John V. McNamee, had not been served, and the plaintiff was allowed to proceed against the other defendants.

It appeared that Hart & Co., merchants of Charleston, sent to R. K. Charles, Esq., an account against McCall & Co. for $14.57, to be collected. Mr. Charles placed the account in the hands of Trial Justice Huggins for suit, and, without further instructions from them, took such steps for the collection as he thought best. Huggins sued on the account. The summons was returned served by one Calvin Josey, acting constable, but who, as it appeared, was not a regular constable, and had no special appointment in the case. When McCall received the summons, and before the day of trial, he enclosed to Huggins the amount of the account, $14.57, without interest or costs. Huggins received the money, but, concluding that there was interest due at twelve per cent. and costs, he credited the amount received and gave judgment for $10, "balance of debt and costs."

Upon this judgment execution was issued, which was taken from the officer sent to levy it. Another execution was issued, whereupon the plaintiff here, McCall, made a motion before the trial justice to set aside the judgment, upon the ground that he had not been made a party by proper process. On that ground the motion was refused, but granted unless the plaintiffs would remit all interest over seven per cent., which was done, and the judgment reduced to $6.93. The execution

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was then placed in *the hands of the sheriff by Mr. Charles, attorney for Hart & Co., with instructions to notify McCall, his object being, as he testified, "to work him up to a settlement." G. W. Brown, deputy sheriff, levied the execution on a mule belonging to L. A. McCall. The sheriff offered to return the mule, but McCall declined to take him. After some six weeks the mule was returned in bad condition, and soon after died.

L. A. McCall applied for a writ of certiorari to set aside the judgment, which Mr. Charles resisted. Judge Wallace, March 12th, 1879, granted the prayer, ordering "that the judg-

ment and execution mentioned in the petition be set aside and canceled, and, also, that Hart & Co. pay the costs of this proceeding, together with $10 costs of this motion." From this order there was an appeal, and this court affirmed the order. State, ex rel. McCall, v. Cohen, 13 S. C. 198.

When the testimony in this case closed, Judge Pressley required argument on the part of the plaintiff as to whether there was any evidence to go to the jury, and, being of opinion there was none, directed Mr. Charles, defendants' attorney, to draw up, for his signature, the following order: "There being no evidence to go to the jury to connect D. D. Cohen, P. Moran, John V. McNamee, N. S. Hart, McDuff Cohen and M. A. Huggins with the trespass set forth in the complaint, it is ordered that as to them the action be dismissed."

The plaintiff appeals from this order upon the following grounds:

1. "Though action has been commenced against the defendants, D. D. Cohen and John V. McNamee, by delivery of the summons to the sheriff for service, yet they, not having been served therewith, were not before the court, and the plaintiff should have been allowed further time to effect service upon them, and the case should only have been heard, and any decision related only to the defendants actually served with the summons.

2. "The order was made on the motion of the court itself.

3. "There was evidence to go to the jury to connect the defendants, known as Hart & Co., with the trespass set forth in the complaint.

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*4. "There was evidence to go to the jury to connect M. A. Huggins with the trespass set forth in the complaint, and from which they could infer his willful, knowing, malicious and corrupt intention and animus.

5. "The order was otherwise erroneous."

No argument was submitted in this court for the respondents, and we have had to make such hasty examination as the press of business would allow. There is nothing in the order having been prepared at the instance of the judge himself. It was not, as in the case of the State v. Parker, 7 S. C. 235, "without notice to the party prejudiced by it," but in the midst of the trial and in the presence of all parties. We consider the matter precisely as if the motion had been made by Mr. Charles, attorney for the defendants. We cannot assume that he was opposed to entering an order in favor of his clients.

The rule certainly is that a non-suit upon the facts should not be granted when there is any evidence to go to the jury, whose exclusive province it is to decide upon the weight of conflicting testimony. As was said in the case of Redding v. South Carolina Railroad Company, 3 S. C. 9 [16 Am. Rep. 681], "where there has been a total failure of testimony, as in Brown v. Frost, 2 Bay 126 [1 Am. Dec. 633], and Hopkins v. DeGraffenreid, Id. 441, there was nothing to leave to the jury, and it was the duty of the judge to non-suit; but, as it is said in Rogers v. Madden, 2 Bail. 321, the practice of ordering a non-suit in invitum for defective testimony is to be pursued with caution." Holley v. Walker, 7 S. C. 144. It is the province of the judge to decide all questions of law, and in this case there was a mixed question of both law and fact.

Trial Justice Huggins was a judicial officer, and in the course of his official duties he rendered a judgment which, as it afterwards appeared, was void for the want of proper service of the parties. One of the questions was whether, as matter of law, he was responsible for the consequences. Upon that point there can be no doubt. It is as well settled as any legal proposition can be that a judicial officer is not liable in damages for an injury which may come to a party by reason of an error of judgment committed in the discharge of his duty where the subject-matter is within his jurisdiction.

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Without going into the long list of *authorities in support of this proposition, extending back at least to the time of Lork Coke, it cannot be necessary to do more than refer to the case of Bradley v. Fisher, 13 Wall. 335 [20 L. Ed. 646], decided in the Supreme Court of the United States as late as 1871, in which the subject received exhaustive consideration.

That was an action for damages by Mr. Bradley, a lawyer, against Judge Fisher of the District of Columbia for striking him from the rolls as a practicing attorney. In delivering the judgment of the court, Judge Field said: "The principle which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in this country. It has, as Chancellor Kent observes, 'a deep root in the common law.' Yates v. Lansing, 5 Johns. 291. Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of Floyd v. Barker, reported by Coke in 1608 (12 Coke 25), where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if

they were required to answer otherwise it would 'tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations.'" This is undoubtedly the law in reference to courts having general authority, and it is equally true in respect to judges of inferior courts, except possibly as to the right to call in question the motives with which they act—whether ignorantly or willfully and corruptly.

The case of Reid v. Hood and Burdine, 2 N. & McC. 168 [10 Am. Dec. 582], was very analogous to this. That was trespass against Burdine, a justice of the peace, and Hood, the plaintiff in an attachment which the said justice, at his instance, had illegally issued against the plaintiff. In delivering the judgment of the court, Judge Richardson says: "The essential characteristic distinction be-

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*tween a judicial and a ministerial officer is that the former is to give judgment, which requires perfect freedom of opinion; but the latter is to execute, which supposes obedience to some mandate prescribing what is to be done, and leaving nothing to opinion. Now, as opinion upon any subject is various and uncertain, we cannot direct the judgment, but must leave it to the honest dictates of the officer's peculiar intellect, upon information acquired; and both information and intellect are so different in different men that it is vain to look for the same correctness of adjudication. In all judicial questions, then, the very aim and duty of the officer is to give his true opinion after due inquiry. If erroneous, he can no more answer for the error than for the head which Heaven has given him. All we ask of such an officer is the just picture which has been impressed upon the tablet of his intellect by the facts and the law together; and however discolored and distorted it may come out, yet if it be the true image of his intellectual impression, we get just what we require and all that he can give. Opinion, then, having no fixed test nor measure, no equal scales nor weights, all we can answer for is its honesty."

But it is insisted that this principle shields a judicial officer from pecuniary responsibility only when the act complained of is within his jurisdiction, and that he is liable as a trespasser when it is beyond his jurisdiction. It is alleged in this case that the trial justice acted without jurisdiction, and on that ground the judgment was declared void, as shown by the order in the certiorari proceedings. The State ex rel. McCall v. Cohen, supra. It is true it was held in that case "that a judgment" (this very judgment) "rendered by an inferior court against a party not brought within its jurisdiction by proper service of process may be set aside under proceedings by certiorari;" but it must not be overlooked that Trial Justice Huggins had jurisdiction of the subject-matter in which he rendered that judgment, although, the parties not being properly before him, it was in fact not a legal judgment. He was not acting beyond his jurisdiction, but he erred in supposing that he had acquired jurisdiction of the persons of the defendants when he had not. Having jurisdiction of the subject-matter, whether he had jurisdic-

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tion of the defend*ants was a matter for his own determination, although he might and did decide that question wrong.

This distinction between excess of jurisdiction and no jurisdiction at all is clearly made in the case already cited of Bradley v. Fisher. "The distinction here made between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists was taken by the Court of King's Bench in Ackerley v. Parkinson. In that case an action was brought against the Vicar-General of the Bishop of Chester and his surrogate, who held the consistorial and episcopal court of the bishop, for excommunicating the plaintiff with the greater excommunication, for contumacy in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin, the citation issued to him being void, and having been so adjudged. The question presented was whether, under these circumstances, the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside on appeal on that ground. Lord Ellenborough observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter, although the citation was a nullity, and said that "no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, 'inverso ordine.'"

Mr. Justice Blanc said there was "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;" and held "that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should, by reason of the error, be entitled to have the conclusion set aside and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction."

We see no evidence in this case that Huggins, the trial justice, acted willfully or corruptly in rendering the judgment. From

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*the record it appears that the defendants had been served in the usual way, and the

illegality of that service having been made by a private person, without special appointment, was not obvious. It is not surprising that the trial justice made the mistake. Indeed, none but a well-informed lawyer would have known that the service was illegal and void. It was not shown that he had anything to do with making the actual levy or detaining the mule. There was nothing tending to connect him with that, except, perhaps, the statement of the deputy sheriff, Brown, that when he was informed of the levy, the morning after it was made, he replied: "All right, go ahead;" and laughed. Huggins denies this, but, if true, it was before the judgment was declared void, and afforded no evidence that in rendering the judgment he had acted willfully and corruptly.

As to the other defendants, members of the firm of Hart & Co., we see no evidence that they did more than creditors are allowed to do in collecting debts, or in any way were to blame. They lived in the city of Charleston, and it does not appear that any one of them was ever in the county of Darlington. In the course of business they sent a small account for collection to their attorney, who, in his efforts to collect it, took such steps as he thought proper. When a writ of certiorari was applied for to set aside a judgment he had obtained for his clients, he resisted the application, and, when he failed, they paid the costs as they were required to do. We see in this nothing so unusual or extraordinary as to show upon their part either the willful procurement or oppressive use of an illegal judgment.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. *453

*(Case No. 1143.)

STATE v. DODSON.

(November Term, 1881.)

[1. *Criminal Law* ⇐586.]

A motion for continuance is addressed solely to the discretion of the Circuit judge, and his ruling thereon is not appealable.

[Ed. Note.—Cited in State v. Lucker, 40 S. C. 550, 18 S. E. 797.

For other cases, see Criminal Law, Cent. Dig. § 1311; Dec. Dig. ⇐586.]

[2. *Criminal Law* ⇐1158; *Jury* ⇐103.]

Whether a juror is indifferent in a cause is a matter of fact to be finally determined by the Circuit Court. As matter of law, a juror is not incompetent who has formed an opinion from what he has read in the newspapers, or heard, but whose mind would not be thereby influenced who is not sensible of any bias or prejudice, and who would be governed by the evidence.

[Ed. Note.—Cited in State v. Coleman, 20 S. C. 448; State v. Prater, 26 S. C. 202, 2 S. E. 108; State v. Williams, 31 S. C. 257, 9 S. E. 853; State v. James, 34 S. C. 52, 12 S. E. 657; States v. Haines, 36 S. C. 507, 15 S. E. 555; Sims v. Jones, 43 S. C. 94, 20 S. E. 905; State v. Williamson, 65 S. C. 244, 43 S. E. 671.

For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066, 3070, 3071, 3074; Dec. Dig. ⇐1158; Jury, Cent. Dig. §§ 444, 456, 460–479, 497; Dec. Dig. ⇐103.]

[3. *Criminal Law* ⇐1152.]

A prisoner cannot, in this court, object to the ruling of the Circuit judge that a juror was competent, when such juror was challenged by defendant, and he obtained his jury without exhausting his peremptory challenges.

[Ed. Note.—Cited in State v. Anderson, 26 S. C. 601, 2 S. E. 699; State v. Weaver, 58 S. C. 110, 36 S. E. 499.

For other cases, see Criminal Law, Cent. Dig. § 3056; Dec. Dig. ⇐1152.]

[4. *Witnesses* ⇐52.]

The wife of a prisoner, on trial, is an incompetent witness in his behalf. State v. Workman, (5) 15 S. C. 541, approved.

[Ed. Note.—Cited in State v. Reynolds, 48 S. C. 387, 26 S. E. 679.

For other cases, see Witnesses, Cent. Dig. §§ 124, 126–136, 165, 415, 416, 417, 419, 424; Dec. Dig. ⇐52.]

[5. *Criminal Law* ⇐528, 673.]

The confession of one of the defendants implicating himself and others, is competent evidence against himself, and should be proved as made, including the names of his confederates as stated by him, the jury being instructed that it is evidence only against the party who made the confession. State v. Workman, (4) 15 S. C. 541, approved.

[Ed. Note.—Cited in State v. Carson, 36 S. C. 531, 15 S. E. 588; State v. Petsch, 43 S. C. 148, 20 S. E. 993; State v. Milam and McCoy, 65 S. C. 322, 43 S. E. 677.

For other cases, see Criminal Law, Cent. Dig. §§ 1005, 1873; Dec. Dig. ⇐528, 673.]

[6. *Witnesses* ⇐49.]

A party convicted of infamous crimes, and who has served out his sentence, is restored to his competency as a witness by a pardon afterwards granted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 116; Dec. Dig. ⇐49.]

[7. *Criminal Law* ⇐730.]

While defendants' counsel were portraying to the jury the effect of a conviction, the trial judge, interrupting, cautioned the jury that their duty was to pass upon the facts regardless of the consequences of their verdict. *Held*, no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. ⇐730; Homicide, Cent. Dig. § 554.]

[8. *Criminal Law* ⇐824.]

In an arson case, where no mitigating circumstances appeared in the evidence, this court will not grant a new trial, because that the Circuit judge neglected to charge the jury that the prisoners might be recommended to mercy under the act of 1878 (16 Stat. 631), and their punishment thereby mitigated—no request so to charge having been made of him.

[Ed. Note.—Cited in State v. Dawkins, 32 S. C. 24, 10 S. E. 772; State v. Sullivan, 43 S. C. 213, 21 S. E. 4; State v. Owens, 44 S. C. 325, 22 S. E. 244; State v. Adams, 68 S. C. 427, 47 S. E. 676.

For other cases, see Criminal Law, Cent. Dig. ⇐2002, 2003; Dec. Dig. ⇐824.]

[9. *Criminal Law* ⇐876; *Indictment and Information* ⇐173; *Names* ⇐5.]

The indictment charged the offense to have been committed by Rich Bates, and the verdict

found Richard Bates guilty. *Held*, an immaterial variance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2095; Dec. Dig. ⟸876; Indictment and Information, Cent. Dig. § 539; Dec. Dig. ⟸173; Names, Cent. Dig. § 4; Dec. Dig. ⟸5.]

[10. *Criminal Law* ⟸1159.]

Insufficiency of evidence is a ground of appeal which this court cannot consider in a criminal case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. ⟸1159.]

Before Hudson, J., Greenville, July, 1881.

This was an indictment against William Dodson, Pleasant Adams, Joseph Burton,

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Rich Bates and Fletcher Maddox, for *arson, in burning a large building in the city of Greenville, known as the Academy of Music, during one of the nights of 1879, the same being, at the time, occupied in part as a sleeping apartment. At the first trial, Fletcher Maddox pleaded guilty and was sentenced to be hung. The others were convicted and sentenced, but appealed to this court and obtained a reversal of the judgment. On their second trial, they were again convicted and sentenced, and again they appealed.

Omitting its statement of facts bearing upon grounds of appeal based upon the insufficiency of evidence in certain particulars, the report of the presiding judge was as follows:

An effort was made in behalf of defendants to have the case continued because of the absence of several (two) witnesses alleged to be material. These witnesses were shown by the return of the sheriff and by other evidence, to be absent from the State or not to be found, and one of them to be incompetent. The witnesses being without the jurisdiction of the court, in view of all the surrounding circumstances, I deemed it my duty, in the exercise of a sound discretion, to order the trial to proceed. From the information derived from the statements and argument of counsel, I then thought, and still think, that no injury was done the defendants in refusing this motion—which I could not have granted consistently with the rules of sound discretion, in view of the long time this charge had been pending, its previous tedious trial and the great uncertainty of ever obtaining the attendance of the witnesses.

The organization of the jury was greatly delayed and rendered very tedious by lengthy examinations and cross-examinations of each juror on his voir dire before being presented, and by the exercise of the right of challenge by each defendant separately. A number of persons stated on their voir dire that they had formed an opinion regarding the guilt or innocence of the prisoners, were biased by such opinion and felt that they could not stand indifferent in the case. The challenge for cause against them was of course sustained. Others stated that they had formed an opinion, but stated further that such opinion arose from what they had heard of the case or from the report of newspapers, which, however, would not in the least influ-

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ence *their minds as jurors if sworn in the case. They stated that they were sensible of no bias or prejudice whatever, for or against the defendants or either of them, and would stand entirely indifferent and be governed alone by the evidence to be adduced. Answering thus, they were presented, but in every instance were challenged peremptorily, and no juror was empaneled except those who, on their voir dire, swore that they were without opinion in regard to the guilt or innocence of the accused—were entirely free from bias, and stood indifferent between the State and the prisoners at the bar. Such boni et legales hominès and none others, were sworn as jurors in this case.

In the progress of the trial, the State's counsel offered in evidence the written statement and confession of the defendant, William Dodson; to this the defendants' counsel objected, because the said Dodson had been previously convicted of two infamous offenses and had suffered punishment therefor. The court ruled that in no event could the confession of Dodson be evidence except as against himself, and its admissibility was not destroyed by reason of his infamy. If freely and voluntarily made, it should be admitted for what it might be, in the opinion of the jury, worth, as against Dodson and no other. It appearing to have been freely and voluntarily made by Dodson, and reduced to writing by another and signed by Dodson, the statement was admitted to be read by the jury, they being duly cautioned that it should not and must not be at all weighed by them, save only as against Dodson.

Fletcher Maddox, who had been jointly indicted with the other defendants, and pleaded guilty at the first trial, and against whom sentence of death had been pronounced, was tendered by the State as a witness for the prosecution. The counsel for the defendants objected that this witness not only had been sentenced to be hanged for this arson, but had been twice previously convicted of larceny, once for grand larceny, in 1879, and, subsequently, for petit larceny, for both of which offenses he had suffered the penalty of the law. To this the counsel for the State replied by producing a pardon in due form by the executive of the State for each of the crimes, and also a general pardon

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for *all past offenses against the laws of the State. No allegation nor proof was made of any offense save these crimes for which he held specific pardons.

I held that these pardons restored the com-

petency of Maddox as a witness in our courts, but not his credibility. He stood as a competent witness, but whose credibility was impaired by infamy; but how far he was to be believed was a question for the jury. I remember no contest over the competency of any other witness offered by the State, and the exceptions and grounds of appeal make mention of no other.

On behalf of the defendants, Hattie Burton, wife of the defendant Joseph Burton, was offered as a witness, but objected to by counsel for the State. I held her incompetent. Joseph Burton being jointly indicted with the others, his wife, who is clearly incompetent to testify in his behalf, is, also, by the rules of evidence, excluded from testifying in behalf of his confederates and co-defendants.

The case is one of great importance; it excited, as is usual, great interest in the community, and brought forth the warmest zeal and highest powers of intellect of learned counsel for the State and defendants. A large number of witnesses appeared on the stand, and the voluminous testimony consumed much time in development. At the close of the argument I proceeded to deliver my charge to the jury. To them I carefully defined the crime of arson, and, in doing so, read the statutes of the State defining the offense. I earnestly cautioned them not to consider the statement and confession of Dodson, except as against himself, and that as against him, even, it was for them to say what weight they should attach to it.

In speaking of the witness Maddox, I told the jury, as I have stated above, that his testimony was before them as that of an infamous man and as an accomplice in this grave charge. It was for them to say what credit should be given to his testimony; and it was my duty to tell them, that whilst it is lawful to convict upon the uncorroborated testimony of an accomplice, yet it is unsafe to do so, and that they should seek for facts and circumstances, established by credible witnesses, in corroboration of Maddox before believing him. In my entire charge,

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I rigidly *confined myself to my strict duty in expounding the law, avoiding comment on the testimony, and leaving the facts of the case entirely to the jury. No exception at the time was taken to my charge by either side, nor did the counsel for the defendants make any request to charge any legal proposition; nor was I requested to call the attention of the jury to any statute prescribing the punishment for the offense.

The jury rendered a verdict of guilty against each defendant on trial, and their counsel, upon the grounds set forth in the proposed case, and which need not be here repeated, moved the court for a new trial, and in arrest of judgment. I refused the motion and pronounced against the convicts sentence of death.

The motion for a new trial and in arrest of judgment, is now renewed before the Supreme Court, upon the grounds urged before me. The case as proposed by the appellants, with the solicitor's allowances and disallowances, comes to me for settlement and for my report. Perhaps I cannot better complete this, my report, than by noticing seriatim but briefly the appellants' grounds of appeal in order merely to correct misconceptions and errors of fact, and to place the case in its true light before the Supreme Court.

I remark on ground of motion for new trial:

1. The rule observed in presentation of jurors has been sufficiently explained. None were presented who did not swear that they were indifferent, and could give the defendants an impartial trial, notwithstanding impressions made upon their minds from reports and rumors, and no juror was sworn who had formed any opinion at all, or who expressed the least bias.

2. Hattie Burton was held an incompetent witness, because she was the wife of Joseph Burton, a co-defendant with the others—a fact which the appellants' counsel omits to state.

3. The admission of William Dodson's statement and confession as evidence against himself alone, has been explained.

4. No further explanation is required as to the competency of Fletcher Maddox as a witness. Specific pardons restored his competency.

5. This ground is erroneous in its statement. The court did not refuse to allow the solicitor to point out the statute upon

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*which the indictment was based. It was pointed out to Mr. Stokes by the solicitor, and it was read by the court in charging the jury.

6. This ground arises from misapprehension. Mr. Stokes, in the heat of argument, was in eloquent but extravagant terms urging upon the jury that, if convicted, the defendants would be hanged, and that their innocent blood would be upon the hands of the jury. He had said much as to the severity of the punishment, when I interrupted him only so far as to remind him that the jury were not responsible for the law; they must not be frightened out of propriety by the severity of the punishment.

7. This exception is erroneous in representing me as giving the same instruction as to the confession of Dodson and testimony of Maddox. It fails to draw the distinction. Dodson's confession was carefully restricted as affecting him alone. The testimony of Maddox, affecting all, the jury were told, should be corroborated, as I have explained.

8. So far as the recommendation of mercy is concerned, it is the province of the jury

in all cases to incorporate it in their verdict. There was nothing in the evidence tending to mitigate the offense of any one of these men, if guilty; and I suppose this is the reason why no mention of the matter of mercy was made by the counsel for the State, nor for the defendants, nor by the court. In fact, so frightful was the arson, that the whole burden of the argument, both for the State and the defense, was, that if guilty, they must be hanged. And this fate was so strongly held out by Mr. Stokes in terrorem over the jury as to call for the interruption by the court above stated. It was competent for defendants' counsel to plead for and to urge mercy in behalf of all or either of them, and to read them the statute. It was competent for him to ask the court to instruct them upon their power in this respect, and its consequence if exercised. This he failed to do, and cannot now be admitted to charge the omission to the court.

Messrs. E. F. Stokes and J. T. Nix, for appellants.

Messrs. Solicitor Orr and W. E. Earle, contra.

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*February 21st, 1882. The opinion of the court was delivered by

McIVER, A. J. The appellants in this case have again been convicted of the crime of arson, this court having granted them a new trial, after the former conviction, upon grounds stated in 14 S. C. 628, and they now appeal again upon various grounds.

We do not propose to recite the various grounds as set out in the "case," some of them being mere repetitions of others, but will proceed to consider and determine the various questions which we understand to be made by the several grounds of appeal.

The first question raised is whether the Circuit judge erred in refusing the motion to continue the case. As has been repeatedly decided, this is a question addressed solely to the discretion of the Circuit judge, and is not reviewable on appeal. We may add, however, that it seems to us that the discretion of the Circuit judge was very properly exercised in refusing the motion to continue.

The next question is whether the Circuit judge erred in allowing certain jurors to be presented to the prisoners, who, when examined on their voir dire, stated that they had formed an opinion in reference to the case from what they had heard or seen in the newspapers, which, however, would not in the least influence their minds as jurors; that they were not sensible of any bias or prejudice whatever, either for or against the prisoners, and would be governed by the evidence adduced in the case. The statute, after providing that the court shall, upon the motion of either party to the cause, examine any person called as a juror upon his voir dire, declares that: "If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called." Gen. Stat. Ch. CXI. § 25, p. 523.

This would seem to vest the power of determining the question of fact, as to whether the juror was indifferent, in the hands of the court called upon to try the case, and we do not see how this court could undertake to review such determination. But even were this not so, we see no error in the course pursued by the Circuit judge. Any other course

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would have the effect of *excluding from the jury box, in any case of such magnitude or public interest as would be likely to attract attention, the very class of persons who would be best qualified to occupy that position, for in cases of that character it would be difficult to find persons of ordinary intelligence who had not received some impressions in regard to a case from what they had heard or read in the newspapers. If, however, the Circuit judge did err in allowing such persons to be presented as jurors, such error could not avail the appellants here, for they were not prejudiced thereby, inasmuch as it appears that none of the jurors who had so expressed themselves were sworn in the case, but that all of them were peremptorily challenged, and as it was admitted in the argument here that the prisoners did not exhaust their peremptory challenges. State v. Price, 10 Rich. 356; State v. McQuaige, 5 S. C. 431; State v. Gill, 14 Id. 412.

The next questions as to the competency of Hattie Burton as a witness for the defendants, and as to the competency of the confessions of Dodson, are fully disposed of by the recent decision in the case of State v. Workman, 15 S. C. 540. Hattie Burton was the wife of one of the prisoners, Joseph Burton, and was offered "to prove the whereabouts of Joseph Burton" on the night the arson was alleged to have been committed, for which purpose she was clearly incompetent. The confession of Dodson was held to be competent evidence against him by the former decision in this case; and the fact that in such confession he used the names of the other defendants did not require that it should have been excluded, or that it should be read omitting the names of the other defendants, as was distinctly decided in the case of State v. Workman, supra. It was, however, the duty of the judge before whom the case was on trial to instruct the jury that such confession could only be regarded as evidence against the person who made it, and not against the other defendants. But this duty was fully performed by the judge who tried this case, and the jury were explicitly cautioned that the confession of Dodson was evidence only against him, and "should not and must not be at all weighed by them save only as against Dodson."

The next inquiry is whether the competency of Maddox as a witness was restored by

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the pardons exhibited. It is laid down *in all the elementary writers on evidence that a pardon restores the competency of a witness who has been convicted of an infamous crime, even if the entire punishment has been suffered before the pardon is granted. 1 Greenl. Evid. § 377; 2 Stark. Ev. 722.

The next objection raised by the appellants —that the Circuit judge "erred in refusing to require the solicitor to point out the exact statute under which the prisoners were indicted, and to read the same to the jury,"— seems to be based upon a misapprehension of the facts, and we need not, therefore, consider whether there would have been any error of law if the Circuit judge had refused to require the solicitor so to do, for it appears that the statute was pointed out and attention called to the amendment increasing the punishment of the offense charged.

The several grounds of appeal which complain that the Circuit judge checked one of the counsel for the prisoners in pressing upon the jury the idea that in case their verdict should be guilty the prisoners would be hanged, and that the jury were instructed that they had nothing whatever to do with the consequences of their verdict, but that their simple and sole duty was to determine whether the prisoners were guilty or not guilty, seem to be based upon a misconception of the judge's charge. The object of these grounds is to convey the impression that the judge deprived the jury of the right to consider anything but the simple question of fact whether the prisoners were guilty of burning the house in question, without any reference to the degree of such guilt, or whether there were any such mitigating circumstances in the case as would justify the jury in finding such special verdict as would, under the act of 1878 (16 Stat. 631), exempt the prisoners from the extreme penalty of the law.

That such was not the intention of the charge, and that it could not have been so construed, we think is manifest from the report of the Circuit judge. In checking the counsel, as it is called, the manifest purpose of the judge was simply to remind the jury that they would not be responsible for the consequences flowing from their verdict, and that they should not be frightened from their propriety by any gloomy visions which counsel, in their zeal in behalf of their clients,

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might present before them, *but that their duty was to pass upon the facts, uninfluenced by the consequences, from the expression of their honest convictions. This is quite common in cases of this character, and we cannot say that it is improper. Certainly we can see no such error of law in it as would justify our interference. It was not charging the jury upon the facts of the case, but, at most, was simply an invocation to the jury to do their duty regardless of the consequences.

The next question is whether there was any error of law on the part of the Circuit judge in omitting to inform the jury that they had the power, under the act of 1878, to bring in a special verdict recommending the prisoners to mercy. As has been recently determined in the case of State v. Gill, 14 S. C. 410, the jury always had this power, and the only effect of the provision in the act above cited is to declare what shall be the definite legal effect of the exercise of this power in the cases mentioned in the act. There are very few instances—we doubt if there are any—in which such recommendation has not been respected by the proper authority, and yet we have never heard it suggested before that the omission of a judge to inform the jury that they had such a power would constitute such an error of law as could be corrected by this court; and we can see no reason why it should be so regarded now, especially when, as in this case, there was no request so to instruct the jury. For, while in capital cases this court, in favorem vitæ, will not insist upon the rule requiring a party who wishes to take advantage of any omission to charge to show a request to charge the matter omitted, but, as is said in State v. McNinch, 12 S. C. 96, will "take notice, in behalf of the accused, of any error apparent upon the record by which the prisoner has been deprived of any of the substantial means of enjoying a fair and impartial trial," yet this does not mean that any immaterial error or omission will thus be noticed. It must be such an error or omission as is substantial or material. Hence, if the error or omission is merely theoretical or immaterial it will not avail the appellant here.

If the judge should omit to charge some undeniable proposition, which did not appear to be applicable to the case as made, it could not avail the appellent here. For example: If, upon the trial of a person under an indict-

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ment for murder, where the *evidence was that the deed was done by deliberately administering poison, or that the prisoner, after making express threats, lay in wait for his victim, the judge should omit to instruct the jury that under an indictment for murder they had the power to convict the prisoner of manslaughter, which would reduce the punishment from death to confinement in the penitentiary, such an omission would certainly not be such an error of law as would justify this court in granting a new trial. For, while it is undeniably true, as an abstract legal proposition, that upon an indictment for murder the jury have the power to render a verdict of manslaughter, the legal effect of which would be to reduce the punishment of the person so convicted, yet the omission so to charge would not be such an error of law as this court would take notice of without a

request so to charge, because it would be wholly inapplicable and immaterial to the case.

So here, according to the judge's report, and from the evidence submitted here, it does not seem that there was anything whatever in the case as made below, calling for such an instruction to the jury, as it is now contended should have been given. So far as we are informed there were no mitigating circumstances in the case. The sole question was whether the persons charged were the persons who did the deed, and it seemed to be conceded, even in the argument of the counsel for the prisoners, that if they were guilty they would be hanged. This being the case, in the absence of any request so to instruct the jury, we do not think the omission of the judge to inform the jury that they had the power to bring in a verdict of guilty accompanied by a recommendation to mercy was such an error of law as deprived the prisoners of any of the substantial means of obtaining a fair and impartial trial. A judge is not bound to lay before the jury all the law which might, under any circumstances, apply to the offense charged but only such principles as are applicable to the case as made by the evidence; and if the party charged desires to have any other principles of law laid down to the jury it is his duty to request the judge to instruct the jury as to such other propositions as he may desire the jury to be informed of.

The case of State v. Nicholas, 2 Strobh. 278, which is mainly relied upon by the counsel for appellants, we do not think

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*applicable to the case now under consideration. That was a case in which a slave was convicted, before a court of magistrates and freeholders, under the act of 1740, which declared that if any slave "shall grievously wound, maim or bruise any white person," such slave should suffer death. The Court of Appeals held that a new trial should be granted where the freeholders who tried the case were ignorant of the existence of the act of 1751, which provided that in any trial for the violation of any of the provisions of the act of 1740 it should be lawful "for the justices and freeholders upon such trial, or a majority of them, to mitigate the punishment to be inflicted upon the offender in all and every case where any favorable circumstances shall appear and induce them to be of opinion that such punishment ought to be mitigated." In that case it was made to appear that the freeholders were ignorant of the law giving them power to reduce the punishment, and it is manifest that it was a very proper case for the exercise of that power. For it was at least doubtful whether the injuries inflicted amounted to a grievously wounding, maiming or bruising within the meaning of the statute, it being alleged that the wounds were merely superficial or flesh wounds, not attended with any peril to life or limb, and not followed by any permanent evil consequences.

Here, however, there is not only no evidence that the jury were ignorant of their power to recommend to mercy, but the presumption is the other way, as it can scarcely be supposed that the jury were ignorant of the fact that they possessed a power which had been exercised by juries, whenever so minded, ever since the foundation of our judicial system; and, as we have said, there does not appear to be anything in the circumstances calling for the exercise of such a power.

The next objection is based upon an alleged informality in the verdict, or rather a variance between the Christian name of one of the prisoners, as written in the indictment and in the verdict—one of the prisoners being designated in the indictment as Rich Bates, while in the verdict his name is written Richard Bates. This we think wholly immaterial, for the names might be rejected altogether—certainly the Christian names—and the verdict would be sufficient.

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*Various other grounds of appeal are based upon an alleged insufficiency of evidence, but this has been so often ruled upon by this court as not constituting any ground of which this court can take notice, that it is unnecessary to cite the cases here.

The judgment of this court is that the judgment of the Circuit Court be affirmed, and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence heretofore passed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 465

(Case No. 1145.)

DUREN v. STRAIT.

(November Term, 1881.)

[1. *Assumpsit, Action of* ⇐25.]

In action against an executor upon an implied contract of the testator to pay for timber trees of the plaintiff cut and removed by the deceased, it is not essential to a recovery that plaintiff should prove title to the land from which the trees were cut; but the Circuit judge erred in instructing the jury that mere proof of plaintiff's possession of the land would entitle him to recover the value of the trees, unless the defendant showed a better right. The real issue involved was the ownership of the trees.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. § 153; Dec. Dig. ⇐25.]

[2. *Ejectment* ⇐90.]

In such action, a plat found among the records of a prior cause between this plaintiff's father as defendant, (then holding in right of his son, a minor,) and another party as plaintiff, in-

volving the title to the land from which the trees were cut, was competent evidence to show the extent of this plaintiff's claim under color of title.

[Ed. Note.—Cited in Heyward v. Farmers' Min. Co., 42 S. C. 146, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702; Fore v. Berry, 94 S. C. 78, 78 S. E. 706.

For other cases, see Ejectment, Cent. Dig. § 268; Dec. Dig. ⟸90.]

Before Fraser, J., Lancaster, February, 1881.

Action by Thomas R. Duren against S. L. Strait, as executor of John Sinclair, deceased, begun in 1876 and revived in 1878. The opinion states the case.

[For subsequent opinion, see Duren v. Sinclair, 22 S. C. 361.]

Mr. Ernest Moore, for appellant.

Mr. R. E. Allison, contra.

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*February 27th, 1882. The opinion of the court was delivered by

McIVER, A. J. This action was originally commenced against John Sinclair to recover damages for trespass upon land claimed as the property of the plaintiff. Sinclair having died pending the action, the plaintiff obtained an order to continue the action against the present defendant as the duly qualified executor of the last will and testament of the original defendant, John Sinclair. The executor demurred and his demurrer was sustained, but leave was granted to plaintiff to amend his complaint so as to convert the action into an action to recover the value of certain timber trees alleged to have been taken from said land by Sinclair in his life-time and converted to his own use.

It will be at once perceived that the present action differs very materially from the one originally instituted. The original action was in substance nothing more than the old action of trespass quare clausum fregit, the object of which was to recover damages for an injury done to plaintiff's possession, and, therefore, the title to the property damaged was not necessarily put in issue. Hence, to maintain that action it was only necessary for the plaintiff to prove his possession and the trespass upon such possession, and unless the defendant, by the plea of liberum tenementum, put the title in issue, it would be unnecessary for the plaintiff to prove any title in himself. This being an action of tort, did not survive, and, therefore, upon the death of Sinclair the plaintiff's right of action of this character was gone, and his only remedy was that pursued by his amended complaint—to waive the tort and sue for the value of the property taken upon an implied assumpsit. To maintain this kind of action it was necessary for the plaintiff to allege and prove ownership of the timber trees; and this might have been done by showing title to the land from which the trees were cut, or by showing ownership of them in some other way, or such a possession of them as would invest him with the character of temporary owner: but mere proof of possession of the land from which the trees were cut would not entitle him to recover their value in an action ex contractu.

The plaintiff having obtained a verdict, the

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defendant moved *for a new trial, which was refused, and from the judgment entered on the verdict the defendant appeals on several grounds.

The first position taken by the appellant is that the Circuit judge erred in refusing to charge the jury "that, in an action of this kind, under the pleadings, the plaintiff, in order to recover, must show actual paper title to the land from which the timber was taken or possession for the statutory period, with color of title, embracing the same," and on the contrary instructing the jury "that actual possession of said land, or constructive possession under color of title, for less than the statutory period is sufficient to enable the plaintiff to sustain the action in its present amended form, unless the defendant has shown title or possession by himself, or title by some one under whom he claims." We cannot say that there was any error in refusing to charge as requested, inasmuch as it may be that, though the plaintiff should fail to establish his title to the land either by adverse possession for the statutory period, or by regular paper title, yet if he had shown his ownership of the trees, acquired after they were severed from the freehold, or such a possession of them as would invest him with the character of temporary owner, he would be entitled to recover.

But we think there was error in instructing the jury that mere proof of possession of the land from which the trees were taken would be sufficient to entitle the plaintiff to recover the value of the trees in an action of the character of the one now under consideration, unless the defendant showed title to or possession of the land in himself, or title in some one under whom he claims. Such a proposition seems to us to ignore the distinction, hereinbefore pointed out, between the action of tort to recover damages done to the possession of land, and the action ex contractu to recover the value of the trees as personal property. To illustrate this distinction more broadly: Suppose the plaintiff had actual possession of the land, and the timber trees in question had been cut on the land and carried off by A., and afterwards taken possession of by B., and converted to his own use. Now the plaintiff could maintain an action of tort against A. for a trespass upon land in his possession, upon mere proof of his possession, unless A. could show title to the

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land in himself or in some one *under whom he was acting. But such an action could not be maintained against B., who never com-

mitted any trespass on the land, and plaintiff's only remedy against B. would be an action to recover the value of the trees which he had converted to his own use; and to maintain such an action it would be necessary for him to allege and prove his ownership of the property whose value he was seeking to recover. Mere proof of possession of the land from which the trees were originally taken would not be sufficient, unless such possession was of such a character and sufficiently long to give him a statutory title to the land.

So, here, the right to sue for the trespass committed on the land by Sinclair having been lost by the death of Sinclair, the plaintiff can only sue for the value of what he alleges is his property which had been taken from him, and to recover in such an action he must prove his ownership of the property taken, and this he may do either by showing a title to the land from which the trees were cut, or that he acquired the ownership of the trees after they were converted into personal property by being severed from the freehold, either by such a possession of them as invested him with the character of owner, or in some other way; but mere proof of possession of the land will not be sufficient.

The next position taken by the appellant is that the Circuit judge erred in instructing the jury that the plat made and used on the trial of the case of J. R. Massey et al. v. Wylie R. Duren et al. [3 S. E. 34] dated September 20th, 1869, could avail the plaintiff as color of title, though it remained among the records of the court and was not in the possession of the plaintiff. It seems that some years before this action was commenced Massey and others brought an action against Wylie R. Duren to recover possession of a tract of land which was claimed by Wylie R. Duren as the property of his son, then a minor, the present plaintiff. For the purposes of that trial a plat was made by the surveyors appointed under the order of the court showing Duren's claim, which covered the land from which the timber trees sued for in this case were cut. That case resulted in a verdict for the defendant, and the plat used on the trial, as is usually the case, was left in the record of that cause.

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*We are unable to see any reason why the plaintiff could not rely upon this plat as color of title. The fact that it was not in the possession of the plaintiff but remained in the record of the above-mentioned cause cannot make any difference. That would seem to be the appropriate place for it, and it certainly furnished evidence of the extent of plaintiff's claim. In Simmons v. Parsons, 2 Hill 492, note, color of title is defined to be "anything which shows the extent of the occupant's claim." It certainly was competent evidence to go to the jury to show that the plaintiff, or those then acting for him, when that plat was made, claimed the land embraced within the lines of that plat, and that clearly would avail the plaintiff as color of title. See Slice v. Derrick, 2 Rich. 629.

The last position taken by the appellant is based upon the ground that the Circuit judge erred in refusing the motion for a new trial, "there being no evidence that the plaintiff had title to the timber or was in actual or constructive possession of the land from which it was taken." There certainly was some evidence on both of these points, and, therefore, this ground need not be considered further.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the case be remanded to that court for a new trial.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 469

(Case No. 1147.)

MANER v. WILSON.

(November Term, 1881.)

[1. *Appeal and Error* ⇐348.]

Whether a decree recommitting a report is intermediate and can be reviewed after a further decree upon the second report is not involved here, inasmuch as the first decree was filed in vacation and no written notice of its filing was ever served upon these appellants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1900; Dec. Dig. ⇐348.]

[2. *Interest* ⇐37.]

A mortgage stipulated for the payment of a sum of money, "with interest at nineteen per cent., payable November 1st, next." *Held*, that after November 1st, the debt bore interest at seven per cent., even though the debtor may have afterwards admitted his liability to pay the greater rate, or even promised to pay it.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 77; Dec. Dig. ⇐37.]

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[3. *Interest* ⇐37.]

*Under the act of 1866, (13 Stat. 318; Gen. Stat. ch. LV, § 5,) to continue the higher rate after the obligation fell due, it was necessary that an agreement to that effect should appear in the original contract and in writing.

[Ed. Note.—Cited in Thornton v. Dean, 19 S. C. 588, 45 Am. Rep. 796; Baum v. Raley, 53 S. C. 40, 30 S. E. 713.

For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. ⇐37.]

[4. *Interest* ⇐38.]

A judgment bears interest at seven per cent. per annum, and no more can be collected by an assignee, the evidence showing an assignment and not an advance of money at a stipulated rate of interest to pay it off.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 79–82; Dec. Dig. ⇐38.]

[5. *Reference* ⇐101.]

A decree decided the principles upon which an accounting should be had and referred the case back for a statement of accounts and for further testimony upon certain specified matters. At reference held for such purposes, proof was

offered of a note and tax receipt not discovered nor produced before that time. *Held*, that the proof should have been received—the business being still under consideration and unfinished, equity will not allow any newly-discovered matter of importance to be excluded for no other reason than that it was not brought forward in the first instance.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 179; Dec. Dig. ⟸101.]

[6. *Appeal and Error* ⟸1022.]

Under the circumstances of this case, items of the account disallowed by referee and allowed by the Circuit judge, were referred back for further testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⟸ 1022.]

[7. *Ejectment* ⟸132.]

Parties taking wrongful possession of lands of another are liable to account for the rental value and not simply for the rents and profits received. But the latter may sometimes be the true measure of the former.

[Ed. Note.—Cited in Rabb v. Patterson, 42 S. C. 537, 20 S. E. 540, 46 Am. St. Rep. 743.

For other cases, see Ejectment, Cent. Dig. § 446; Dec. Dig. ⟸132.]

[8. *Appeal and Error* ⟸1022.]

In a conflict between referee and Circuit judge on a question of fact in a case in chancery, the latter is prima facie right, and where, after several estimates have been put upon the rental value of lands, the Circuit judge reached a conclusion not unsupported by evidence, this court affirmed his decree.

[Ed. Note.—Cited in Fields v. Hurst, 20 S. C. 299; Young v. Young, 27 S. C. 206, 3 S. E. 202; McAteer v. McAteer, 31 S. C. 320, 9 S. E. 966; Kuker v. Carter, 42 S. C. 86, 20 S. E. 22; Benjamin v. Drafts, 44 S. C. 438, 22 S. E. 470.

For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⟸1022.]

[9. *Execution* ⟸322.]

Where property is sold under execution, the proper credit to be entered upon the amount due is the net proceeds of the sale after payment of costs and expenses.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 952; Dec. Dig. ⟸322.]

[10. *Mortgages* ⟸121.]

[Plaintiff having bought a judgment against defendant bearing 7 per cent. interest, *held*, that the amount thereof could not be considered as money advanced for agricultural purposes, so as to come within a mortgage to secure agricultural advances and interest at 19 per cent.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 239; Dec. Dig. ⟸121.]

Before Wallace, J., Hampton, March, 1881.

Action by Samuel P. Maner and others, devisees of James W. Lawton, deceased, against B. J. Wilson and U. B. Wilkinson, commenced in April, 1879. The opinion states the case.

Mr. Jeff. Warren, for appellants.

Mr. Robt. Aldrich, contra.

March 1st, 1882. The opinion of the court was delivered by

McGOWAN, A. J. James W. Lawton died March 8th, 1870, in possession of a tract of

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land, consisting of 1,250 acres in *Hampton county, and other property necessary for the cultivation of such a plantation, viz., horses, mules, oxen, stock, cotton, plantation tools, guano, &c. He left a will by which, after several minor legacies, he devised and bequeathed all his property to Mrs. Mary Ann Maner for life, and after her death to her children. Mrs. Maner is now dead, and her children are the plaintiffs claiming the property.

Shortly before his death (April 3d, 1868) the testator, being indebted to Wilkinson & Wilson, factors, of Savannah, Georgia, for supplies to run his farm, executed to them a mortgage and lien, which provided as follows: "In consideration of advances made to me by Wilkinson & Wilson, to the sum of $2,500, with interest at nineteen per cent., payable November 1st, next, said advances having been made to assist me in my planting operations during the year 1868, I do hereby declare and create a lien or mortgage to the said Wilkinson & Wilson on all that plantation containing 1,250 acres, and on all crops to be cultivated on said place this year, also on eight mules, six cows and calves, two yoke oxen, forty sheep, three wagons, &c., to secure the said payment. And I do hereby constitute said firm my agents to sell and make titles to said place and crops and all other property herein mentioned, repaying themselves for the advances, with interest, fees and expenses incurred," &c.

On April 16th, 1869, the testator also executed to the defendants, Wilkinson & Wilson, a deed in fee of the same property, real and personal, "in consideration of eight thousand dollars paid by said firm to him." Lawton remained in possession of the property until his death in 1870, when Wilkinson & Wilson took possession of all the property, real and personal, covered by the deed of April 16th, 1869, and, in addition, four tons of guano found on the place. In April, 1870, the defendants had sold personal property on the place to the amount of $850, under a judgment and execution against James W. Lawton, which they had purchased and assigned to them April 22d, 1869, by one R. R. Turner. The said defendants also rented the plantation as their own property for about nine years from the death of testator in 1870.

In 1879 the plaintiffs, as remaindermen

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under the will of James W. Lawton, instituted these proceedings against the defendants to have the paper executed as a deed bearing date April 16th, 1869, declared to be a mortgage, and to ascertain the true amount due by the testator Lawton to the defendants, and to have the land reconveyed to them and an account taken of the rents and profits thereof while in possession of defendants under their claim as owners. The de-

fendants answered, claiming the land under their deed. Judge Fraser first heard the case and filed his decree December 19th, 1879, holding that the said deed should stand as a mortgage, and ordering that the clerk of the court, W. J. Causey, Esq., as referee, should take an account of the amount due to the defendants by James W. Lawton at the time of his death—the defendants to be actors in the accounting—the personal property taken and the rents of the land to be set down as credits, making all proper allowance for interest and taxes. From this decree there was no appeal.

The referee took the testimony and made his report, and it will only be necessary to refer to two or three of the points made. The defendants were allowed to the extent of $800 and interest at seven per cent. upon their account current for advances, which had been rendered to Lawton, November 24th, 1869, and also the balance of the judgment, $2,012.61, against J. W. Lawton, which they had purchased and had assigned to them at the rate of seven per cent. interest per annum. And these demands were to be credited with the rental value of the land for nine years, $8,500, and interest on each year's rent from the end of that year, and the value of personal property sold under execution, $850 and interest thereon, and the value of four tons of guano found on the place at $80 per ton and interest thereon.

To this report both parties filed exceptions. The plaintiffs claiming that the referee should have held the account stated for advances barred by the Statute of Limitations, or, if not, that no interest should have been allowed thereon, and, also, that too little was allowed for the rents, which should have been at least $1,200 per annum. The defendants excepted because the referee had not allowed the whole account stated, $1,690.61 and interest, on the account, as well as the assigned judgment at the rate of nineteen per cent. per annum for the whole

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time until paid, and, *also, because the referee charged "rental value," when he should have found "that the defendants were only chargeable with the amounts actually received from the annual rents."

The case upon the exceptions came on to be heard before Judge Pressley, who filed his decree July 28th, 1880, overruling the Statute of Limitations and sustaining the referee in charging rental value instead of rents and profits received for the land; but holding that the whole of the account stated for advances, $1,690.61, should have been allowed the defendants, and that both this account and the assigned judgment should bear interest at the rate of nineteen per cent. per annum. The judge recommitted the case to the referee to take further testimony and restate the accounts between the parties according to the principles above decided. "Either party is free to offer testimony as to the value of the annual rents, or the guano, personalty, property shipped to Savannah or sold by the sheriff," &c.

The referee took further testimony and again stated the accounts. Upon this accounting the defendants offered a new item of indebtedness against J. W. Lawton, which had not appeared before, viz., a sealed note, as follows:

"$1,200. On or before the first of November next I promise to pay Wilkinson & Wilson or order twelve hundred dollars for plantation supplies to assist me in my planting operations the present year. In consideration of which supplies furnished me by Wilkinson & Wilson I obligate and bind myself to consign to them my cotton crop of three hundred and fifty acres production to sell and repay themselves for all advances and customary charges, &c.

"J. W. Lawton. [L. S.]

"June 5th, 1867."

Also tax receipt for 1869, $101.06.

The referee made his report restating the old items of account according to the principles of Judge Pressley's decree, but refusing to allow the defendants the aforesaid note for $1,200, and the tax receipt, on the ground that they were new matter, and not within the terms of Judge Pressley's order of reference. Both parties again excepted, and Judge Wallace overruled the report in so far as it excluded the note for $1,200

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and the tax receipt *for $101.06, and allowed a credit of the gross amount of sheriff's sales, $850, instead of the net balance of $678.85. The judgment also modified the report by reducing the rental value of the land to the amount of rents actually received, and again ordered the report to be recommitted to the referee.

The plaintiffs appeal to this court from the decree of Judge Pressley upon the following grounds:

1. "Because his Honor erred in allowing interest at nineteen per cent. on the account current of $1,691.61 and the judgment of $2,012.61, and overruling referee's report that interest on same be fixed at seven per cent.

2. "Because his Honor erred in overruling the referee's report rejecting as inadmissible a copy of a letter said to have been written by defendants to Lawton in his lifetime, and witnesses' statement, after Lawton's death, as to what Lawton said or agreed to verbally in reply about terms of said letter.

3. "Because his Honor erred in not sustaining the referee's report that $800 was only due by Lawton on the account current at time of his death."

The plaintiffs also appeal from Judge Wallace's decree upon the following grounds:

1. "Because he erred in not sustaining

plaintiff's exception to the report of referee, that the rental value of the land was worth $1,200 annually, and in allowing only ten bales of cotton annually as rent, Judges Fraser and Pressley having decided that the defendants had taken possession of the land unlawfully and were to be charged with such rents as the land could have brought on fair competition in open market.

2. "Because, at any rate, his Honor erred in overruling the referee's report that the rental value of the land was $1,200 per annum.

3. "Because his Honor erred in overruling the referee's report which was adverse to the allowance of the tax receipt of 1869 for $101.06 and the note for $1,200—the same not being authorized by Judge Pressley's decree.

4. "Because his Honor erred in overruling the referee's report allowing $830 worth of personalty sold under execution, as well as $407.61 worth of guano.

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*5. "Because their Honors', Judge Pressley's and Judge Wallace's, decrees were otherwise contrary to law and the preponderance of the evidence."

In the first place objection is made that it is too late to appeal from the decree of Judge Pressley, which, as respondents claim, was not "an intermediate decree necessarily affecting the judgment not before appealed from," but a final judgment, which cannot be reviewed upon appeal from Judge Wallace's decree. Judge Pressley's decree, after declaring the principles which should govern in the accounting, recommitted the whole matter to the referee to state the account, and at least to that extent was an intermediate order; but without going into the question whether Judge Pressley's decree can be reviewed on appeal from Judge Wallace's decree, it is enough to say that, as admitted, the decree of Judge Pressley was filed in vacation and no written notice of it was served on appellants. The object of the notice required is to apprise the appellant that the respondent intends to insist on an appeal within the time fixed by law, and unless such notice is given the appellant is unrestricted as it regards the time within which an appeal may be taken. "The time for giving notice of appeal from a judgment filed in vacation begins to run from the receipt of written notice of the judgment, notwithstanding actual notice." Lake v. Moore, 12 S. C. 563.

In regard to the exceptions, we will, for the sake of clearness, consider them according to subject matter.

First, as to the claims of defendants:

1. It seems that an account current from Wilson & Co. to J. W. Lawton was in evidence, and it is to be regretted that it is not in "the case" as presented here. In regard to that account nothing appears but a mere statement that it bears upon its face, "A balance of $925 on January 12th, 1869, and also items of merchandise and cash furnished to Lawton during the months of April, May, June, July, August, September, October and November, aggregating $2,730.61, reduced by credit to the amount of $1,690.61 due Wilson, November 24th, 1869." In the first report, under Judge Fraser's decree, the referee allowed of this balance only $800 and interest on it at seven per cent. Judge Pressley decreed that the defendants were

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entitled to the whole *balance of the account as rendered, $1,690.61, with interest thereon, until paid, at the rate of nineteen per cent. per annum. In the second report this amount and interest as decreed by Judge Pressley were retained.

We have not the means of determining whether that balance was correct or not, except in so far as interest at nineteen per cent. after November 1st, 1868, entered into it. We cannot agree that any balance of the account which remained unpaid should bear more than seven per cent. interest after November 1st, 1868. At the time the lien or crop mortgage for advances was executed, April 3d, 1868, the law of 1866 was of force, which provided as follows: "In all cases of contract for the hiring, lending or use of money, wherein, by the terms of the original contract, no specific rate of interest shall have been agreed upon in writing, signed by the party to be charged therewith, the legal interest shall be and remain at the rate of seven per cent. per annum." 13 Stat. 318.

In this case there was a contract wherein a specific rate of interest was agreed upon in writing, signed by the party to be charged therewith, but that contract was in these words: "with interest at nineteen per cent. payable first November next" (1868). That contract carried the interest at nineteen per cent. until the advances were due and payable on November 1st, 1868, and no longer. This court has held "that if the debt bears a fixed rate of interest on its face higher or lower than that provided by law, the interest fixed by law attaches on it, for the detention of the principal sum after the debt becomes due, where the parties do not contract that it shall be the rate after that time." Langston v. S. C. Railroad Company, 2 S. C. 248. In several subsequent cases it has been held that it is always a question of intention, to be derived from the terms of the obligation itself, whether the party agreed that the specified interest should continue to run after it fell due. Sharpe v. Lee, 14 S. C. 341; Mobley v. Davega, ante p. 73 [42 Am. Rep. 632].

The only paper in this case signed by the party to be charged, which mentions nineteen per cent. interest, is the lien or mortgage of April 3d, 1868, due November 1st, 1868; and there is nothing in that paper which au-

thorizes the construction that Lawton's

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*promise to pay nineteen per cent. on advances, "payable first November next," was intended to reach beyond the time the money fell due. We do not see how it can alter the result if the account for advances, with interest calculated at nineteen per cent., was rendered to Lawton in his life-time; and there was no evidence that he objected to it, or even if it were shown that he verbally promised that the interest should continue to run at nineteen per cent. on the balance after it became due and payable, in order to continue that interest after the obligation fell due it seems that two things were necessary; first, that it should appear to be the agreement of the parties that the interest should so run, and, second, that such agreement should appear in writing in the original contract. No such agreement appears in the contract, and, as a consequence, the balance of the account for advances will bear interest at the rate of seven per cent. from and after November 1st, 1868.

II. In reference to the balance of the judgment of E. C. Wade & Co. v. James W. Lawton, $2,012.61, which was assigned to defendants April 22d, 1869, the interest should be allowed at the rate of seven per cent. It nowhere appears how much was paid for the judgment. There is no charge for the money, as such, advanced for the judgment, which was not "taken up," but assigned and kept in force as a judgment, and, as we understand it, certain personal property of Lawton, after his death, was actually levied and sold under it. A judgment at law bears interest at the rate of seven per cent. per annum. Gen. Stat. 318.

We can find no evidence in the case that Lawton ever agreed in writing to pay nineteen per cent. interest for any advances except for agricultural purposes. The money with which the execution was purchased was not advanced for agricultural purposes, and we cannot infer such a contract, as to the judgment, from the mere fact that he promised that interest for advances to make crops. We do not think that the money with which the judgment was purchased "stands on equal footing with the advances in the account current." So far as the interest on the judgment is concerned, the decree of the Circuit Court is reversed, and the interest on the judgment will be calculated at seven per cent. according to law.

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*III. The claim for the $1,200 agricultural note was not made until the last reference under Judge Pressley's decree, which authorized the referee "to take further testimony and state the account between the parties according to the principles therein announced," either party being free to offer testimony as to the value of the annual rents, or the guano, personalty, property shipped to Savannah or sold by the sheriff, &c. Under this order the referee held that he could take testimony only on the points specially indicated, and refused to consider the new matter—the note and tax receipt—then presented for the first time.

Judge Wallace overruled the report upon this subject, and ordered the note and tax receipt to be allowed. The ground upon which the referee excluded these matters was not sufficient. The order was to ascertain the debt of the defendants against Lawton at the time of his death. The business being still under consideration and unfinished, equity will not allow any newly-discovered matter of importance to be excluded for no other reason than that it was not brought forward in the first instance.

As was said in the case of Gist v. Gist, Bail. Eq. 343: "In strictness this claim comes too late; it ought to have been made before the master on the reference. This was not done, and there was neither any exception to his report on that ground, nor was the point made at the hearing in the court below. Still, however, I suppose it to be within the competency of this court, if any claim or ground of defense has been casually omitted to be made, to afford the parties an opportunity of trying its merits, and the court is always reluctant whilst the case is in its power to exclude any apparently just claim or defense."

There seems to be no doubt about the tax receipt for 1869, which was before the defendants took possession of the land, and if it was not included in the account stated, should be allowed.

But, as to the note, it seems strange that in such a controversy the defendants should have entirely overlooked an item of debt for $1,200, or so far miscalculated the amount of their claim, when Mr. Wilson said in his testimony "that Lawton owed them $900, in January, 1869." The note bears date June 5th, 1867, and is in the nature of a lien for agricultural advances. Its terms show that it was given, not to be collected as an ordi-

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*nary money demand, but to cover plantation supplies for 1867, as the lien for $2,500 was given for the year 1868, "in consideration of which supplies Lawton bound himself to consign to them his cotton crop of three hundred and fifty acres production to sell and repay themselves for all advances and customary charges," &c. There is no proof as to what extent supplies were furnished Lawton in 1867, nor how much, if any, of his cotton crop of that year went in payment. The defendants did not claim the lien for $2,500 in 1868, but rendered a formal account current for supplies down to November, 1869, which included charges anterior to that time. Unexplained, the presumption would be that this account included balance for all advances previously made. It is not

to be supposed that the defendants would render a formal account for supplies, omitting those made in 1867 to the extent of $1,200, and, accordingly, Mr. Wilson states in his testimony that "when we made up account current we put in all appearing on the books."

It may be that the itemized account rendered will show the truth of the matter. If it turns out that supplies were furnished in 1867 to the amount of this lien note, and they have never been paid for or included in the account stated, the claim should be allowed. But we think the note should be referred back to the referee to ascertain all the facts connected with it: why the delay in producing it, and especially whether the supplies covered by it were furnished in 1867, and if so, whether they were included in the account rendered, or have been paid for in whole or in part by cotton or otherwise; and it is so ordered.

Second, as to the claims against defendants:

I. In reference to the rents of the land. The defendants took possession of the plantation May 4th, 1870, and held it and rented it until January 1st, 1879, as owners under a paper, in form a deed, but which has been declared to be a mortgage. It is conceded that the land did not belong to the defendants, and they must account for rents, but the contest is as to what amount they shall be required to pay. The plaintiffs contend that the defendants are chargeable with such rent as they could have received if they had offered the plantation for rent on fair competition in open market; and the defendants

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insist that they *are only liable for the actual rents and profits received while they had possession. Judge Pressley held that the view of the plaintiffs was the correct one—that the defendants should account for "the rental value"—for the reason that they took possession without due process of law, and had no right to cause loss to the estate of Lawton by their unsuccessful planting experiment, and so he construed Judge Fraser's decree. We concur in this view. The occupancy of the defendants certainly bears no analogy, as was contended, to that of a tenant in common, as against his co-tenant, who is in possession of his part as of right. "One tenant in common cannot maintain a possessory action against his co-tenant except for an actual ouster; but if he ousts the other co-tenants, and keeps them out by force, then he would be liable as a trespasser for the rental value," &c. Jones v. Massey, 14 S. C. 307.

The defendants entered and held as absolute owners. It is true that they had a conveyance of the land, in form a deed, but as a deed it has been held to be invalid. They knew it was intended to be a mortgage, and as they did not enter and hold as mortgagees they are not entitled to be considered as mortgagees rightfully in possession.

Under this judgment the referee restated the accounts. There was proof as to the amount of rents actually received, and conflicting testimony as to the rental value of the land, and he found the rental value to be $1,200 per annum.

Judge Wallace, while concurring in the principle upon which the rents were charged, held as matter of fact that the rents actually received were substantially the same as those the plantation would have brought "on fair competition and in open market." He says: "That in fixing the rent of the land the proof of the plaintiffs and the finding of the referee tend more to show what the plantation was worth, in the opinion of the witnesses, than what it would have brought during the time defendants had it in possession. The proof is that it brought ten bales of cotton, weighing five hundred pounds each, and the taxes for each year defendants had it in possession, except the last year, when it brought nine bales and the taxes. There is no proof that there was either carelessness, negligence or

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thriftless*ness in the renting of the land, or that there was any desire or intention of defendants to benefit the party to whom they rented it by allowing him to have it at an under value; on the contrary, it is proved that after the plaintiffs came into the possession of the place they rented it to the same party for the same rent—nine bales of cotton and the taxes. My conclusion is that the rents which could have been received, had the place been offered on fair competition, in open market, are ten bales of cotton and the taxes for each year the defendants had it in possession, except the last, and for that year the rent should be nine bales and the taxes." Shall this ruling of the Circuit judge, modifying the finding of the referee upon a question of fact, stand as the judgment of this court?

Being a case in chancery, we have the right to consider all the testimony, which we have done. There is conflict in the testimony, and in that case the judgment of the Circuit judge is at least prima facie right. There are several considerations which induce us to concur with him. The opinion of witnesses as to what land would rent for is necessarily somewhat speculative. The question of what land would rent for in the market is not always identical with that of its worth. During at least part of the time this land was in possession of the defendants the government was somewhat unsettled and labor more or less demoralized. The defendants did not occupy the land themselves, but rented it to others. They claimed to be the owners, and it was their interest to get full rent. This is the third estimate that has been made of their rents. It concerns the interest of the country that there should be

an end of litigation. Whilst, as an original question, we might possibly not have reached the same conclusion which the Circuit judge did, we cannot say his ruling as to the amount of rents was error, and the same is affirmed.

II. The sheriff, under the execution assigned to defendants, sold personal property on the place to the amount of $850, of which $171.15 was applied to costs and expenses, leaving a net balance of $678.85, which amount, and not the gross sales, the judge ordered to be credited on the execution. In this we concur with the judge. This exception is overruled.

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*III. The defendants found on the place when they took possession, four tons of guano, worth $407.61, which they used. The defendants deny accountability for this, alleging that they sold the guano to Lawton in his life-time, and that it was neither paid for nor included in the account stated—that they simply canceled the charge by taking back the guano. The referee held the defendants liable, and the Circuit judge reversed the report in that particular. This item is recommitted for further proof under Judge Wallace's order of reference.

Subject to the modifications herein made, it is the judgment of this court that the judgments of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

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16 S. C. 482

(Case No. 1149.)

STATE v. THORNBURG.

(November Term, 1881.)

[*Intoxicating Liquors* ⟸152.]

A party was properly convicted under the act of 1880 (17 Stat. 460) for selling liquor without a license outside of an incorporated town, although the liquor was whiskey sold and used only for medicinal purposes.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 165; Dec. Dig. ⟸152.]

Before Aldrich, J., York, June, 1881.

The opinion states the case.

Mr. J. H. Rion, for appellant.

Mr. Solicitor Gaston, contra.

March 4th, 1882. The opinion of the court was delivered by

McGOWAN, A. J. This was an indictment under the act of December, 1880, for selling spirituous liquors without a license. Eugene Lowry testified as follows:

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*"On or about twenty-first of this month (June, 1881,) I bought and paid for a quart of whiskey from the defendant, William Thornburg. His place is outside of the town limits—outside of corporation—short distance outside. It is in this county, York. The defendant sold it to me, and I paid him for it. I have a very sick brother; his disease is consumption. The doctor uses whiskey in the treatment of brother's case. He told my father to send to Thornburg's for whiskey, because his whiskey was better than any other he could get. Father sent me for the whiskey, and I told Thornburg all about what the doctor said, and what the whiskey was wanted for before I got it. Thornburg owns a government distillery outside the corporate limits. The whiskey I bought from him was used strictly in the way for which it was bought."

The judge charged the jury that the act under which the indictment was framed contained no exceptions as to the use that might be made of the spirituous liquors sold; that the prohibition was absolute and without exception against all selling outside of the corporate limits of a city, town or village. Hence, if they were satisfied that the sale was made as alleged, it was no defense that the whiskey was bought for medical purposes—was sold for such purposes—and that, in fact, it was so used.

The jury found the defendant "guilty," with a recommendation to mercy. His attorney moved for a new trial and in arrest of judgment. The judge refused both motions, and he appeals to this court upon the following exceptions:

1. "For, that his Honor charged the jury that if it was proved that the defendant sold spirituous liquors without a license in the county of York, outside of the corporate limits of Yorkville, that would be sufficient upon which to base a verdict of guilty.

2. "For, that his Honor charged the jury that the fact that the said liquor was sold for the purpose of being used, and was in fact used, only for medical purposes, did not constitute a legal defense.

3. "For, that his Honor charged the jury that if they believed the facts as testified to by the witnesses for the State, the same constituted a violation of the act.

4. "For, that his Honor did not grant the

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motion for a new *trial upon the ground that the testimony was not sufficient to base a conviction under the act.

5. "For, that his Honor did not grant the motion in arrest of judgment upon the ground that the testimony was not sufficient to base a conviction under the act."

The act of 1880 (17 Stat. 460) provides as follows:

"Section 1. That from and after the passage of this act no license for the sale of spirituous or intoxicating liquors shall be granted in South Carolina outside of the incorporated cities, towns and villages of this State; and it shall be unlawful for any per-

son or persons to sell such liquors without a license so to do.

"Sec. 4. Any person violating any of the provisions of this act shall, upon conviction thereof, be fined in a sum of not less than two hundred dollars, or imprisoned for a term of not less than six months, or both fined and imprisoned, in the discretion of the court trying the case."

These provisions are positive and without qualification of any kind, and we have no authority to amend them or construe them in such way as, in effect, to add the words: Provided this inhibition shall not include a sale to one who declares at the time that the liquor so purchased is intended alone for medical purposes. Such construction would not only disregard the plain and positive words but completely emasculate the act and thereby defeat the manifest intention of the Legislature.

We do not think that the case cited from Kansas is analogous to this. Neither the title nor reference was given,† but, as stated here, the case involved only the question whether certain compounds or tinctures containing alcohol as one of the ingredients should be held to be within the meaning of Section 10 of the Kansas act, which is in these words: "All liquors mentioned in Section 1 of this act, and all other liquors and mixtures thereof, by whatever names called, shall be considered and held to be intoxicating liquors within the meaning of this act." It seems that there were three cases heard together. In one the article sold was "bay rum," in another it was "a compound of whiskey, tolu and wild cherry—prepared by

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a physician," and in *the third it was a compound known as "Prickly Ash Bitters," and the question was whether these were such articles as fell within the meaning of the act.

Judge Brewer, in delivering the judgment of the court, said: "It cannot be doubted that Section 10 is broad and sweeping enough to bring within the statute every liquid which, by reason of the presence of alcohol, will produce intoxication, and this, irrespective of the amount of alcohol contained, or the presence of other ingredients of such a character as to prevent any use of the liquid as a beverage. * * * But such was not the intent of the Legislature. The use of intoxicating liquors as a beverage was the evil, and the statute must be read in the light thereof. Now the cases before us group themselves into three classes. The first embraces what are generally and properly known as intoxicating liquors, unmixed with any other substances. Thus, in one case, the sale of brandy is charged. The second includes articles equally well known —standard articles—which, while containing alcohol, are never classed as intoxicating beverages. Their uses are culinary, medical, or for the toilet. They are named in the United States Dispensatory and other similar standard authorities. The formulæ for their preparation are there given. Their uses and character are as well recognized and known by their names as those of a horse, a spade, or an arithmetic. The possibility of a different and occasional use does not change their recognized and established character. A particular spade may be fixed up for a parlor ornament, but the spade does not belong there. So essence of lemon may contain enough of alcohol to produce intoxication. It is possible that a man may get drunk on it, but it is no intoxicating liquor. Bay rum, cologne, paregoric, tinctures generally, all contain alcohol, but in no fair or reasonable sense are they intoxicating liquors or mixtures thereof. * * * Now, in reference to these several classes we think these rules may be laid down. The first class is within and the second without the statute, and the court, as matter of law, may so declare. It is unnecessary in charging the sale of whiskey or brandy to allege that it will produce intoxication, nor will it bring the sale of 'essence of lemon' within the statute to allege that such essence will pro-

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duce intoxication. *The courts will take judicial notice of the uses and character of these articles. You need not prove what bread is, or for what purpose it is used. No more need you in respect to whiskey or gin on the one hand, or cologne or bay rum on the other. They are all articles of established name and character." &c.

This case distinctly holds that there can be no doubt when the article sold, as in this case, was whiskey, pure and simple. The quality of the article as to the power to produce intoxication is well known, and its sale is forbidden, without regard to the purpose for which, in particular cases, it may be intended. "You need not prove what bread is, or for what purpose it is used. No more need you in respect to whiskey or gin on the one hand, or cologne or bay rum on the other. They are articles of established name and character."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

† It is the Intoxicating Liquor Cases, to be found in 25 Kans. 751.—REPORTER.

16 S. C. 486

(Case No. 1154.)

STATE v. SIMS.

(November Term, 1881.)

[1. *Riot* ⇐5.]

Where a riot is committed in doing an unlawful act it is not necessary that the indictment should charge that the offense was done in terrorem populi.

[Ed. Note.—For other cases, see Riot, Cent. Dig. § 8; Dec. Dig. ⇐5.]

[2. *Criminal Law* ⇐93.]

The Court of General Sessions has jurisdiction of riots only when they are of a high and aggravated character, but this is sufficiently charged in an indictment which alleges the riot to have consisted in assault and battery on peace officers.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 161; Dec. Dig. ⇐93.]

3. State v. Simmons, 4 S. C. 75, and State v. McKettrick, 14 S. C. 346, explained and reconciled.

[4. *Municipal Corporations* ⇐185.]

Under the authority given to a municipal corporation to make all such rules as may be necessary to good order and public peace, the power to appoint policemen is implied; and the appointment of such officers may be shown by their own testimony and corroborating circumstances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492–509; Dec. Dig. ⇐185.]

[5. *Arrest* ⇐63.]

Under the circumstances of this case, policemen were authorized to arrest without warrant, soon after its occurrence, parties guilty of riotous conduct, although not committed in view of the officers.

[Ed. Note.—Cited in Loggins v. Southern Ry., 64 S. C. 328, 42 S. E. 163; Percival v. Bailey, 70 S. C. 74, 49 S. E. 7.

For other cases, see Arrest, Cent. Dig. § 147; Dec. Dig. ⇐63.]

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[6. *Witnesses* ⇐398.]

*Defendant testified that at the disturbance, he had not made use of a certain expression, and one M., a witness, testified that he was not present. *Held*, that the defendant and M. might be contradicted, as to these matters, by the State in reply, although they had not been advised of time, place and person.

[Ed. Note.—Cited in State v. Kelley, 46 S. C. 64, 24 S. E. 60.

For other cases, see Witnesses, Cent. Dig. §§ 1267, 1274, 1275; Dec. Dig. ⇐398.]

[7. *Criminal Law* ⇐684.]

The admission of cumulative evidence in reply is within the discretion of the trial judge.

[Ed. Note.—Cited in State v. Jacobs, 28 S. C. 37, 4 S. E. 799; State v. Johnson, 66 S. C. 32, 44 S. E. 58.

For other cases, see Criminal Law, Cent. Dig. §§ 1615, 1618; Dec. Dig. ⇐684.]

[8. *Criminal Law* ⇐755½.]

A charge upon facts, on which the jury are not called upon to pass, is not in violation of the constitution.

[Ed. Note.—Cited in Moore v. Columbia, etc., Railroad Co., 38 S. C. 31, 16 S. E. 781; State v. Ezzard, 40 S. C. 323, 18 S. E. 1025; Norris v. Clinkscales, 47 S. C. 519, 25 S. E. 797.

For other cases, see Criminal Law, Cent. Dig. §§ 1731–1765; Dec. Dig. ⇐755½.]

[9. *Witnesses* ⇐266.]

This court cannot declare error in the refusal of the Circuit judge to permit more than one counsel for defendants to cross-examine a witness for the State, although the several defendants are represented by different counsel.

[Ed. Note.—Cited in State v. Huckie, 22 S. C. 301.

For other cases, see Witnesses, Cent. Dig. § 910; Dec. Dig. ⇐266.]

[This case is also cited in Ex parte Schmidt, 24 S. C. 366, without specific application, and in State v. Byrd, 72 S. C. 110, 51 S. E. 542, as to the common-law right to arrest without warrant.]

Before Aldrich, J., Richland, March, 1881.

This was an indictment against Thomas Sims, Jupiter Mitchell, Joseph Thomas and William Mikell. Mitchell was acquitted, and the other three convicted. They appealed.

The indictment in its first count charged that the defendants "with force and arms at Columbia, in the county and State aforesaid, unlawfully, riotously and routously, did assemble and gather together to disturb the peace of the said State; and being so then and there assembled and gathered together, in and upon one E. R. Warner, a peace officer and policeman of the city of Columbia, in the county and State aforesaid, and Starling Strickland, a peace officer and policeman of the city of Columbia, in the county and State aforesaid, and in and upon one W. W. Higby, a peace officer and policeman of the city of Columbia, in the county and State aforesaid, in the peace of God and the said State then and there being, then and there unlawfully, riotously and routously, did make an assault; and them the said E. R. Warner, the said Starling Strickland, and the said W. W. Higby, then and there unlawfully, riotously, and routously, did beat, bruise, and wound, and ill-treat, and other wrongs to the said E. R. Warner, the said Starling Strickland, and the said W. W. Higby, then and there unlawfully, riotously, and routously, did to the great damage of the said E. R. Warner, the said Starling Strickland, and the said W. W. Higby, in contempt and defiance of the laws, to the evil example

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of all others in like case offend*ing against the form of the act of the General Assembly in such case made and provided, and against the peace and dignity of the State."

The second count charged the defendants with an assault upon these same officers, naming them as above, and that the defendants "from them the said E. R. Warner, &c., and out of their custody and against the will of them, the said E. R. Warner, &c., unlawfully, and forcibly, and riotously, and routously, did rescue and put at large one Joseph Thomas, then and there being under arrest and in the custody of the said peace officers and policemen aforesaid, and the said Joseph Thomas himself out of the custody of the said peace officers and policemen

aforesaid, and against their will, unlawfully, and forcibly, did rescue and put at large, against the form of the act," &c.

Other facts are stated in the opinion.

Mr. Allen J. Green, for appellants.

Mr. Solicitor Bonham, contra.

March 7th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. At the March Term, 1881, of the Court of General Sessions for Richland county, the defendants were tried and convicted on an indictment containing two counts; the first for riot, and the second for rescue. Allen J. Green, Esq., appeared for defendant Sims, and John T. Sloan, Esq., for the other two. The prisoners were tried together and the presiding judge ruled that one attorney should alone conduct the cross-examination for all of the defendants.

The riot charged in the first count of the indictment was not alleged to have been committed in terrorem populi, nor was it charged as of a high and aggravated nature.

The defendants were found "guilty." Motions were made in their behalf for a new trial and in arrest of judgment. First. For a new trial for defendant Sims, because his Honor refused to allow his counsel to cross-examine witnesses for the prosecution. And

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*for all of the defendants: 1. Because his Honor erred in receiving testimony to contradict defendants and defendants' witnesses; the solicitor having failed to lay the foundation therefor according to rules of evidence. 2. Because his Honor erred in allowing the State to introduce cumulative evidence in reply. 3. Because there was not sufficient evidence to connect Sims with the second count of the indictment. 4. Because his Honor erred in charging the jury that the arrest laid in the second count of the indictment was a lawful arrest—the arrest having been made by a policeman without warrant, and at a time when there was no disturbance.

For arrest of judgment: 1. Because the first count in the indictment was fatally defective, in that it did not allege terrorem populi and that the offense was of a high and aggravated nature. 2. Because the court had no jurisdiction of the first count; and, 3. Because the arrest which is the foundation of the second count, to wit, rescue, was unlawful and that his Honor should have so held. These motions were refused, and the defendants, appeal on the grounds above stated and on the further ground: That his Honor erred in charging the jury that the only question for them was, did the defendants rescue the prisoner in a riotous and tumultuous manner, saying: "Has the evidence convinced your minds that there was a riotous rescue of prisoners? If so, your verdict must be guilty."

The facts of the case are briefly as follows: The defendant, Thomas, created some disturbance of a violent and disorderly character at Griffin's store in the city of Columbia. Griffin sent for the police, and very soon Warner, Strickland and Higby appeared; by this time the disturbance had ceased, though Thomas was still present and drunk. Griffin pointed out Thomas to the peace officers as the party who had created the disturbance and ordered them to arrest him. The officers attempted the arrest, but Thomas resisted, a scuffle ensued and a crowd collected. Thomas was tied, but finally escaped, as it was alleged, by the assistance of the defendants. The arrest was made by Warner, Strickland and Higby, as policemen under the city authorities, and was made without a warrant.

The verdict of the jury has settled the

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facts. First. That the *defendants did take from the policemen the prisoner, Thomas, in a violent and tumultuous manner; and, second, after being assembled and gathered together, they did riotously and routously assault, beat, wound and ill-treat the said policemen. The indictment charged these two acts and the jury have said guilty. This verdict covers both charges, and we must regard both established as matter of fact. Now, the important question in the case is, do these facts establish as matter of law the offenses of riot and rescue. After considering these questions we will then look into the other exceptions.

It is urged in arrest of judgment: 1. That riot has not been established, because no such offense is charged, the indictment being defective in that it failed to allege the offense in terrorem populi. If there could be no riot in the absence of proof of terrorem populi as an independent fact, then this objection would be fatal. But Lord Holt has given a distinction, as is said, in Commonwealth v. Runnels et al., 10 Mass. 519, founded in good sense, between those indictments in which the words in terrorem populi are essential and those wherein they may be admitted. He says that in indictments for that species of riot which consists in going about armed and without committing any positive act, the words aforesaid are necessary, because the offense consists in terrifying the people, but in riots in which an unlawful act is committed the words are useless. 11 Mod. 116.

According to Blackstone, a riot is where three or more actually do an unlawful act of violence, or if they beat a man, or do any other unlawful act with force and violence. * * * 4 Bl. Com. 146; State v. Brooks, 1 Hill 362. The essence of the riot in some cases is the terrorem populi. In such cases it is necessary to aver that fact. In others the essence may be the committing some unlawful act with violence, or in a violent and tumultuous manner; in such cases it seems

unnecessary that the aforesaid words should be used. Mr. Greenleaf (3 Vol., Sec. 219,) says: If the indictment charges the actual perpetration of a deed of violence, such as assault and battery, &c., it is not necessary to allege or prove that it was done to the terror of the people, but proof of all the other circumstances alleged will support the indictment without proving directly any terror.

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*In this case the charge is the commission of an assault and battery on peace officers unlawfully, riotously and routously. We think this was sufficient, and therefore the exception of appellant as to this point is untenable.

2. Appellants except to the indictment as to the first count, because it does not charge the offense as of a "high and aggravated character," and, therefore, no offense is charged and proved over which the Court of General Sessions had jurisdiction.

In the case of the State v. McKettrick, 14 S. C. 346, it was held that in cases of assaults and batteries it was necessary that the indictment should contain an allegation of facts and circumstances showing that the offense was of a high and aggravated character, or some distinct charge of that kind, in order to give the Court of General Sessions jurisdiction. This applies to riots as well as to assaults and batteries. Section 11 of Chapter XXV., General Statutes, page 195, defining the criminal jurisdiction of trial justices, gives trial justices jurisdiction of all rioters * * * in almost the same language as Section 10 does of assaults and batteries, and declares the punishment of such offenders, when not of a high and aggravated character, is within the limit prescribed for trial justices, to wit, by fine not exceeding $100 and imprisonment in the jail or workhouse not exceeding thirty days.

The indictment charges the riot to consist in an assault and battery by three or more persons, upon peace officers, riotously and routously, and though it does not distinctly allege that this assault and battery was committed upon these peace officers while in the discharge of their duty, yet such was the testimony, and such may well be regarded after verdict as the legal intendment of the indictment. A charge of that character upon peace officers performing their legitimate duty, would be of a high and aggravated character.

There is no conflict between the case of the State v. Simmons, 4 S. C. 72, and the case of McKettrick, as some seem to suppose. Previous to the case of the State v. Simmons, an act had been passed conferring exclusive jurisdiction on the City Court of Charleston in all offenses less than felony. This act in that case was declared unconstitutional, be-

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cause in violation of Section 18, *Article IV., which gives exclusive jurisdiction to the Court of General Sessions in all criminal cases which shall not be otherwise provided by law. The court in the case of the State v. Simmons very properly held, that the legislature had no power in the face of this section of the constitution to divest the Court of Sessions of jurisdiction in any criminal case. It might confer concurrent jurisdiction on other courts, but not exclusive, as it attempted to do in the act referred to on the City Court.

But this does not apply to the exclusive jurisdiction conferred on trial justices in assaults and batteries and other breaches of the peace, as decided in the case of the State v. McKettrick, because that exclusive jurisdiction does not come from an act of the legislature, but it comes from the constitution itself. Section 19, Article I., provides, that all offenses less than felony, in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath without indictment or intervention of a grand jury, &c.

Assaults and batteries and other breaches of the peace, rioters, &c., not of a high and aggravated nature, can only be punished by fine not exceeding one hundred dollars and imprisonment not exceeding thirty days. Gen. Stat., Ch. XXV., §§ 10 and 11. If so, under Section 19, Article I., they shall be tried by justices of the peace, or other officer authorized by law, to wit, trial justices, summarily and without the intervention of a grand jury. This makes the jurisdiction in such cases exclusive. It is derived, not as the City Court of Charleston, from an act of the legislature, and therefore unconstitutional, but from the constitution itself, therefore legal. There is not the shadow of a conflict between the two cases.

The next exception raises the question, whether there was error in holding as matter of law that the police officers had authority to arrest as they did, without warrant and after the disturbance had ceased. The exception raising this question is in the following language: "Because his Honor erred in charging the jury, that the arrest laid in second count of indictment was a lawful arrest —the arrest having been made by the police

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*without warrant and at a time when there was no disturbance." This exception admits that the arrest was made by the police, to wit, by persons acting as policemen. But the legality of the arrest is questioned upon the grounds that it was made without warrant and when there was no disturbance. Whether the city authorities had the power to appoint policemen or peace officers is not raised in this exception, or in any other, nor is it denied that these men were appointed

and were then on duty. If it was necessary to decide this question, we would say that the city authorities certainly had such power under the amendment to the charter, March 2d, 1871, § 10, (14 St. 572.) The power therein granted to make all such rules as may tend to preserve the quiet, peace, safety and good order of the inhabitants, carried with it the power to provide the necessary machinery to execute. The end warranted the necessary means, the only limitation being, "not inconsistent with the laws of the land."

When a statute gives jurisdiction over an offense, it impliedly gives power to apprehend the offender. 4 Bl. Com. 290, note. So, here, where the amended charter, 1871, gave the power to make all such rules as might be necessary to good order and public peace, it impliedly gave power to provide the means of enforcement, by the apprehension and punishment of the offenders. The fact that these men, Strickland and the others, were on duty, with the insignia of office and the badge of authority visible on their persons, accompanied with their own testimony as to their appointment, is sufficient evidence that the city authorities had exercised the power to make rules for the good order of the city and had provided the machinery for arrests, &c. Under these circumstances we must assume that they were legally on duty on this occasion as peace officers, and that they had all the powers which ordinarily belong to such officers.

Is it legal for peace officers to arrest for offenses less than felony, without warrant and when there is no disturbance in view? As a general rule it is not, but we find the following in East P. C. 306: "Lord Hale and some later authorities have holden that such arrests may be made upon the charge of another, though the affray be over, for the purpose of bringing the party before a justice to

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find sureties, or for appearance. But *where time and circumstances will admit of it, the better way is to apply for a warrant. It seems clear, however, that if one menaces another to kill him, upon complaint thereof to a constable forthwith, he may, in order to avoid present danger, arrest the party to detain him till he can conveniently bring him to a justice of the peace. 2 Hale P. C. 88. But this power is grounded on the duty of the officer to prevent a probable felony, and must be governed by the same rules which apply to that case; though Dalton extends it even to the prevention of a battery. Dalt., Ch. CXVI., § 3." In 1 Russ. Cr. & M., Ch. X., § 2, p. 771, it is stated "that in all cases of misdemeanor a peace officer may apprehend the party while committing the offense, and it should seem upon fresh and immediate pursuit in some instances." See, also, Rose. Cr. Ev. 256.

It seems in this case that Thomas had raised a row in Griffin's store, and had beaten two or three men. Griffin had put him out, but he came back and went out again, but was still present and drunk when pointed out to the police; he refused to be arrested and got into another man's wagon. Was not this upon fresh and immediate pursuit? This was certainly within the principle laid down by Lord Hale, cited above. See also case of City Council v. Payne, 2 N. & McC. 475. We think the arrest, under the special circumstances of this case, as detailed in the evidence, was legal. Without such power on the part of policemen under such circumstances, municipal authorities for the preservation of peace and good order would be worthless, and our towns and cities would be frequently subjected to uncontrolled violence and disorder.

Next exception. "Because his Honor erred in receiving testimony to contradict defendants and defendants' witnesses, without laying the foundation therefor according to the rules of evidence. It is a rule of evidence, that before a witness can be impeached by evidence that he has made statements out of court different from those made on the stand, the foundation must be laid by stating to him time, place and person. We do not see that this rule has been violated here. The rule does not preclude a party from proving that what the witness has testified to in court is untrue. If so, truth, which is the object of judicial investi-

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gation, *would seldom be found. The question was, did the defendant Sims use a certain expression, and also whether Mikell was there. Sims had denied using the expression and Mikell had denied being present. The State was allowed, after these denials, to prove that Sims did use the expression and that Mikell was present. This violated no rule of evidence.

The exception as to cumulative testimony is equally untenable. The admission of such evidence was within the discretion of the judge. 2 Phil. Ev. 912.

We do not see that the Circuit judge violated the inhibition of Art. IV., § 26 of the constitution, by charging upon the facts of the case. What he said about there being a tumultuous assemblage at Griffin's store on that day, and the calm that came over the crowd when the police arrived, was not pertinent to the issue. The jury was not charged with the finding of these facts. Their inquiry was whether after the police arrived they had been riotously assaulted and beaten, and whether a prisoner subsequently arrested by them had been rescued from their grasp. The statement of the judge objected to had nothing to do with these questions and could not have affected the verdict.

The appeal must fail also as to the exception that but one counsel was allowed to cross-examine the witnesses for the State. The offenses charged were riot and rescue,

the defendants were all tried together. In fact they had no right to sever if they had demanded it. State v. Littlejohn, 1 Bay 316. The case was an entirety. Besides, the motion made was one addressed to the discretion of the court; it appertained to the conduct of the cause in court, of which the presiding judge is more competent to determine than any one else. Without this power on the part of the judges, cases would be interminable. We do not see that any legal right of the defendant was infringed or refused. In the absence of this we have no power to interfere.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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*(Case No. 1155.)

YATES v. GRIDLEY.

(November Term, 1881.)

[1. *Process* ⟸96.]

In action for partition, the clerk of court issued an order for the publication of a summons to the non-resident co-tenants (but made no direction for service through the mail) upon plaintiff's affidavit "that defendants are not residents of this, but are residents of the State of New York, and that their post-office is unknown to deponent and cannot be ascertained, notwithstanding due diligence has been employed, nor can they be found in this State after due search for them." Defendants had no notice of the action until after sale. *Held*, on motion afterwards made by defendants to vacate the judgment, that the order of the clerk was valid, and that it was not necessary that the affidavit should state that the sheriff had made search, or show the facts upon which the statements of the affiant were based, if the clerk was satisfied by the allegations of the affidavit. This case distinguished from Smith & Melton v. Walker, 6 S. C. 174, which arose under the attachment act.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 118; Dec. Dig. ⟸96.]

[2. *Judgment* ⟸354.]

Hill v. Watson, 10 S. C. 275, approved, and the act of 1869 for vacating erroneous judgments construed, and limited, in equity causes, to cases in which there is error of law apparent on the face of the record, or where evidence has been newly discovered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 691, 703, 704; Dec. Dig. ⟸354.]

[3. *Partition* ⟸73.]

Where only two commissioners in partition acted, the third not having been notified, and the return was confirmed by the Circuit judge with knowledge of these facts, *Held*, that the return was sufficient, and that the judgment of confirmation could not afterwards be set aside by another Circuit judge because only two commissioners had acted.

[Ed. Note.—Cited in Allen v. Allen, 76 S. C. 498, 57 S. E. 549.

For other cases, see Partition, Cent. Dig. § 206; Dec. Dig. ⟸73.]

[4. *Partition* ⟸91.]

A commissioner in partition, who is thoroughly acquainted with the land to be partitioned, may act without again going upon the land, and, after consultation with the other commissioners, agree upon a return that a division is impracticable.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 261; Dec. Dig. ⟸91.]

[5. *Partition* ⟸112.]

A defendant made a party by publication to an action for partition, cannot, under Section 158 of the code, be admitted on motion after sale, to have the judgment vacated. If he desires to raise the question of good faith he must do so under a proceeding more formal than a motion, and by proof more reliable and better sifted than affidavits.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 419–423; Dec. Dig. ⟸112.]

[6. *Partition* ⟸107.]

Land was sold by the clerk in December, under an order of sale which required cash sufficient to pay costs, the balance on a secured credit, and if terms of sale were not complied with the land to be immediately advertised for resale on the next sales-day at the risk of the former purchaser. The purchaser did not comply with her bid until January 15th, when the clerk executed the title-deed, the property not having been resold. *Held*, that the delay of the purchaser to comply furnished no ground for vacating the sale and canceling the deed.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 363; Dec. Dig. ⟸107.]

[7. *Judicial Sales* ⟸31.]

[Cited in Farrow v. Farrow, 88 S. C. 342, 70 S. E. 459, to the point that titles executed in South Carolina at official sales are good without confirmation.]

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59–67; Dec. Dig. ⟸31.]

[This case is also cited in Cavender v. Ward, 28 S. C. 473, 6 S. E. 302, without specific application, and in Gibson v. Everett, 41 S. C. 25, 19 S. E. 286, as to the requisites of affidavit for order of publication, and in Davis v. McDuffie, 18 S. C. 495, and distinguished therefrom.]

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*Before Kershaw, J., Aiken, September, 1881.

This case is stated fully in the opinion. The order for publication should be added, which was [as] follows: "After reading and filing the affidavit of Kate C. Yates, the above plaintiff, of the non-residence of Edward Gridley and Elisha Risley the above defendants, it is ordered, that said defendants be served by publication in the 'Aiken Journal and Review' once a week for the period of six weeks."

Copy-summonses were, however, mailed addressed to the defendants at New York city, but they did not reside there and never received them. They first heard of the action about the end of January, 1881.

Messrs. James Aldrich and John C. Haskell, for appellants.

Messrs. Henderson Bros., contra.

March 7th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. The appellant instituted an action for a partition of a tract of land located in Aiken county, of which she and respondents were co-tenants. The respondents being non-residents were made parties by publication. The writ in partition was directed to three commissioners, two of whom alone acted. These two made return and recommended a sale, and Judge Thomson, by a decretal order dated November 11th, 1880, ordered a sale by the clerk, the terms being, cash sufficient to pay all costs and disbursements of the action, and the balance on a credit of one year, &c., with the condition, "that upon failure of the purchaser to comply" the clerk shall immediately thereupon advertise the premises for sale on the next sales-day at the risk of the former purchaser.

At the sale under this order the appellant became the purchaser, but she did not comply until after the next sales-day, but then complying she received a conveyance from the clerk. On March 5th, 1881, Judge Wallace, upon certain affidavits and certificates submitted to him, stayed all further proceed-

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ings under *the decretal order of Judge Thomson and directed the appellant to show cause before him why the alleged service of summons on respondents should not be set aside, also the judgment rendered by Judge Thomson, and all proceedings under said summons and judgment. Also, why the deed from the clerk should not be disaffirmed and set aside as irregular and fraudulent.

The return to this rule was ultimately heard by Judge Kershaw, who, on September 24th, 1881, pronounced his decree vacating the judgment and all proceedings thereunder and all orders before judgment, on the following grounds: 1. Because the service of summons was incomplete, the affidavit upon which it was made being held by him insufficient. 2. Because only two of the commissioners of the three named in the writ acted, the third never having been called upon to join in the performance of the duty imposed, and also because it appeared that the two who signed the return, never went upon the land, or held any conference with each other, but separately signed the return recommending a sale. He further held, that the appellant not having complied with the sale on the day of sale, although she complied afterwards, the clerk was not authorized to execute a deed to her.

The appeal seeks to reverse this decree and the questions involved are: 1. Was the summons sufficient? 2. Was the return by the commissioners to the writ in partition so defective as to vitiate it? 3. Was the deed by the clerk "ultra vires"?

As to the first point. It seems that the publication of the summons was ordered upon the affidavit of the appellant. The Circuit judge held this affidavit insufficient, upon the ground that it failed to show the jurisdictional facts, in that it did not appear "that the summons had ever been lodged with the sheriff, nor that any effort had been made to ascertain the post-office of the defendants, nor that any search was in fact made in the State, except from the statements of the affidavit, but upon that alone the clerk acted in granting the order, as will appear from the recitals of the order."

The affidavit was as follows: "Personally appeared before me Kate C. Yates, who, being sworn, says that Edward Gridley and Elisha Risley, the above defendants, are non-

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residents of *this, but are residents of the State of New York, and that their post-office is unknown to deponent, and cannot be ascertained, notwithstanding due diligence has been employed, nor can they be found in this State after due search for them. That said defendants have property in this State, as deponent is informed and believes, as described in the complaint in this cause for a partition of the same."

This affidavit was held insufficient for the reasons given above, the judge stating that the officer making the order of publication was not warranted in accepting the statements contained in the affidavit, as to the post-office of respondents and the fact that they could not be found in the State, as conclusive; but that he should have required the facts upon which these statements were based, so that he could have decided for himself whether the conclusions of the affiant were reasonably true.

Section 158 of the code provides that where a party is a nonresident, but has property in the State, and the court has jurisdiction of the subject-matter of the action, he may be made a party by publication, where it is made to appear by affidavit, to the satisfaction of the officer ordering such publication, that defendant cannot after due diligence be found within the State, and that a cause of action exists against him * * * a copy of the summons to be forthwith deposited in the post-office directed to the person, to be served at his residence, unless it appears that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained by him.

All that this section requires is, that it be made to appear by affidavit to the satisfaction of the officer who directs the publication, that the defendant has property in the State, that he cannot be found therein after due diligence, and that a cause of action exists against him. And if the post-office is known, or can with reasonable diligence be ascertained, the order must direct also that the party be served at his residence through the post-office.

In this case the clerk of the court who ordered the publication, we must suppose, was satisfied with the affidavit submitted to him. His duty was somewhat of a judicial character, which he could perform upon being satisfied by affidavit that the conditions demand-

ing the publication were present. The act
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does not *specify the character of the facts and circumstances which must be stated in the affidavit, or the quantity of evidence necessary to satisfy the officer, before ordering publication. It simply requires that it must appear by affidavit to his satisfaction. It seems to be left to his discretion, and, in the absence of fraud and collusion, can his judgment be overruled?

There is nothing in the act directing that the summons should be placed in the hands of the sheriff, and non est returned thereon, nor is there anything defining what facts should exist probative of the jurisdictional facts. All this seems to have been left to the officer, and when he is satisfied, in the absence of fraud and collusion, it is final.

We do not think that the case of Melton v. Walker, 6 S. C. 169, applies. The attachment act does not employ the language found in the publication act. The former requires certain facts to appear, not to the satisfaction of the officer ordering the attachment, but absolutely. It would be proper, therefore, in attachments, that the facts relied on to found the attachment, should be stated circumstantially.

Next, as to the ground that the return to the writ in partition was fatally defective. The motion to vacate this judgment was made in part, as is stated by respondent's counsel, under the act of 1869, as to erroneous judgments, (now repealed by the act of 1880, but still of force as to this judgment,) and also under Section 158 of the code.

The act of 1869, (Gen. Stat. 497, § 2,) as construed in Hill v. Watson, 10 S. C. 275, was not intended to make any change in the legal grounds upon which relief either at law or in equity would previously have been given or refused, but simply to provide a new mode of procedure by which judgments might be assailed, to wit: by motions, applicable alike to judgments at law and to decrees in equity. Previous to this, decrees in equity could not be attacked below except by petition for rehearing, if made before the filing of the decree, or leave to file a bill of review, if made after decree filed. Simpson v. Downs, 5 Rich. Eq. 421. Since this act, and while it was of force, the mode of procedure in all cases was
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by motion, but this act, as has been *stated, furnished no new grounds upon which to vacate judgments and decrees. Hill v. Watson, supra.

As to decrees in equity, Chancellor Dunkin, in Hunt v. Smith, 3 Rich. Eq. 540, said: "A bill of review and motion for rehearing are entertained on similar grounds. First, they will be entertained on account of error of law apparent on the face of the decree, and any part of the record may be resorted to for the purpose of making such error of law in the decree manifest. The other ground upon which a bill of review or a motion for a rehearing will be entertained, is newly-discovered testimony."

Now, the facts upon which the Circuit judge acted in vacating the judgment of Judge Thomson on this branch of the case, were, first, that but two of the commissioners out of the three appointed executed the writ; second, that the third was never called to join; and, lastly, that the two who acted never went upon the land, but separately signed a prepared return recommending a sale. The fact that but two of the commissioners joined in the writ appeared on the face of the proceedings. Was it error of law in Judge Thomson to order the partition on such a return? We think not. The acts authorizing the appointment of commissioners in such cases expressly provide for the execution of such writs by the appointees, or a majority of them. Here, three were appointed, and two acted; this was within the acts. Judge Thomson, after a full review of the case, and after carefully reciting all the facts, both as to the service by publication, and the return of the writ by two only of the commissioners, granted the judgment. We see no error in this—none such as can be corrected by a brother Circuit judge.

But it is said that the mandate of the writ, requiring the commissioners to go upon the land, was not obeyed. It appears from the affidavits that Commissioner Hall did go upon the land—Chafee did not, the reason being, that he was well acquainted with it—had known it all his life, had hunted on it when a boy, and had frequently been on it since manhood, and that he was thoroughly prepared to say that it could not be equitably divided. Meeting Hall on his return from inspecting the land, Chafee, after consultation, agreed with Hall upon a return, which was made to the court. This we think was
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a substantial com*pliance with the act by a majority of the commissioners. It was not such a subsequently-discovered fact as should vacate a judgment.

The motion was also made under Section 158, Subd. 5, of the code, which provides that were one is made a party by publication, upon good cause shown, he may be allowed to defend after judgment at any time within one year after notice thereof, * * * but the title to property sold under such judgment, to a purchaser in good faith, shall not thereby be affected. Without undertaking now to say what the mode of proceeding should be where a party desires to avail himself of this provision of the act as to publication, or what should be the effect of such application upon the case, it is enough to say that the order below is too far-reaching here, if the motion of respondents was merely a motion to come in and defend.

The section referred to provides that property sold under the judgment to a purchaser in good faith, shall not thereby be affected. The appellant should have the opportunity of

raising the question of good faith under some proceeding more formal than a motion, and to test that question upon testimony more reliable and better sifted than affidavits.

Next, as to the non-compliance. The land was sold on sales-day in December, the terms being cash sufficient to pay costs and disbursements of suit, and the balance on a credit of one year, and upon failure by purchaser to comply, then an immediate advertisement for resale, on the next sales-day, or upon some convenient sales-day thereafter, at the risk of the former purchaser. It seems that the appellant did not comply on the day of sale in December, but did comply during the month of January after, and the clerk executed titles. Why compliance was not made on the day of sale does not fully appear. If appellant refused to comply, or was wholly at fault, she could not have demanded thereafter a specific performance. Seymour v. Preston, Speers Eq. 486. But in the absence of fraud or collusion, we do not think that a failure to comply literally with the terms of sale as to the cash payment, the moment the hammer falls, is such failure in itself as will in every case forfeit the bid.

'Tis true that when property is offered ei-

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ther at public or *private sale for cash, the sale is not binding unless the cash is tendered according to the terms, and officers selling under orders should not indulge contrary to the order, but there may be reasons why cash could not be paid down at once, and why the sale, notwithstanding this, should be held good. In this case the cash portion was not a fixed portion of the purchase-money, as one-fourth, or one-third, or any other fixed proportion, but such sum as might be required to pay costs and disbursements, the balance on a credit of one year.

It may be that the exact amount of the costs and disbursements could not be ascertained on the day of sale, or the parties entitled thereto may have been willing to wait a few days. At all events, the clerk afterwards received the cash and executed titles. Had he refused to do so, it may be that appellant could not have enforced the contract, but having completed the contract, by receiving the money and executing titles, we are of opinion that it should not be set aside upon a summary proceeding like this and solely upon the ground of failure literally to comply.

In Young v. Teague, Bailey Eq. 13, where land was sold for partition as in this case, the terms required the giving of a mortgage by the purchaser to secure the purchase-money. This was not done at the purchase, nor had it been done when a proceeding was instituted to vacate the sale on that and other grounds; yet as it did not appear that the purchaser had refused to give the mortgage but was ready and willing to comply, the court held that all it could require now was that the purchaser should do then what ought to have been done at the sale.

In the case of Young v. Teague, the application was grounded upon an offer of an advance of $600 over the bid of the purchaser, and other facts showing that the party making this offer was prevented from bidding at the sale by mistake, &c. This was a strong case, and although the purchaser had not complied literally with the terms of sale in giving the mortgage, yet as the deed had been executed by the commissioner the court refused to set it aside.

The English practice of opening the biddings before confirmation does not apply in

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this State. Young v. Teague, supra. *When titles have been executed in this State at official sales, they are good without confirmation unless assailable for fraud, or other facts and circumstances entitling the party to equitable relief. And the better practice in such cases, unless the matter is clear, is by regular action rather than by motion to show cause. Gordon v. Sims, 2 McCord Eq. 160.

It does not appear, however, that the conveyance from the clerk has been set aside for fraud, but solely upon the ground that the terms of sale as to the payment of the cash portion immediately upon the sale were not complied with. We do not think that fact, in itself unexplained, when these terms were complied with within so short a time afterwards, as above, was sufficient to annul the clerk's deed.

Without prejudice to respondent's right to come in and defend under Section 158 of the code, by such proceedings as may be legal and proper, in our opinion the service in this case by publication was sufficient; the return to the writ in partition by two of the commissioners out of three named, in the absence of fraud, was all that was necessary, and that the execution of the deed to the appellant by the clerk must stand unless assailed by some more effective ground of equitable relief than the mere unexplained fact that the cash portion of the sale was not immediately paid upon the sale.

The judgment of this court is that the judgment of the Circuit Court be reversed.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 504

(Case No. 1156.)

MURRAY v. WITTE.

(November Term, 1881.)

[1. *Vendor and Purchaser* ⇐266.]

A purchaser of an intestate's lands sold for partition in 1853 gave her bonds for the purchase-money, and as guardian for two of the infant distributees received two of these bonds

in part of their estate. As the instalments upon the bonds became due, she charged herself as guardian with the amounts, and accrued interest, and so it appeared in her returns made

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at the *time to the Court of Equity. One ward became of age in 1858 and the other in 1859, and the guardian, at these dates respectively, gave to each her bond, without sureties, in a penal sum double the amount ascertained to be due, and conditioned for its payment, which sum in each case was larger than the amount of her purchase-bonds. In 1866, the guardian confessed judgment upon each of these bonds given to her former wards, and under these judgments the lands purchased by the judgment debtor at the partition sale were sold. Afterwards the former wards brought their action against the vendees of the purchasers at the sheriff's sale to foreclose the statutory lien under the act of 1791. *Held*, that the bonds given to the commissioner in equity in 1853 were paid, and the lien to secure their payment thereby discharged.

[Ed. Note.—Cited in Chick v. Farr, 31 S. C. 474, 10 S. E. 176, 390.

For other cases, see Vendor and Purchaser, Cent. Dig. § 730; Dec. Dig. ⟸266.]

[2. *Guardian and Ward* ⟸74.]

The union of the character of debtor and creditor in the person of the guardian here, did not certainly extinguish the statutory lien that secured her indebtedness, but the circumstances of the case show that the original debt was treated by all parties as paid, and its security as satisfied.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 206–218; Dec. Dig. ⟸74.]

[3. *Payment* ⟸24.]

One security does not operate as payment of another unless so intended by the parties; but the intent that the bonds taken by the wards at their majority should discharge the indebtedness of their guardian as then ascertained, is clearly deducible from the circumstances of this case.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 28, 29; Dec. Dig. ⟸24.]

Before Wallace, J., Sumter, June, 1881.

Action by George M. Murray and Elizabeth N. Bradley against George W. Witte, G. M. Sanders and Robert J. Brownfield. It cannot be certainly ascertained from the brief when the action was commenced, but it was probably not long before its hearing on Circuit. The opinion states the facts.

The Circuit decree was as follows:

The first question that arises upon the merits is, was the lien destroyed by the delivery to Mrs. E. V. Murray, of her bonds as the estate of her wards. This question has been repeatedly considered, and the principles governing it stated by our own court. See Clowney v. Cathcart, 2 S. C. 409; Charles v. Jacobs, 9 S. C. 297; Koon v. Munro, 11 S. C. 139. The principle is fully and clearly stated in Charles v. Jacobs. It will be seen that when Mrs. E. V. Murray received her own bonds as part of the estate of her wards, there was a presumption of their payment at maturity, but this presumption was not conclusive against the wards, and they were not concluded by it, but could set up the debt and lien, if it was not actually paid.

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*When the plaintiffs attained their majority, Mrs. E. V. Murray, their guardian, gave to each a bond for the amounts due each by their guardian. Subsequently, Mrs. Murray confessed judgment to each upon these bonds. It is insisted that this was payment of the original debt, and operated to discharge lien. In the case of Adger & Co. v. Pringle, 11 S. C. 527, the court says: "Whether the debt of the ancestor is discharged by the bond of the heirs is a question of fact depending upon intention. It is not payment unless so accepted by the creditors, and the burden of proof is on the party affirming it."

In the recent case of Johnson v. Clarke, 15 S. C. 72, the court says: "The plaintiffs stood upon their note, and the defendant whose defense was payment and satisfaction should have shown affirmatively that the new note was intended to be and was actually received in payment and satisfaction." This rule has long been established. See Bailey v. Wright, 3 McC. 484; Thomas v. Kelly, 3 S. C. 214 [16 Am. Rep. 716].

In regard to these bonds given by the guardian to her wards, only the naked facts appear that the bonds were given and judgment confessed. This is not enough to show affirmatively that these bonds were given and received in payment and satisfaction of the indebtedness of the guardian secured by the statutory lien. Judgments were entered on these confessions, executions issued and levied upon the land and bought by Kirkpatrick for five hundred dollars. Under the rule established in the cases of Ex parte City Sheriff, 1 McC. 399; McClure v. Mounce, 2 McC. 423; McLure v. Wheeler, 6 Rich. Eq. 343, there can be no doubt as to the interest sold under a judgment and execution upon a bond that is also secured by a mortgage. These cases hold that an execution issued to enforce a judgment upon a bond that was secured by a mortgage before the judgment, is only leviable upon the equity of redemption, and that was all that passed at the sale; that the fee still remained subject to sale under proper proceedings to foreclose the lien. So here the sale under the confessions was only of the equity of redemption, and this was all that Kirkpatrick bought. The fee still remained subject to the lien, and Kirkpatrick bought subject to that incumbrance. The answer set up the presump-

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tion of pay*ment from lapse of time. There were as matters of fact, repeated acknowledgments of the liability by Mrs. E. V. Murray, in her return to the ordinary, the bonds executed and the confession of judgment as late as 1866. Twenty years did not elapse from that time to the filing of the complaint.

There is no proof of other facts, to raise the presumption of payment. It not appearing that the bonds were received in payment, they are a mere "acknowledgment of the amount ascertained to be due," (Thomas v. Kelly, 3 S. C. 214 [16 Am. Rep. 716]) and are secured by the lien (Griffin v. Addison, 3 S. C. 109). The debt and lien still subsisting, and not barred by lapse of time, the possession of the lands cannot be set up as a bar to the enforcement of the lien. In Wright v. Eaves, 10 Rich. Eq. 582, it is held, that "where from payment made by the debtor or his representatives, or other cause, the mortgage debt will not be presumed satisfied, as between debtor and creditor, from lapse of time, no presumption of release or satisfaction of the mortgage will arise in favor of one holding under a purchase from the mortgagor, although twenty years have elapsed since the mortgagor conveyed the premises and delivered possession to the purchaser. Twenty years have not elapsed since the sale by the sheriff. Mrs. Murray before the sale could not claim adversely as against the lien. See also Daniels v. Moses, 12 S. C. 130, and Clark v. Smith, 13 S. C. 585. It is therefore ordered that the third ground of demurrer be overruled. It is adjudged that plaintiff have judgment for the foreclosure and sale of the land described in the complaint as subject to the lien set up in the complaint.

Messrs. J. J. Dargan and Buist & Buist, for appellants.

Messrs. Haynsworth & Cooper, contra.

March 7th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. This is an action to foreclose a statutory lien of lands of an intestate sold for partition. The defendants demurred to the complaint. The demurrer was overruled and judgment of foreclosure pro-

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nounced. The defendants appealed *and the following is a statement of the facts out of which the legal questions arise. Samuel J. Murray, late of Sumter county, died intestate, in 1850, leaving a considerable estate real and personal. On January 5th, 1852, his real estate was sold for partition by order of the Court of Equity. His widow became the purchaser of the Grove Hill tract, a portion of which was located on the west side of the Charleston road. The remainder of his lands was also partitioned at the same time, but as this remainder is not involved in this action no further reference thereto is needed here. The purchase of Mrs. Murray of the Grove Hill tract on the west side of the Charleston road amounted to $4,788.03. She complied with the terms of sale by receipting for $145.50, the amount to which she was entitled as one of the heirs, and by executing and delivering to the commissioner three bonds dated January 17th, 1852, bearing interest from January 5th, 1852, with surety, two of which were conditioned each for the payment of $1,865.35, and the other for $911.83, all payable in three annual equal instalments. Thereupon, the commissioner by deed conveyed to her the land.

In the meantime, Mrs. Murray had been appointed guardian of two or her minor children, who are the plaintiffs here. Under the order of sale the commissioner was directed to distribute the securities and other proceeds of sale among the parties entitled thereto, to the said parties who were of age and to the guardians of the minors. In pursuance of this order, he made the distribution, turning over to Mrs. Murray, for her ward Elizabeth N., in October, 1852, one of her own bonds for $1,865.35, and on the same day, another of her bonds, for the same amount, for her ward George. The third bond was turned over to some other of the parties, and having been long since paid, disappears from the case.

This action of the commissioner was duly reported to the court and was filed for information on June 6th, 1853. During her guardianship Mrs. Murray received other funds for her wards more than sufficient to pay their current expenses. In her annual returns to the commissioner Mrs. Murray charged herself with the instalments and accrued interest on these bonds at or about the time at which they became due and payable

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respect*ively. On July 7th, 1858, Elizabeth having arrived at age, a computation was made of the amount due her in the hands of her guardian. This amount was ascertained to be $4,870.58; of this amount, $2,790.94 came from the bond which the guardian had received from the commissioner. On the same day Mrs. Murray liquidated her indebtedness as guardian to Elizabeth by executing to her her penal bond of that date for $9,600, conditioned for the payment of $4,870.00 on January 1st, 1860, with annual interest until finally discharged. On this bond payments have been credited in discharge of the interest up to January 1st, 1860. George M. arrived at age in July, 1859, and the same arrangement was made with him. The amount found due him was $4,208.63, of which $2,936.89 came from the bond received by the guardian as his share of the Grove Hill land. This indebtedness was liquidated by Mrs. Murray giving to George her penal bond for $8,000.00, conditioned for the payment to George of $4,000.00. Upon this bond appears credits on January 1st, 1860, of $245.00 in excess of the interest up to that date.

In 1866, George and Elizabeth (who had intermarried with one Samuel J. Bradley) commenced actions on these last bonds, upon which Mrs. Murray confessed judgments

for the penalty in each of the bonds. These judgments were duly entered and signed by the clerk on December 12th, 1866, and on the same day executions were issued and lodged in the sheriff's office for Sumter county.

Thereafter, some time in 1868, the sheriff of Sumter, by virtue of these executions, levied upon and sold the Grove Hill plantations, then in the possession of Mrs. Murray, with other property. At this sale, one James D. Kirkpatrick became the purchaser of the land at the price of $500.00. In January, 1869, Kirkpatrick having received titles from the sheriff sold and conveyed a portion of his purchase, embracing two hundred and eighty-seven acres, more or less, of the Grove Hill tract on the west side of the Charleston road, to Samuel J. Bradley. The remainder of this tract on the west side of the Charleston road Kirkpatrick sold to William Bonneau Murray, taking his bond and a mortgage of the premises. This bond and mortgage Kirkpatrick subsequently assigned to the defendant, George W. Witte.

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*Witte afterwards obtained a judgment of foreclosure of this mortgage against the heirs of Bonneau Murray, then deceased. At this foreclosure sale Witte became the purchaser, receiving a deed from the sheriff on February 11th, 1874. Samuel J. Bradley died in November, 1869, having a short time before his death conveyed to Samuel J. Pinckney that portion of the Grove Hill tract which he had bought from Kirkpatrick, with other lands, in trust for certain purposes. Under this deed the defendant, Robert J. Brownfield, became trustee, so that Brownfield and Witte (Geo. M. Sanders being the tenant of Witte) became possessed of all the Grove Hill tract lying west of the Charleston road purchased at the original partition sale by Mrs. Murray, to secure which purchase it is claimed by the plaintiffs that the statutory lien now sought to be enforced, attached under the act of 1791.

The plaintiffs claim that no part of Mrs. Murray's bonds to the commissioner given for this land has been paid, and they now seek by this action to enforce the statutory lien on the land in possession of the defendants, which, they allege, attached at the purchase by Mrs. Murray in 1852, and which they claim is still of force, to secure to them the payment of the purchase-bonds received for them by their guardian. The presiding judge sustained the plaintiffs and gave judgment for the foreclosure of this statutory mortgage.

The grounds of appeal are numerous, being fifteen in number, but the leading question is, whether, upon the facts stated, one or all, the statutory lien which it is admitted originally covered the land, has since become extinct, and before this action was commenced. If so, the case will end at that point, and this opinion in that event need not be encumbered with the discussion of the other questions raised. We will address ourselves first to this leading question.

The main facts relied upon by the appellants in support of their position, that the statutory lien has been extinguished, are: First. That the relation of creditor and debtor became united in the person of Mrs. Murray as to the bonds in question, when they were assigned to her in 1852 by the commissioner, and hence they were then paid by operation of law, and hence, also,

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*the land pledged for their payment was then released. Second. That Mrs. Murray in her annual returns as guardian charged herself with the receipt of the instalments on these bonds, with accrued interest, at about the time they fell due respectively. Third. The settlement between Mrs. Murray and her wards, the plaintiffs, after they arrived at age, when they each took from Mrs. Murray, in liquidation, as they state in the complaint, the penal bonds mentioned above; and, lastly, they rely on the lapse of time.

The effect of the union of the characters of creditor and debtor in the same person, has been often before the courts, not only in our own State but elsewhere. The most recent decision with us is Charles v. Jacobs, 9 S. C. 297. In that case the question was fully discussed, and the general rule, with the exceptions, presented in a concise and compact form. The authorities sustaining the positions there announced, will be found cited and discussed in the opinion delivered, so that it will be unnecessary for me to make further reference than to that case and the cases therein referred to.

The rule, as is said there, appears to be, that where a debtor becomes executor or administrator of his creditor, the debt is presumed to be paid from the time of its maturity. * * * This is the general rule. But this does not bind the creditors and distributees not having assented thereto, so as to prevent them from reaching such securities, if any, by mortgage pledge or lien originally taken to secure said debt, if it should turn out that the debt had not really been paid. In other words, the presumption of payment by operation of law in such case will not defeat the securities mentioned as against creditors and distributees, in the event that no payment has in fact been made.

The presumption of payment is not conclusive, so as in itself to extinguish such securities by mortgage pledge or lien, if any. So, too, the executor or administrator may prevent the presumption of payment from attaching as to themselves, by dealing with the obligation as still outstanding, by transferring it to creditors of the estate, as was done in the case of Charles v. Jacobs and also in Clowney v. Cathcart, 2 S. C. 402. But in that case the union of the two characters,

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though not discharging the principal *debtor, will discharge the personal sureties. If, however, the executor or administrator, as was said in Charles v. Jacobs, "actually treats the debt as paid and accounts for it as such, it becomes legally extinguished, and it cannot be revived by any act of the executor afterwards, such as transferring it in payment of debts of the estate; and if payment is accepted by the distributees on such account, they too, are precluded from setting up the debt."

Now, according to these principles, the statutory lien under the act of 1791 having attached on the bonds of Mrs. Murray, the mere union of the character of creditor and debtor in her person did not in itself extinguish this lien in so far as to prevent the distributees from enforcing it. Yet, if it subsequently appears in the case that she has treated her debt as paid, and that it has so been accepted and regarded by the parties entitled to the proceeds, and that an accounting has been had upon the basis of payment to herself and accepted by the parties in interest, then the case of Charles v. Jacobs is authority for the position that the debt is extinguished and consequently with it the statutory lien also. So that the real questions are: Do the admitted facts force the inference that Mrs. Murray dealt with and treated her bonds as paid—that she accounted for the proceeds on settlement as if collected? Did her wards so understand, and have they accepted other bonds in payment?

It is stated in the complaint that Mrs. Murray, during her guardianship, charged herself in her annual returns with the instalments and accrued interest on her bonds at or about the time they respectively became due and payable. In Clowney v. Cathcart, supra, which is similar in many of its features to this case, the real estate of an intestate was sold by order of the court. James Cathcart, the acting administrator, became the purchaser, and gave his bond secured by mortgage of the premises. The order of the court, after directing the commissioner to apply the funds in his hands to the payment of certain debts, directed the balance to be paid over to the administrator to be administered in due course of administration. Under this order Cathcart's bond and mortgage were delivered to him. Shortly after receiving them, and after the char-

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acters of creditor and debtor had *thereby re-united in his person, he assigned these securities to Robinson and Caldwell, creditors of the estate, in payment of their demand, thus treating the debt as a subsisting obligation, notwithstanding the union of the two relations. Shortly after this, in his returns he charged himself with the amount of his bond with the accrued interest, and credited himself with the amount as paid to Robinson and Caldwell.

The question in the case was whether the bond and mortgage had been extinguished. The court said: "That had the administrator done any act expressive of an intention to treat the securities as extinguished and in its nature equivalent to payment, the debt would have become extinguished and the mortgage discharged." The return of the administrator was relied on, but that was held not sufficient, because, before this return was made, the administrator had assigned the bond and mortgage to Robinson and Caldwell as a subsisting obligation, and the court said: "That the return was intended to express the transaction, which was complete by the transfer of the bond and mortgage into the hands of the administrator, and the subsequent transfer of the same by him to Robinson and Caldwell." In other words, the object of the return was to show that this bond and mortgage had come into the hands of the administrator as part of the estate, and had been accounted for in the transfer to Robinson and Caldwell, and this entry in the administrator's accounts, instead of affording evidence that the debt had been paid, was evidence directly to the contrary. In that case, therefore, it was properly held that the mortgage should be enforced.

The case before the court differs very materially from Clowney v. Cathcart and also from Charles v. Jacobs, in the fact that there is no evidence that Mrs. Murray dealt with her bonds as a subsisting obligation. She did not transfer them to her wards or to any one else. We never hear of them after the assignment by the commissioner, except at or about the time the instalments fell due, when she returned the proceeds with the accrued interest in her hands as so much cash. This was certainly an act on her part expressive of her intent to treat the original debt as extinguished, and in its nature equivalent to payment. What else could have been her purpose? If she had

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regarded the bonds as *still outstanding, why have not returned them as investments, and why especially did she make this return part of the time that the instalments fell due, embracing the interest which had accrued up to that date? This transaction, so far as she is concerned, can be explained upon no reasonable hypothesis except that she had complied with her contract, and had paid herself as guardian the amount which she owed herself in that character as an individual.

But the important question is, has this debt, thus received by the guardian, been accounted for on settlement, and have the appellants accepted this settlement as payment in such way as to preclude them from now setting up the statutory mortgage

against the land? The appellant, Elizabeth, came of age in 1858, and George in 1859. Very soon after each arrived of age an accounting took place. In these accountings, if the bonds of Mrs. Murray had been understood by the parties as still in existence and unpaid, they should have been produced and turned over to them respectively. The guardian was the mother of the appellants, and we cannot suppose that she had any purpose of defrauding her own children. And no doubt had the bonds been in existence as uncollected interests they would have been produced and delivered to the parties, and her notes given for the balance of the funds in her hands. But this course was not adopted. The computation was made upon the basis of her returns, as we must suppose, embracing the proceeds of these bonds as collected by her, and the remainder of the funds received by her during her administration as guardian. The amount ascertained upon this basis to be due, in the strong language of the complaint, was liquidated by Mrs. Murray to each of the parties by giving her penal bonds in double the amount thus found due.

In 1866, actions were instituted by both plaintiffs on these bonds, in which actions Mrs. Murray confessed judgment. Under these judgments the lands now attempted to be subjected to the statutory liens were sold in 1868, and the proceeds applied, and thus matters have remained until 1879, when this action was commenced.

Now, do these transactions furnish evidence that plaintiffs accepted and ratified the understanding of Mrs. Murray that her original bonds had been paid? That the account-

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ing and settle*ment above was made on that basis, and her penal bonds taken by them in payment of the amounts then found due as a finality? Or, do they show that this settlement was intended simply to ascertain the amount due, and that the bonds of Mrs. Murray were taken as mere memoranda showing the result, leaving the original bonds outstanding and to be enforced with the statutory mortgage on the lands at such time in the future as the plaintiffs might desire?

The fact that the computation and settlement were made; that the original bonds were not produced and turned over; that heavy penal bonds of the guardian were taken for the full amount in liquidation, as is stated in the complaint; that suit was afterwards brought on these bonds; that Mrs. Murray confessed judgment in these suits, that her land was sold thereunder, and the proceeds applied; that twenty years elapsed from that settlement before this action was brought, nearly eleven years of which defendants or their grantors were in possession of these lands, with the plaintiffs living near by and making no whisper of their rights under the statutory lien, afford a very strong moral presumption that it was the understanding of all parties that this settlement was final and conclusive as to the past. And the attempt now to revitalize the original indebtedness of Mrs. Murray, in the face of these facts, and after this long delay, has much the appearance of an afterthought.

'Tis true that the mere taking of a new bond does not in itself extinguish a prior bond. The authorities of this State are full to the effect that a new obligation does not amount to a satisfaction, unless it is so agreed and understood by the parties. Thomas v. Kelly, 3 S. C. 214 [16 Am. Rep. 716] Kelsey v. Rosborough, 2 Rich. 244. In Adger v. Pringle, 11 S. C. 527, McIver, A. J., said: "The rule of law is well understood, that where a creditor takes an obligation of inferior or equal rank it does not extinguish ipso facto the prior obligation, as that is payment only which is intended and accepted as payment; hence, when a creditor takes a new bond for one previously held by him, which has been lost or destroyed, the original debt or obligation is not extinguished unless it is made to appear that the creditor accepted such new bond in payment; and the burden of proof is

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upon him who *asserts the fact that the new bond was taken as payment." In Johnson v. Clarke, 15 S. C. 72, the same doctrine was held, with the statement that the fact that the new bond was accepted as payment might be shown by the facts and circumstances as well as by positive proof. In Burton v. Pressly, Cheves Eq. 9, Chancellor Johnston said in the Circuit decree, which was adopted as the opinion of the court: "That if the new was given in payment of the old, the fair inference is that the mortgage must fall with the note. But if for mere convenience a new note was executed to take the place of the old one, the object being substitution and not payment, I suppose that all the incidents were transferred to the new."

Whether a new note then is to operate as payment, depends entirely upon the intent of the parties, and, when so intended, if there be a mortgage or other security attached to the old, it will fall with the old note. The error of the Circuit judge was not in the conclusion which he drew from the facts which he applied to this question, but in not applying all the facts. He based his decision upon the naked facts that a new obligation had been given and the confession thereon. If these had been all the facts of the case, his conclusion was in accordance with the cases above referred to. We think the return of the guardian, the failure to produce the original bonds at the settlement and to turn them over, the long delay and the profound silence of the plaintiffs for more than twenty years after the settlement and liquidation, all of which are admitted, were significant facts bearing upon the question

as to the intent and understanding of the parties as to the purpose of the settlement. These were all circumstances connected with the transaction, surrounding and intermingled with it, and should have been considered.

The judgment of this court is that the judgment of the Circuit Court be reversed.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. *517

*(Case No. 1157.)

WILSON v. BRADDY.

(November Term, 1881.)

[1. *Trusts* ⇐179.]

Good faith should be allowed to have its influence in determining the responsibility of trustees for conduct and transactions affecting their trusts, especially during the time when Confederate currency was the only medium of exchange in this State.

[Ed. Note.—Cited in Brabham v. Crosland, 25 S. C. 535, 1 S. E. 33.

For other cases, see Trusts, Cent. Dig. § 233; Dec. Dig. ⇐179.]

[2. *Guardian and Ward* ⇐33.]

Land was sold by the Court of Equity in 1864 for Confederate money at a highly inflated price, and a portion of the purchase-money fell due in January, 1865. *Held*, that this instalment was properly received at maturity by the commissioner in equity, and from him this money was then properly received by a guardian to the extent of his ward's interest in such payment.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 142–161; Dec. Dig. ⇐33.]

[3. *Guardian and Ward* ⇐33.]

And a bond of indemnity given by the debtor to the guardian at the time of these payments to secure the latter from any loss by reason of his receipt of Confederate money, imposed no liability upon the debtor.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 142–161; Dec. Dig. ⇐33.]

[4. *Guardian and Ward* ⇐33.]

Nor was any liability under this bond fixed upon the obligor by a decree of the court establishing a devastavit against the guardian in the receipt of this Confederate money, in a cause between the ward and his guardian to which the obligor was no party.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 150; Dec. Dig. ⇐33.]

[5. *Payment* ⇐14.]

The ordinance of the convention of 1865 was intended only to relax the rules of evidence, so that it might be shown that the contract was made with reference to Confederate currency, and not to fix a measure of liability. This is done, in the absence of other testimony, by the Corbin scaling act.

[Ed. Note.—Cited in Chalmers v. Jones, 23 S. C. 468.

For other cases, see Payment, Cent. Dig. §§ 91–98; Dec. Dig. ⇐14.]

Before Pressley, J., Marion, March, 1881.

Action by John O. Wilson, as executor of the will of W. W. Braddy, deceased, against E. A. Braddy and others, legatees and creditors. The opinion states the case.

Messrs. Townsend & McKerall, for appellant.

Messrs. Johnson & Johnson, contra.

March 7th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. Judge Pressley, who heard this case on Circuit, makes the follow-

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ing statement of material facts: "In *January, 1864, plaintiff's testator, W. W. Braddy, at a sale by the Court of Equity, bought the land of James Tart, deceased. He paid three-fifths of the price in cash and gave bond and mortgage, payable in two equal instalments, for the remainder. When the first instalment fell due, which was on January 1st, 1865, he offered to pay the same, but E. J. Moody, guardian of Enos M. Tart, a minor, who had a share in said land, refused to receive that share in Confederate money from the commissioner unless W. W. Braddy would give a bond of indemnity to save him harmless. Braddy gave the bond. Moody received the Confederate money."

The minor, E. M. Tart, arriving at age in 1869, brought action against his guardian, Moody, for an accounting and settlement, and recovered judgment against Moody for $1,092, the amount adjudged him on account of the payment to Moody by the commissioner of the first instalment of the land purchased in Confederate money above referred to. How the court reached this amount does not fully appear. It seems, however, that Braddy bought the entire lands of Tart, containing seven hundred and thirteen acres, at $33,600.32, three-fifths to be paid in cash, and the remainder to be paid in one and two years. The cash payment was made, and the remainder, to wit, $13,552, secured by bond and mortgage. Of this remainder Moody was entitled as guardian to one-half.

When the first instalment fell due he received his ward's share in Confederate money under the circumstances above stated. When the second instalment became due, on January 1st, 1866, which was after the war, the parties by valuing the land in good money, and adopting some scale of their own, fixed the amount at $600, which was accepted as payment of that instalment, and the court seems to have adopted this as a basis as to the amount due by Moody to his ward in good money for the Confederate money received by him from the commissioner in payment of the first instalment, and gave judgment for the ward against Moody for $600, with interest from January 1st, 1866, amounting in all to $1,092. From this judgment there was no appeal. In the meantime Moody, the guardian, had become insolvent and failed to pay to his ward the amount

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thus adjudged *him, with the exception of $66.25, which it seems the ward received.

W. W. Braddy having died, his executor, the plaintiff, instituted the present action to marshal the assets of Braddy's estate, and the creditors being called in, the bond of indemnity given by Braddy to Moody, the guardian, was presented by T. C. Moody, as assignee of E. J. Moody, as a claim against the estate, because of the fact that in the action above referred to he had been held liable for $1,092 to his ward in receiving the Confederate money in which this bond was to indemnify and save him harmless. E. M. Tart, the ward, also claimed this bond as a security for the amount due him from his guardian as established in the action mentioned. The condition of this bond is as follows: "That whereas the said E. J. Moody is guardian of Enos Murchison Tart and is entitled to receive as such guardian a portion of bond in the commissioner in equity's office in said district, which the commissioner in equity is willing to receive in Confederate currency, provided the same will be received by the said E. J. Moody, guardian as aforesaid. Now, if the above bound, William W. Braddy, principal, and his sureties, shall indemnify and save harmless the said E. J. Moody from all liability, expenses, costs, or loss he may incur in consequence of receiving the sum of three thousand eight hundred and thirty-four and eighty-five one-hundredths dollars, the portion to which E. M. Tart is entitled to of the payment now due in Confederate currency, then this obligation to be void and of none effect, else to remain in full force and virtue."

The referee to whom the case was referred reported as to this branch of the case, that he found as matter of fact that the sale of the land purchased by Braddy was based on Confederate money as receivable in payment, and, therefore, that the commissioner in equity and Moody, the guardian, rightfully received that currency in discharge of the first instalment of Braddy's bond. Judge Pressley concurred in this finding of the referee, and decided in substance that if such was the fact, then Moody committed no default as guardian in receiving the Confederate currency, and inasmuch as the bond of indemnity was to save Moody harmless in receiving this currency and not for his failure

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*to account for it, there had been no breach of this bond, and, therefore, no liability had attached to the estate of Braddy. He also held that T. C. Moody, assignee, was not a purchaser for valuable consideration of the indemnity bond, but that E. M. Tart, the ward, was entitled to it, if in the opinion of this court it could be established against the estate of Braddy, except $66.25, which had been paid Tart by Moody, the guardian. This amount he adjudged would go to T. C. Moody under the assignment, if the bond was recoverable.

E. M. Tart appeals from this decree, alleging error on the part of the Circuit judge, in that he erroneously held that E. J. Moody, the guardian, committed no default in receiving the Confederate money to which the bond of indemnity related, thereby practically reversing, as it is claimed, the judgment of the Circuit Court in the case of E. M. Tart v. E. J. Moody, his guardian, in which the said E. M. Tart had been adjudged the sum of $1,092, on account of the wrongful receiving of this Confederate currency by his said guardian, from which judgment there had been no appeal. The plaintiff also gave notice of appeal in the event that Judge Pressley's decree should be reversed, on the following grounds: 1. Because E. J. Moody has not been damnified, and until he is there is no liability on the part of the estate of W. W. Braddy on the bond of indemnity. 2. Because if the estate of Braddy is liable at all, the liability is the value of the Confederate money received by Moody as guardian, to be ascertained by the Corbin scaling act and not under the ordinance of the convention.

We concur with Judge Pressley in holding that the commissioner rightfully received Confederate currency on the bond in question on the facts found by the referee, concurred in by himself, and that the guardian did not commit a breach of trust in receiving this money from the commissioner. Independent of the general rule, that where a trustee or other agent acts in good faith, within the scope of his duties, and a loss occurs, that the loss should fall upon the estate rather than upon himself individually, the decisions in reference to receiving Confederate currency during the war, fully sustain the action of the commissioner and trustee in this

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case. Neely v. McFadden, 2 S. C. *180; Smith v. Prothro, 2 S. C. 376; State v. Mosely, 10 S. C. 1; West v. Cauthen, 9 S. C. 59; DeSaussure v. McClenaghan, 6 S. C. 85.

It will not do to look back from our standpoint to transactions occurring during the war and determine them by our present surroundings. Great injustice would be done by such a course. Things were anomalous then and it was difficult to know what was best. The soundest judgment was often at fault, and men of the highest business capacity and practical sense failed to mark coming events correctly and to foresee their unfortunate results,

There was a complete upheaval in everything. The entire Confederacy, embracing a large portion of the American states, had no other medium of exchange except Confederate currency. Business men in their private affairs, public officials, judicial tribunals, trustees, guardians, and agents, for themselves and for their cestuis que trust and

wards, and all other classes dealt with it, and there is no reason that fiduciaries should alone be made victims.

Good faith, even in peaceful and quiet times, and when business rules are fixed and well established, has been allowed its influence in the protection of parties occupying such relations, when overtaken by misfortune, much more should it be regarded as to transactions during the war, when all these rules had given way and acts and conduct had to be determined upon a state of things entirely new and in which all were without experience. But especially in this case should these considerations govern. The land out of which Braddy's sale bond originated was sold in Confederate times. It was confessedly with reference to Confederate currency. Indeed the price it brought shows this. The tract contained about seven hundred acres; it brought $33,-632 net, nearly $50 per acre, when, according to the testimony, it was not worth more than $10 or $12 in good money; three-fifths were paid in cash in Confederate currency, the balance on a credit of one and two years.

There can be no doubt as to the understanding of the parties. It was bought on a Confederate basis, and was expected to be paid in that currency. When then the commissioner received the money, he did but what his contract required him to do, and

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*when Moody received it from the commissioner he received the property of his ward. For this receipt he incurred no responsibility except to account for it. Judge Pressley's decree on this branch of the case is sustained upon principle and authority.

It is contended, however, that Braddy's bond of indemnity was intended to save Moody harmless against all loss, &c.; that Moody has been adjudged by the decree in the case of Tart v. Moody to pay $1,092 on account of his receipt of this Confederate money, and, therefore, the estate of Braddy is responsible for that sum. The object of the indemnity bond when properly construed was intended to save Moody harmless against all loss that he might legally incur. It was intended as a guaranty that Moody could legally receive the Confederate currency. Has there been a breach of the bond in this respect? This we have decided above.

It is true the Circuit Court in the case of Tart v. Moody, Judge Townsend presiding, decided otherwise, and, Moody having submitted to that decision without appeal, it binds him, but it did not settle the law of the case except as to the parties and privies bound by failure to appeal. Under our view, that decree was clearly erroneous. The ordinance of the convention allowing the value of the property to be inquired into was resorted to to fix the liability of Moody. Under the decisions, this ordinance was never intended as a measure of liability, but was intended to develop the fact, whether the contract was made with reference to Confederate currency or good money. It was intended to relax the rules of evidence and to open the door for the inquiry, whether the term dollar, in contracts during Confederate times, means a Confederate dollar or other currency.

The price which property brought, compared with the real value, was a clear index to this question, and such was its purpose. This question being determined then, the measure of liability was left to other evidence, the act known as Corbin's act, in the absence of other evidence showing a different value at a given time and place, being adopted as the measure for Confederate currency. Neely v. McFadden, 2 S. C. 169; Harmon v. Wallace, 2 S. C. 208; Parker v. Wilson, 3 S. C. 296; Moore v. Johnson, 7 S. C. 308; [Thorington v. Smith] 8 Wall. 1 [19 L. Ed. 361]. This principle should have been applied in the case of Tart v. Moody, and if

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it had *been, Moody could have been held responsible only for the value of the Confederate money which he received from the commissioner, and, perhaps, not even for that, if this money died on his hands without fault on his part.

Suppose Braddy had not paid the commissioner, would his liability after the war, under the facts of this case, been greater than the value of his bond scaled by Corbin's act? We think not. If so, this is all that could legally have been adjudged against Moody. When he received the Confederate money on Braddy's bond he virtually occupied to his ward the position that Braddy had to the commissioner, and he should not have been held to higher responsibility than Braddy would have been had he never paid it. We have said, however, that the judgment in the case of Tart v. Moody, being unappealed from, binds Moody. Does it bind Braddy? Judgments bind parties and their privies only. Braddy was no party to that suit. He was not summoned as an original party, nor indeed could he have been under the then state of the pleadings. He was not even touched by Moody. He was in no sense a party.

Was he a privy? Privies are of two kinds, privies in blood and privies in estate. We cannot see that Braddy occupied either of these relations. The suit was by Tart against Moody, as his guardian, for account and settlement, and Moody in no sense represented Braddy. In Bond ads. Ward, 1 N. & McC. 201, A. gave B., a constable, an indemnity bond to levy and sell a mare of C., which B. did. C. recovered the value of the mare of B. B. then brought an action on the indemnity bond. Held, that he could not recover, not having given notice to A. of previous action. In Burrill v. West, 2 N. H. 192, where the plaintiff brought action

on a promise to save harmless, the same doctrine was held. See Big. Estop. 66. Also the Ordinary v. Condy, 2 Hill 313.

It is the judgment of this court that so much of the judgment of the Circuit Court as adjudged that Braddy's estate was not liable for the receiving of Confederate money by Moody, the guardian, and also so much as held that Braddy's estate was not bound by the judgment in the case of Tart v. Moody, is affirmed.

McIVER and McGOWAN, A. J.'s., concurred.

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*(Case No. 1158.)

STATE, ex relatione THOMPSON, v. THE CHERAW AND CHESTER RAILROAD COMPANY.

(November Term, 1881.)

[1. *Corporations* ⇐60.]

The terms "stock" and "capital stock" considered, and *held*, that stock when used in reference to corporations and in connection with the privilege of subscribing thereto, means capital stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 162; Dec. Dig. ⇐60.]

[2. *Corporations* ⇐65.]

An act of the legislature authorized the issue of bonds by a county "in subscription for preferred stock" of a railroad company, and the act provided that the county "shall receive from the company preferred stock to the amount of the said bonds, which preferred stock shall bear interest at the rate of seven per cent. per annum." *Held*, that this preferred stock meant capital stock, different from other capital stock only in the preference given to it in the matter of dividends.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 170; Dec. Dig. ⇐65.]

[3. *Corporations* ⇐95.]

A certificate of stock tendered by the company to the county setting forth that the county was entitled to the stated amount, but impliedly declaring it not to be capital stock, was not sufficient; and there was no error in a writ of mandamus prescribing a form of certificate in substantial compliance with the terms of the act.

[Ed. Note.—For other cases see Corporations, Cent. Dig. § 436; Dec. Dig. ⇐95.]

[4. *Mandamus* ⇐141.]

The judges of the Courts of Common Pleas have power at chambers to issue writs of mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 276–278; Dec. Dig. ⇐141.]

[5. *Mandamus* ⇐14.]

A demand by the county made upon the railroad company for certificates of preferred stock, although the demand did not specify the precise character of the certificates, was sufficiently definite to warrant this subsequent proceeding by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 45; Dec. Dig. ⇐14.]

[6. *Mandamus* ⇐176.]

The peremptory writ in mandamus must conform to the alternative writ, but such conformity existed in this case.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 393; Dec. Dig. ⇐176.]

Before Mackey, J., Chester, July, 1881.

This was a proceeding by mandamus on the petition of the State of South Carolina, ex relatione W. Banks Thompson, John O. Darby and Waties Pendergrass, as county commissioners in and for the county of Chester, against the Cheraw and Chester Railroad Company, and William Hardin, as president, and David Hemphill as secretary and treasurer of said railroad company. The opinion states the case.

Messrs. J. & J. Hemphill and J. H. Rion, for appellants.

Messrs. A. G. Brice and S. P. Hamilton, contra.

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*March 4th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. Under an act entitled "An act to authorize and empower certain counties to issue bonds in subscription for preferred stock of the Cheraw and Chester Railroad Company," approved March 14th, 1874, the county of Chester subscribed the sum of $75,000, and in accordance with the terms of said act, duly made, executed and delivered seven hundred and fifty bonds, of the par value of $100 each, in payment of said subscription. The fourth section of said act provides as follows: "On the completion of the said railroad in the county, the board of county commissioners shall receive from said company an amount of preferred stock of said company equal to the amount of the said bonds, which preferred stock shall bear interest at the rate of seven per cent. per annum."

This road had been completed for more than a year prior to this proceeding, which was commenced on May 13th, 1881, by petition to Hon. T. J. Mackey, Circuit judge, at chambers, praying that a writ of mandamus do issue to Hardin, the president of the company, and Hemphill, the secretary, commanding them to execute and deliver certificates for fifteen hundred shares of preferred stock of said company to the petitioners, county commissioners, alleging a demand and refusal, previously made. Upon this petition an alternative writ was granted on May 13th, 1881, requiring the respondents to make and execute a certificate or certificates of "preferred stock" in the Cheraw and Chester Railroad Company to the amount of $75,000, * * * and to deliver the same to the said county commissioners immediately upon the receipt of the writ, or that they appear before the Honorable Thomas J. Mackey, judge of the Sixth Circuit, sitting at chambers, in

and for the county of Chester, at the court house, on the 3d day of June, A. D. 1881, to show cause why they refuse to do so.

On the 1st day of June thereafter an order was granted the petitioners for leave to amend the alternative writ issued on May 13th by inserting the words, "In proper form and manner a certificate or certificates for fifteen hundred shares (of the par value of fifty dollars a share) of preferred stock in the

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Cheraw *and Chester Railroad Company, bearing interest at seven per cent. per annum," in place of the words "certificate or certificates of preferred stock," &c., and also to insert after the word "subscription" in the original writ, the words "being fifteen hundred shares of said stock." This amended writ was served on June 3d, 1881, with leave on the part of respondents to make their return thereto within twenty days; and the hearing was fixed for the 30th day of June. To these writs respondents made return within the time, and while denying that any demand had ever been made upon them for fifteen hundred shares, at the par value of $50 a share, of preferred stock, and that no mandamus could lawfully issue from one of the judges of the Circuit Court, they tendered a certificate, which they stated the board of directors had authorized them to prepare, and further stating that they had no power to offer any other. The certificate tendered is as follows: "Cheraw and Chester Railroad Company. Certificate No. 1. $75,000. State of South Carolina. Preferred stock, seven per cent. interest. These presents certify that the Board of County Commissioners of the county of Chester, having issued seven hundred and fifty bonds of one hundred dollars each, of date April 1st, 1875, in pursuance of an act of the General Assembly of the aforesaid State, entitled 'An act to authorize and empower certain counties to issue bonds in subscription for preferred stock of the Cheraw and Chester Railroad Company,' approved March 14th, 1874, are holders of seventy-five thousand dollars of preferred stock of the Cheraw and Chester Railroad Company, which said stock bears interest at the rate of seven per centum per annum from the day of the completion of said railroad in said county, to wit, the 1st day of June, 1880, to be paid prior and in preference to any dividend upon the capital stock of the said company. Witness the hands of the president and treasurer, and the corporate seal. May 26th, A. D. 1881."

Judge Mackey held this certificate insufficient, as it failed to show the number of shares in the capital stock of the company which the county was entitled to, and leaving it doubtful whether it was intended as a certificate of indebtedness of the company to the county, or a certificate showing the number

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of *shares that the county held in the capital stock of the company; and he issued a peremptory mandamus commanding the respondents without delay to deliver to the petitioners a certificate in the following form:

"This is to certify that the county of Chester is entitled to fifteen hundred shares in the capital stock of the Cheraw and Chester Railroad Company. This certificate of fifteen hundred shares of the capital stock of the Cheraw and Chester Railroad Company is preferred stock issued by virtue of the act of the General Assembly of the State of South Carolina, approved March 14th, 1874. Witness the hands of the president and treasurer with the corporate seal."

From this peremptory mandamus the respondents to petition below have appealed on the following grounds:

1. Because the cause was heard and the judgment rendered at chambers.

2. Because there was no proof of any previous demand upon respondents for a certificate or certificates of fifteen hundred shares of the capital stock, or preferred stock, or preferred capital stock of said railroad company, but it was proved on the contrary that no such demand had ever been made.

3. Because the relators are not entitled to fifteen hundred shares of capital stock, or preferred stock, or preferred capital stock of the Cheraw and Chester Railroad Company.

4. Because the alternative writ of mandamus does not state sufficient facts upon which to base relators' claim to the relief demanded, nor does it set forth the particulars in which they have been wronged.

5. Because the peremptory writ of mandamus does not conform to the alternative.

6. Because the peremptory writ requires the respondents to execute and deliver a certificate in a particular form therein set forth, contrary to law.

7. Because respondents had already tendered to the relators, as county commissioners as aforesaid, a certificate for $75,000 of preferred stock of said railroad company in conformity with law.

The prominent questions involved in this appeal are, whether the respondents, under the facts and law, are entitled to a certifi-

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*cate from appellants representing that they have shares in the capital stock of appellants' company? And, if so, whether the certificate tendered by appellants, or the one ordered by the court, is the proper certificate? This question must be determined upon the construction which shall be given to the act of the legislature above referred to, under which the county of Chester has become connected with this railroad.

The words in that act to be interpreted, and upon which the question depends, are "preferred stock." What was meant by these words is the question. The act authorized the counties to subscribe for "preferred stock" and the county commissioners to receive cer-

tificates of "preferred stock" for such subscription. Did the legislature intend by this that the county should have shares in the capital stock of the company, or that it should become simply a preferred creditor, or occupy some other relation not well defined?

The first rule in ascertaining the intent of an instrument, whether it be an act or any other paper, is to go to the meaning of the words. What then is the meaning of the term "stock"? Stock in its general acceptation, when applied to business, according to lexicographers, means money invested in business. Capital stock and capital are synonymous terms, hence capital stock. In this general sense it is money invested in business operations, whether that business be conducted by a single individual, a partnership, a corporation, or government; and it makes no difference how the money is obtained, whether by labor, by borrowing, or otherwise. If the money is borrowed it is represented in the hands of the lender by bonds, notes or other papers, with the government by governmental securities, sometimes called stocks. But in such cases the lender is not a stockholder in the business. So far as the party himself is concerned, if the money borrowed or otherwise obtained is invested in his business, it is his capital or stock in trade. This is the general meaning of the term.

But when it is used in connection with a chartered or joint stock company, made up of individuals, it has a somewhat more limited signification. It means then the money advanced by the corporators or members as

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the capital, which is usually, for con*venience, divided into equal amounts called shares, for which each member is entitled to a certificate, showing the number of shares which he has in the company; or, in other words, the amount of money he has furnished to the common stock; which certificate is the evidence of his being a stockholder. Field Corp. § 123.

The word "stock" in connection with a corporation composed of numerous corporators united in one organism by charter, seems to have this technical meaning, in the limited form above given; and although a corporation as well as natural individuals engaged in business may borrow money, and indeed are often compelled to do so, yet the money thus borrowed is not understood to be stock, except in the general acceptation above given. The corporators are not entitled to distinct shares in such money, nor are the bonds or other evidences of indebtedness given by the company in such cases to the lender called the stock, capital or otherwise, of the company.

Our opinion is, that when the term "stock" is used with reference to railroad or other corporations, especially when it is used in connection with the privilege to "subscribe" thereto, it means capital stock. We have not been pointed to a case or an authority where, with such surroundings, it could be or has been legitimately interpreted otherwise. There is no other stock in a business company, the basis of which is money, except capital stock; if so, it has not yet received a name or distinctive feature.

Would a privilege to subscribe to stock in a company chartered and organized for business purposes, ever be interpreted by any one to mean a privilege to lend money to such company in the sense of becoming a creditor? Such a conception would scarcely enter the mind of the most experienced in the ways of such companies if invited to subscribe to the stock. The common mind would never think of such an idea, and the rules of interpretation require that the ordinary and well understood meaning of words should be given to them, unless they are controlled and directed by the context, or by the demand of other words, or other parts of the instrument, when the whole is construed together. If Chester county is not a stockholder or shareholder, what relation does it occupy to

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the company? If it be *that of a creditor, where is the evidence of the debt, and when is the debt to be paid? There is nothing promised except the interest, and that is contingent. If the county is a stockholder, what other stock has the company but capital stock?

Next, what does the word "preferred" mean? This word is relative; it refers to something else, and it means that the thing to which it is attached, whatever that may be, has some advantage over another thing of the same character, which but for this advantage would be like the other. If, then, the term "stock," when employed in connection with railroad or other chartered companies, means money invested in the business of the company, represented by certificates of shares, known as capital, or capital stock, and there is no other known stock belonging to such companies, having a distinct and separate characteristic from capital stock, what effect can the word "preferred" have when attached to it, except to indicate that in that case it is to have some advantage which it would not have otherwise? In other words, in such case can it be anything else than preferred capital stock, or a preferred interest in the money paid in by stockholders, divided into shares and represented by certificates showing the shares of each holder? The word "preferred" used in the act intended certainly to give the counties some advantage over others holding a similar interest, and occupying (without that word) the same position to the company as the counties, and who, but for the county being preferred, would stand with them on the same plane.

Now, have the counties any preference over creditors? The only preference provided for, is the payment of seven per cent. It

does not appear that other creditors are entitled to less; the county cannot therefore be a creditor. The act then must have intended to put the counties on the same plane with the other stockholders, with the advantage (over the others) of being preferred in the particular mentioned.

We think that when the legislature allowed the counties to "subscribe for preferred stock" in this company, it intended that they might subscribe to the capital stock thereof, their stock to be preferred over the common stock by being entitled to seven per cent. interest out of the dividends in advance of the others.

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*Now, as to the certificate which should be issued to the county commissioners. Having held that the words "preferred stock" in the act, accompanied with the word "subscribe," indicated the capital stock, the same words employed in the certificate would mean the same thing there; and if the railroad authorities in the certificate tendered had followed the language of the act strictly, without additional expressions throwing doubt upon their understanding, or rather indicating that they did not intend the county to be regarded as shareholders in the capital stock of the company, then the certificate would have been a compliance with the act and in strict performance of the duty imposed upon them, and in such case they would have been exempt from this writ. But they added to the words of the act the following: "Prior and in preference to any dividend upon the capital stock of the company." This was drawing a distinction not only as to the preference, but as to the essential character of the stock. This was in effect denying that the county was a shareholder in the capital stock, and impliedly asserting that it held some other position. Now, it is not for this court to speculate as to what underlies this controversy, but whatever may be behind it, the parties in conflict, either present or prospective, have a right to place themselves in proper position—the position to which the law entitles them.

We think the legislature means that the counties subscribing should have a certificate showing that they were stockholders in the capital stock of the railroad company; that the certificate tendered by the company as at present couched fails to show this—in fact it implies otherwise. We think further that the certificate ordered by Judge Mackey expresses the idea plainly and fully as to this right, and, therefore, that his order should be affirmed.

The cases referred to by the counsel of appellant in which the terms "preferred stock" are concerned, have been examined and considered. We have found nothing in any of these cases antagonistic to the position taken above. It seems to be admitted in all the cases that the holders of preferred stock are shareholders or stockholders in the stock of the company. The question which seems to have been discussed in many of the cases

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*was, whether the company had the power to create preferred stock. In others, what were the rights of the holders of such preferred stock as to the interest or dividend allowed on such stock. And in some of them, what control such stock had in the management of the company. In no case was it denied that they were stockholders, or claimed that they were simply creditors.

Most of the cases relied upon by appellant will be found reviewed somewhat in Green Br. U. V. 164 and notes. See the cases there of St. John v. The Erie R. R. Co., 22 Wall. 136 [22 L. Ed. 743]; Williston v. Mich. Southern & Ind. R. R. Co., 13 Allen 400; Hazlehurst v. Savannah G. & N. A. R. R. Co., 43 Ga. 13; Rutland & Burlington R. R. Co. v. Thrall, 35 Verm. 536; Hoyt v. Quicksilver Mining Co., 17 Hun 172; Kent v. Quicksilver Mining Co., 12 Hun 53; Bailey v. R. R. Co., 17 Wall. 99 [21 L. Ed. 611]; Taft v. R. R. Co., 8 R. I. 311. Some of these were the cases cited for appellant. They involved almost entirely questions of the character above stated. In the discussion of these questions the "preferred stock" is constantly referred to as represented by shares, and in no case are the holders of such preferred stock regarded as creditors simply. Such stock has often been resorted to, say these cases, to raise money, when the corporation has become crippled, and disaster and failure seemed near at hand; and with the view to raise the money, this stock has been allowed some advantage, some preference over the common stock.

"The issue of preferred stock," says Mr. Pierce, "is a mode by which a corporation obtains funds for its enterprise without borrowing money or contracting a debt. Its holders are a privileged class who are entitled to dividends of a certain per cent., payable out of the net earnings, in priority to any dividends upon ordinary stock." Pierce Rail. L. 124.

We come next to the exceptions to the mode of procedure, &c., in this case. The first raises the question of the power of the judge to hear application for mandamus at chambers. This power is expressly conferred on the judges of the Court of Common Pleas by statute. Gen. Stat. 547.

The next raises the question of demand. It seems that demand was twice made on the officers of the company for the certificate.

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*It is true the demand did not specify the precise character of the certificate which the commissioners claimed to have issued, but it was a demand for certificates of "preferred stock," and we think was sufficiently definite to warrant this proceeding, upon failure to respond on the part of the company.

The appellants further except: "Because the peremptory writ of mandamus does not conform to the terms of the alternative writ." The alternative writ in mandamus, is required to sustain the same relation to such proceedings as a declaration does to the ordinary common law action. High Extr. Rem. §§ 449, 530. In it is found the relator's cause of action and the relief which he seeks. It combines the double function of process and pleading. It serves to bring the respondent into court as well as to apprise him definitely of the ground of action against him. The peremptory writ is the final process or judgment, and it must conform to the alternative; otherwise it is defective. In the amended alternative writ in this case, the relator claimed a certificate of fifteen hundred shares of preferred stock under the act March 14th, 1874. The peremptory writ substantially conforms to this claim, and the certificate prescribed by the judge is, in substance, in accordance with the mandate of the writ.

It is the judgment of this court, that the order of the judge below be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 533

(Case No. 1159.)

STATE OF SOUTH CAROLINA v. CORBIN & STONE.

(November Term, 1881.)

[1. *Attorney General* ⇐7.]

Under a statute which authorized the attorney-general "to file and prosecute informations or other process against persons who intrude upon the lands, rights or property of the State," he had authority to institute an action to recover moneys of the State received by attorneys representing a former attorney-general in a previous action brought by such former attorney-general to require a corporation to pay for phosphatic rocks taken from lands belonging to the State.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. §§ 8–10; Dec. Dig. ⇐7.]

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[2. *Attorney General,* ⇐7.]

*This action was also authorized under Chapter XVI., § 35, of the General Statutes, which requires the attorney-general "to defend the rights of the State in all cases wherein the rights of the State may be involved."

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. §§ 8–10; Dec. Dig. ⇐7.]

[3. *Attorney General* ⇐7.]

It having been twice reported to the General Assembly by two successive attorney-generals that this action had been instituted and was pending, and no disapproval having been expressed by that body, it amounted to a confirmation by the General Assembly of the action taken.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 10; Dec. Dig. ⇐7.]

[4. *States* ⇐76.]

There is no statute that authorizes the comptroller-general to settle with attorneys representing the State for moneys of the State in their hands by allowing them to retain a part in payment of fees for services rendered by them in recovering such moneys.

[Ed. Note.—For other cases, see States, Cent. Dig. § 77; Dec. Dig. ⇐76.]

[5. *States* ⇐130.]

Such a settlement would be in violation of Article II., § 22, of the constitution, which provides that "no money shall be drawn from the treasury but in pursuance of an appropriation made by law."

[Ed. Note.—For other cases, see States, Cent. Dig. § 128; Dec. Dig. ⇐130.]

[6. *Trial* ⇐136.]

In this action the Circuit judge construed the order of the court in a former cause allowing attorneys a certain per centum of the fund collected, and submitted it to the jury to say what was the amount of the fund then collected. *Held*, that in this there was no error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323–327; Dec. Dig. ⇐136.]

[7. *States* ⇐64.]

An order of a Circuit judge allowing attorneys a certain per centum of moneys recovered for the State as a fee for services rendered in the cause, could amount to no more than an audit of the proper fee, as the moneys of the State can be paid out only in pursuance of an appropriation made by law.

[Ed. Note.—For other cases, see States, Cent. Dig. § 66; Dec. Dig. ⇐64.]

[8. *States* ⇐199.]

An individual has no right to sue the State directly, nor can he interpose a claim against the State as a counter-claim, discount, or set-off in action brought against him by the State.

[Ed. Note.—Cited in Mendelsohn v. Banov & Volaski, 57 S. C. 150, 35 S. E. 499.

For other cases, see States, Cent. Dig. § 189; Dec. Dig. ⇐199.]

[9. *Pleading* ⇐211.]

To a counter-claim in such case, an oral demurrer interposed at the trial was properly sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 481; Dec. Dig. ⇐211.]

[10. *Courts* ⇐305.]

The United States Circuit Courts have no jurisdiction of a controversy between a State and a citizen of another State. It was not error, therefore, in the State court in such case, to refuse an order removing the cause to the United States Circuit Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 844; Dec. Dig. ⇐305.]

[11. *New Trial* ⇐41.]

Irrelevant and immaterial remarks of the Circuit judge to the jury on the facts, furnish no ground for a new trial.

[Ed. Note.—Cited in Moore v. Columbia, etc., R. Co., 38 S. C. 31, 16 S. E. 781; State v. Ezzard, 40 S. C. 323, 18 S. E. 1025; Norris v. Clinkscales, 47 S. C. 519, 25 S. E. 797.

For other cases, see New Trial, Cent. Dig. §§ 67–71; Dec. Dig. ⇐41.]

Before Hudson, J., Richland, July, 1880.

This was an action by the State of South Carolina against D. T. Corbin and William Stone, partners in the practice of law. The opinion fully states the case.

Mr. W. E. Earle, for appellant.

Messrs. Youmans, attorney-general, and C. R. Miles, contra.

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*March 7th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. In this case, the State brought action against the defendants for certain money collected by them as attorneys, to wit: for $28,000, less $3,700 allowed them in the complaint as a counsel fee. The defendants, appellants, interposed objection to the action on the ground that it had been instituted by authority of the comptroller-general, and they denied the right of the comptroller-general to prosecute such action. This objection was overruled by the presiding judge. They then claimed that the money sued for had been collected by them in a certain proceeding against the "Oak Point Mines," in which they represented the State; that the Circuit Court had allowed them sixty-two and a half per cent. upon this amount, and that they were entitled to retain this much at least. The court left it to the jury to determine whether the whole amount in the hands of defendants had been recovered in that suit, or only a portion, to which the order of the Circuit Court referred.

For a further defense, they relied on an alleged settlement made with T. C. Dunn, the then comptroller-general, in which this matter had been adjudicated, and the balance due, to wit, $206.06, had been turned over to the State treasurer. They also set up various counter-claims and set-offs for services rendered the State as attorneys. These, on motion, without previous notice, were struck out, upon the ground that they constituted a cross-action and that the State could not be held to answer thereto. Among these counter-claims was one for a sum of money alleged to have been advanced to the treasury, which Treasurer Leaphart had taken credit for in accounting with and paying off the members of the General Assembly of 1876 and '77. The court refused to hear testimony on this subject, it being a counter-claim that could not be set up in the courts against the State.

The defendant Stone claimed to have acquired citizenship in New York before suit brought, and upon a showing that he had instituted proceedings to remove the case to the Circuit Court of the United States, asked judgment of dismissal as to him. This was refused. The jury found a verdict for

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$23,728.44, with *interest from July 8th, 1876. The defendants appealed from the above rulings of the presiding judge, and also from certain refusals to charge upon requests, hereafter to be noticed and considered if necessary.

The important questions in the case are: First. Did the settlement made with Comptroller Dunn bar this action? If not, then, Second. Did the presiding judge err in submitting to the jury as a question of fact, whether the whole amount in defendants' hands had been collected in the suit against the Oak Point Mines Company, and therefore subject to the order of the Circuit Court allowing defendants sixty-two and a half per cent. as a fee, or only a part of it? Third. Did the judge err in holding that the State could not be sued even by a counter-claim?

Before considering these questions, however, it will be proper to dispose of the question which lies at the threshold of the case, as to the authority of the attorney-general to institute this action. In 1873 Attorney-General Melton, under "An act to fix the salary and define the duties of the attorney-general," (Gen. Stat. 109, § 26,) which empowers the attorney-general, when in his judgment the interests of the State require it, to file and prosecute proceedings against persons who intrude upon the lands, rights, or property of the State, * * * commenced proceedings against the South Carolina Phosphate Company, Limited, or the "Oak Point Mines," for intruding upon the rights of the State by mining and removing from North Wimbee creek, a navigable stream, phosphate rock, the property of the State, and prayed judgment for the value of the rock removed, and for perpetual injunction. * * * The appellants, with Attorney-General Melton, represented the State. Under an order of court in that proceeding, this company paid to appellants the sum of $28,000. Of this amount they paid to the treasurer in June, 1877, $206.06, retaining the balance as fees for professional services, viz.: $17,737.34 in that case, and $10,056.60 in another. Attorney-General Conner, at the instance of Comptroller-General Hagood, in August, 1877, brought action to recover this money, thus retained by appellants as counsel fees, claiming that appellants under the order of the court, hereafter to be considered, were entitled to retain only the sum of $3,700.

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*This action, thus commenced by Attorney-General Conner, has been continued by Attorney-General Youmans, and is the one now before the court.

There can be no doubt but that Attorney-General Melton, under Section 5 of the act above referred to (Gen. Stat. 110), had authority, on his own motion, to commence the action against the phosphate company, which resulted in the recovery of the money here sued for. This section is as follows: "He may, when in his judgment the interests of the State require it, file and prosecute information or other process against persons who intrude upon the lands, rights, or property of the State." This gave Attorney-General Melton full authority to act in the original suit, and we think the act is wide enough to vindicate the action of Attorney-General Conner in instituting this suit and Attorney-General Youmans in prosecuting it. This suit may well be regarded as an inci-

dent to the action against the phosphate company. It is intended to gather the fruits of that action, and was rendered necessary as a result thereof.

Besides, if the appellants illegally withhold the State's money claimed at their hands, why is not this a violation of the act above cited? Money is property, and if appellants are illegally in possession of the State's money and refuse to deliver it, why, in contemplation of law, may they not be regarded as having intruded themselves upon the property of the State and thereby made themselves liable under the act above referred to.

But, in addition to this, the attorney-general is especially required to "defend the rights of the State in all cases where its rights are involved." Gen. Stat. 110, § 35. The prosecution of a claim in behalf of the State is defending its rights. In fact, inasmuch as the State is seldom or never a defendant in a cause, the only, or, at least, the general way in which he may be called upon to defend its rights, is by prosecuting its claims as plaintiff. But still, in addition, it appears that Attorney-General Conner reported this action to the General Assembly; the same report was made by Attorney-General Youmans after he took charge of the case. Even then, if legislative authority was required, the failure of the General Assembly to condemn or disapprove, after two formal reports, on the familiar doctrine of principal

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and *agent, would amount to a confirmation. This objection cannot be sustained.

Next, was the comptroller-general authorized to make the settlement relied on by the appellants as accord and satisfaction? If the comptroller had such power, it should be found in the acts creating the office and defining its duties. There are no common law powers attached to this office. On the contrary, the comptroller is a constitutional officer, having only such powers and duties as have been, or may be, provided by law. Const. Art. III. § 23. We have not been cited to any act in which such power is expressly delegated, nor in which such duties are imposed, as would by necessary implication invest him with such power. Nor have we been able to find any act of the kind. We conclude, therefore, that no such act exists.

But, even if one could be found, would it be constitutional? The legislature might authorize the comptroller or any other officer to audit and determine claims against the State, but could it empower such officer to direct payment and satisfaction in the absence of a regular appropriation. Section 12, Article IX, of the constitution, provides in brief and express terms, "That no money shall be drawn from the treasury but in pursuance of an appropriation made by law." This section stands directly in the way of the settlement of Comptroller Dunn, as an accord and satisfaction, even if he was authorized to adjudicate the claim of defendants. The adjudication, even if legal, did not authorize appellants to retain the money in payment of their claim.

No officer of the State is empowered to appropriate the public money in this shorthand way. The General Assembly makes the appropriation, the comptroller draws his warrant, and the treasurer pays. This may seem somewhat formal and technical, especially when the creditor has the money already in his hands. But experience has taught that it is best to be particular in reference to public funds. Some forms must be observed and some checks interposed. These have been required with us, and no power has been given to any officer to dispense with them.

Next. Did the Circuit judge err in submitting to the jury the question whether the order of Judge Maher, allowing appellants sixty-two and a half per cent. on the amount col-

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lected, *covered the entire amount received, or only that part received under the first judgment? The original action against the phosphate company was brought to recover damages on account of phosphate rock dug previous and up to the date of the action, and for perpetual injunction. This action was instituted in 1873. On July 21st, 1875, a decree was filed in this action, giving judgment to plaintiff for $5,984, being the value of rock mined up to the commencement of the action. At the same time it was further ordered that the company be enjoined from continuing their mining operations until they complied with the act of March, 1870, Section 3, 14 Stat. 381. On the same day, a second order was filed directing the referee to ascertain and report the quantity of rock mined by the company pending the litigation, the company having been permitted to mine during the litigation under an arrangement agreed upon. On November 9th, 1875, the referee reported, under this last order, that 22,016 tons had been mined while the suit was pending, in addition to that for which judgment had already been granted. On November 11th, 1875, the court confirmed this report of the referee and ordered the company to pay to plaintiffs' attorneys the sum of $22,016, and also the sum of $5,984 previously adjudged to plaintiffs. In October, nearly a month before this last report in November and its confirmation by the court, the judge, on motion of the appellants, and upon the suggestion of Attorney-General Melton, referred to Asher D. Cohen, Esq., the matter "to determine and report what per cent. of the fund collected in the above entitled cause would be proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein."

It will be observed, that when this order was made, no money had actually been collected, but judgment had been rendered for $5,984, the value of the rock mined up to the commencement of the action, and which

was the result of the suit proper. Mr. Cohen, October 28th, 1875, reported, recommending sixty-two and a half per cent. of the fund collected in the case as a suitable fee. This report was confirmed by Judge Maher, November 4th, 1875, all this being before the decree of November 11th, giving judgment for $22,016 for the mining during litigation, and after the judgment for $5,984, the value of

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the rock mined *up to the beginning of the action. Now, the question before Judge Hudson upon these facts was, did Judge Maher intend to subject both of these amounts to the sixty-two and a half per cent. as appellants' counsel fee, or did he intend to apply this measure to the $5,984 only, which was the product of the suit proper.

In the extract from Judge Hudson's charge found in the exceptions, it does not clearly appear what precise question he submitted to the jury. It is unfortunate that the whole charge has not been furnished. The brief is exceedingly voluminous as to other matters, but it is meagre as to the charge of the judge, and the court has had some difficulty in determining the exact question submitted. It was the province of the court to construe the order of Judge Maher and to submit to the jury such questions of fact as arose thereon, and, as we understood the charge, this is what Judge Hudson did. He construed the order to mean that the counsel fee was to come from the product of the action proper, and he submitted to the jury, as a question of fact, the question, what fund had been collected in that action, stating to them at the same time that the $22,016 was the result, not of the action, but of an intermediate arrangement to prevent suit. We see no error in this. But, even if there was, we do not see that it should affect the result of this case. Admit that it was the purpose of Judge Maher's order to fix the fee at sixty-two and a half per cent. of the whole amount collected ($28,000), could that order, thus interpreted, have been allowed as a defense to this action, brought to recover money in the hands of appellants belonging to the State? We think not. Judge Maher, provided he had jurisdiction of such question, might have settled the amount of the claim due appellants. But would that have authorized Judge Hudson to direct his jury to give appellants credit for that amount in the action before him? This would have been an appropriation of the State's money by the court, when the constitution says that no money can be appropriated except by the General Assembly.

But, did Judge Maher have legal authority to adjudicate appellants' claim against the State? We know of no act or law which gives the courts of the State jurisdiction to

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audit claims of *this kind. The order of Judge Maher amounted to nothing more than an audit. It simply adjudged the value of the services, fixing sixty-two and a half per cent. of the amount "collected in the suit" as proper compensation. It did not order payment, nor could it have done so legally. And for the same reason Judge Hudson was powerless to have this amount credited on the funds in the hands of appellants. If the order of Judge Maher was final and conclusive as to the amount of the fee, the appellants should have paid the money collected by them into the treasury of the State, and have gone before the legislature with this order and had their claim incorporated in the appropriation bill. Under this view of the case, as the order of Judge Maher could in no event have been a good defense to this action, it is immaterial what question Judge Hudson submitted to the jury arising thereon.

Next, did the judge err in holding that the State could not be sued in her own courts, and on that ground in ruling out the counter-claims of appellants? It is hardly necessary to discuss the question as to the right of an individual to sue the State directly. That no such right exists is universally admitted. However righteous, just and meritorious the claim may be, the courts can afford no remedy. The State in her sovereignty will do justice at her own will, and not by the intervention of her courts. The courts are of her own creation, and for her citizens. Treasurers v. Cleary, 3 Rich. 374; State v. Baldwin, 14 S. C. 138.

But it is said that this is a discount or counter-claim, and not a suit. In Treasurers v. Cleary, supra, that question was made, and the court said: "A discount is nothing else than a modified form of suit, in which defendant claims of the plaintiff some right which he might enforce in a suit at law." In the State v. Baldwin, supra, McIver, A. J., for the court, said: "The State cannot be sued in its own courts, nor can the defendant interpose such claim as a discount or set-off, which is nothing but a cross-action, to an action against him by the State." He said further, "one who renders service to the State, for which there is no compensation provided by statute, cannot, as in the case of services rendered to a private person, raise

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an implied assumpsit against *the State, and for such services he has no legal claim which can be enforced by process of law." The discount allowed in the case of the State v. Gaillard, 1 Bay 500, was especially provided for under the amercement acts—and that case has no general application. The cases referred to by appellants' counsel, from the Supreme Court of the United States, in our opinion are inapplicable. They were all, more or less, influenced by the act of Congress, March 3d, 1797, providing for discounts legal and equitable against the United States, under certain circumstances and conditions. True, in some of the cases it is stated that

this act did not create the right to discount, but simply recognized it as pre-existing, and that the act was intended to regulate and control it. But still, in reading the cases we cannot fail to see that the act was relied on as the foundation. Besides, in some of the cases, the claim set up by defendant was for services rendered under contract well defined and the fees fixed by law. In others for a pro rata share of funds in possession of the government, in which the defendants claimed an interest, differentiating these cases from the case now under consideration.

Thus, in the case of United States v. Mann, 2 Brock. Marsh. 10 [Fed. Cas. No. 15,716], the defendant's claim, as deputy marshal, was founded upon services which his office required him to perform under law, the fees being fixed by statute.

In the case of United States v. Wilkins, 6 Wheat. 144 [5 L. Ed. 225], Judge Story said: "We think it a reasonable construction of the act (referring to the act of 1797) that it intended to allow the defendant the full benefit, at the trial, of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and indefinite transaction, which would constitute a legal or equitable set-off of the debt sued for by the United States."

In the case of The Siren, 7 Wall. 154 [19 L. Ed. 129], where Mr. Justice Field lays down the doctrine more broadly in favor of appellants' position than in the other cases, the proceeding was in rem, and the court permitted the claims of individuals to be established against the property libeled, although adverse to the claim of the United States. Justice Field, it is true, placed this right broadly on the ground of set-off, saying that

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"although direct *suit cannot be maintained against the United States, or against their property, yet, when the United States institute suit, they waive their exemption so far as to allow a presentation by the defendant, of set-off, legal and equitable, to the extent of the property demanded."

But we do not see that this declaration was necessary to the case and the judgment rendered. The Siren had been condemned by the court at the instance of the government, and the proceeds having thus been placed in course of judicial administration, it was held that any proper claim prior to that of the government might well be paid out of such proceeds. We do not see that this prevented a case of discount or set-off. In the case from Kentucky—The Sinking Fund Commission v. Northern Bank—the State had sold property to the defendant with a mortgage over it. The court allowed the defendant a reduction out of the purchase-money sufficient to remove the encumbrance. The case in 18 Geo. 662, Powers v. Central Bank, is placed squarely on the right of discount, but Judge Lumpkins seems to have reached his conclusion with hesitation and doubt, and frankly suggested at the conclusion of his opinion that it would be well for the State legislature to pass an act similar to the act of Congress, expressly allowing defendants to discount legal and equitable claims against the State. From a note appended to this case, it would seem that it did not give satisfaction.

But, whatever may have been decided elsewhere, in the face of our own cases of the Treasurers v. Cleary and the State v. Baldwin, we cannot do otherwise than hold that the claim of appellants had no legal status in the court below. It is universally admitted that a State cannot be sued in its courts without its consent. Our courts have decided that a counter-claim is a suit. It is so recognized in this case by the appellants in their motion for judgment on the failure of the State to answer their counter-claim, and cannot be set up.

There can be no doubt, however, that there is an underlying principle of justice, which might permit defendants, under proper regulations, to have their claims against the State, if any, considered and passed upon by

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the same tribunal before which they *may be summoned to answer the State. And, if we might presume to suggest, it may be wise for the General Assembly to enact some remedy in such cases. Until then we must declare the law as it stands. Our province is judicial, not legislative.

The defendant, Stone, sought to remove this case, as to himself, into the Circuit Court of the United States for the District of South Carolina, on the ground that at the commencement of the suit he was a citizen of New York. The petition presented for that purpose and the bond filed were in form correct, but no order was granted by the Circuit Court, Judge Shaw, before whom the motion was made, having died without acting thereon, and the motion was not renewed thereafter. The attorney for Stone, however, filed a copy of the proceedings in the Circuit Court of the United States. Thereafter, in 1880, Attorney-General Youmans moved that court to have the case stricken from its docket, but no decision has been rendered on that motion. Under this state of facts Judge Hudson refused the motion, and ordered the trial to proceed against both dedendants. We think he was right.

We do not see that the United States Circuit Court has anywhere been given jurisdiction in a controversy between a State and a citizen of another State on the ground of the citizenship of the parties. That court has jurisdiction only as has been conferred by the act creating it, and the amendments thereto. We have been pointed to no act conferring such jurisdiction as contended for here. The constitution of the United States has conferred this jurisdiction upon the Su-

preme Court, but nowhere do we find it conferred upon the Circuit Courts. The reason seems to be founded in the dignity of the State. Respublica v. Cobbet, 3 Dall. 467 [1 L. Ed. 683]. In the Railroad Co. v. Mississippi, 12 Otto [102 U. S.] 136 [26 L. Ed. 96], the case was removed to the Circuit Court, but this was on the ground that the controversy involved the construction of an act of Congress. It belonged to that class of cases where jurisdiction is conferred, because "arising under the constitution, or the laws of the United States." It affords no authority for the motion made here. Besides, it does not appear, except in the statements of the petition, that defendant, Stone, was a citizen of New York when this action began.

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*The Circuit Court then not having jurisdiction in a case like this, it was not subject to removal, under the acts of Congress providing for the removal of causes to the United States Circuit Courts. Dillon p. 10 et seq.

We do not think the court below was in error in admitting the oral demurrer interposed by plaintiff to the counter-claims of defendants. This demurrer raised the question of jurisdiction. This question, under Section 171 of the code, like that, "That the complaint does not state facts sufficient to constitute a cause of action is expressly reserved from waiver, although no objection be taken by formal demurrer or answer." The cases referred to by appellants' counsel, in [Evans v. McLucas] 12 S. C. 56 and [Ross v. Linder] Id. 592, do not controvert this proposition. There the objection was such as required a formal demurrer. Neither do the cases of Bank v. Zorn, 14 S. C. 450 [37 Am. Rep. 733], and Cohrs v. Fraser [5 S. C. 351] apply; there the motion was to strike out the answer, not for the want of jurisdiction, but for other causes.

The exceptions involving inadvertent remarks made by the judge must be overruled. These remarks were not strictly upon the facts at issue, and therefore contrary to the inhibition of the constitution. At most they were irrelevant, and as is said in the exceptions, inadvertent. Certainly not so material as to afford ground for a new trial.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 545

(Case No. 1160.)

BRISTOW v. McCALL.

(November Term, 1881.)

[1. *Trusts* ⟸151.]

A testator devised his real estate to A. and B. and their heirs in trust for the use and benefit of both his son E. and daughter D. He continued: "I hereby direct my executors hereinafter named to divide my lands equally between my son E. and daughter D., and permit each to use, possess and enjoy his or her half in severalty during his or her natural life,

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and after *the death of either, that they divide the share of each among his or her children equally." A. and B. were appointed executors of the will. After testator's death, the trustees divided the land between E. and D., and each went into possession of the share allotted to them. Afterwards E.'s interest in this land was levied upon under execution and sold. *Held*, that the purchaser took no title.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. ⟸151.]

[2. *Trusts* ⟸131.]

The trust was not executed for the life of E. by the Statute of Uses, but the legal title remained in the trustees to enable them to perform the duties imposed upon them.

[Ed. Note.—Cited in Huckabee v. Newton, 23 S. C. 295; Bowen v. Humphreys, 24 S. C. 455; Wieters v. Timmons, 25 S. C. 493, 1 S. E. 1; Ayer v. Ritter, 29 S. C. 137, 7 S. E. 53; Snelling v. Lamar, 32 S. C. 76, 10 S. E. 825, 17 Am. St. Rep. 835; Carrigan v. Drake, 36 S. C. 365, 15 S. E. 339; Holmes v. Pickett, 51 S. C. 280, 29 S. E. 82; Pope v. Patterson, 78 S. C. 343, 58 S. E. 945; Breeden v. Moore, 82 S. C. 539, 64 S. E. 604.

For other cases, see Trusts, Cent. Dig. §§ 175, 175½; Dec. Dig. ⟸131.]

[3. *Execution* ⟸41.]

Nor was the interest of E. in this land such an interest as was subject to levy and sale under the tenth section of the Statute of Frauds (2 Stat. 527, Gen. Stat. 472 § 2,) the trust not being a pure and simple trust for the benefit of the debtor alone.

[Ed. Note.—Cited in Smith v. Smith, 24 S. C. 314; State of South Carolina v. Evans, 33 S. C. 190, 11 S. E. 697.

For other cases, see Execution, Cent. Dig. § 91; Dec. Dig. ⟸41.]

Before Wallace, J., Marlborough, September, 1881.

Action by Alexander E. Bristow against C. S. McCall. The opinion fully states the case.

Messrs. Townsend & Livingston, for appellant.

Messrs. James Conner and H. H. Newton, contra.

March 7th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. The plaintiff, appellant, seeks to recover possession of a tract of land located in Marlborough county, of which the defendant is in possession.

It was admitted that one John H. David formerly owned the land, and the plaintiff attempted to connect himself with the title of David. For this purpose he first introduced the will of John H. David, deceased, referring to the tenth clause thereof as bearing upon the land in dispute. In this clause the testator gave and devised to A. H. Douglass and A. N. Bristow and their heirs, all of his real estate, in trust, nevertheless, for the use and benefit of both his son, Evander David,

and daughter Elizabeth, wife of William J. Daniels, with directions to his executors to divide the lands equally between his son Evander, and daughter Elizabeth, and to permit each to use, possess and enjoy his or her half in severalty during his or her natural

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life, and after the *death of either that they divide the share of each among his or her children equally, appointing the said A. H. Douglass and A. N. Bristow, executors. The division of the land was made by the executors and each party put in possession of his and her share.

Numerous judgments and executions against Evander were offered in evidence, under which the land in dispute was sold, and a deed from the sheriff to the plaintiff, dated December 7th, 1870, regularly recorded, was properly proved. Under this deed the plaintiff went into possession and so continued until some two years ago, when the defendant went into possession, but it does not appear how the defendant got possession. The executors, A. H. Douglass and A. N. Bristow, are both dead.

With the proof of the above facts the plaintiff closed, whereupon the defendant moved for a non-suit, on the ground that E. David had no interest in the land in dispute subject to levy and sale under and by virtue of the aforesaid judgments and executions. The presiding judge granted the non-suit.

Now, the only question before this court on appeal of plaintiff is this: Did Evander David have such an interest in the land as was subject to levy and sale by the sheriff? If so, there was error in the judgment of non-suit: otherwise, the judgment must be affirmed.

Two classes of interests in lands are subject to levy and sale for debt: First, legal interests, and, second, certain trust estates, such as are contemplated by Section 10 of Statute of Frauds. Did Evander David have an interest in this land belonging to either of these classes? This interest, whatever it was, came through the will of his father. It will not be contended that he took a legal interest by the express terms of this will, because the fee in the land is conveyed expressly by the will to Douglass and Bristow, as will be seen at once on reading it. It is devised to these parties and their heirs. This is a direct conveyance of the fee.

This is admitted by appellant, but it is contended that the legal title passed from these parties to Evander and the remaindermen by the Statute of Uses, and that at the time of the sale by the sheriff, by operation of this

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statute, Evander was legally seized of *a life-estate, which, by the sale, went to the plaintiff as purchaser. The Statute of Uses never executes the use while there is anything for the trustee to do, necessary to the accomplishment of the trust created by the deed. It applies in cases only where there is nothing to be done by the trustee, as where an estate is given to one and his heirs simply in trust for another. In such case the title passes through the trustee directly to the cestui que trust, the latter becoming the legal owner by virtue of this transmission, caused by the statute.

But, where the trustee is charged with the performance of some duty in connection with the property, which cannot be performed except by the authority of the legal title vested in him, the statute has no application, because, if it did, it would defeat the very purpose intended by the execution of the deed. The statute affords a statutory mode of conveyance, where a conveyance is intended, but it does not destroy a trust interest, when such interest was intended to be created as evidenced by imposing a duty upon the trustee. In this case, Douglass and Bristow, trustees named in the will, were charged with duties. They were, in the first instance, to divide the land between Evander and his sister, then, to permit each of them to use, possess and enjoy his or her portion in severalty for life, and after the death of either or both, to divide the share of each among his or her children equally.

Now, if immediately upon the death of the testator, the statute stepped in, and ousting Douglass and Bristow, transferred the legal title to Evander and his sister for life, and to their children in remainder, by what authority could they have attempted to discharge the important duties which the testator solemnly enforced upon them as his chosen friends? This is not a case for the statute, and Evander not having a legal interest the sheriff had no power to sell the land on that ground.

Did he have such trust interest as by Section 10 of Statute of Frauds is subject to levy and sale? The trust interest referred to, it is true, is not very distinctly defined in the act, nor is it clearly pointed out in the decisions. But it is conceded that it must be a clear and simple trust and for the benefit of the debtor alone, the object of the statute

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being merely to remove the *technical objection arising from the interest in the land being legally vested in another person, where it is so vested for the benefit of the debtor. Doe v. Greenhill, 4 Barn. & Ald. 684; White v. Kavanagh, 8 Rich. 395.

A simple trust is said by the authorities to be (Lew. Trusts 21; Bouv. Inst. § 1900;) "a trust corresponding with the ancient use; and it exists where property is simply vested in one person for the use of another, and the nature of the trust not being qualified by the letter is left to the construction of the law." A trust of this kind, for the benefit of the debtor alone, and not jointly with others,

would fall under this section, but if others were interested, that fact would exclude the application of the statute. Rice v. Burnett, Spears Eq. 585 [42 Am. Dec. 336]. The trust must be a pure and unmixed one in favor of the debtor alone, because the effect of a sale under this section is to divest the estates both of the trustee and the cestui que trust, and to transfer them to the purchaser, which would be prejudicial to the interest of others, where others are joined in the trust. Harrison v. Battle, 1 Dev. Eq. 541.

Now, did the will of David create a pure and unmixed trust, or, in the language of the cases, a simple trust in this land in favor of Evander alone, such an interest as that a sale thereof by the sheriff would not interfere with any duty imposed upon the trustee, or the interests of other cestuis que trust? The will conveyed the fee-simple of the entire land of the testator to Douglass and Bristow, for the use and benefit of Evander, and Elizabeth, a married woman, with direction to divide the land equally, and to permit each of them to use, possess and enjoy one half in severalty during life, and after the death of either, to divide his or her share equally among his or her children.

We do not think that there was a simple trust conveyed here in any distinct portion of this land to Evander alone, in the sense contemplated by the tenth section of the Statute of Frauds, as construed by the decisions. Before the division, there was a joint life interest in Evander and Elizabeth, and after the division, the interest of each in the portions allotted to each was accompanied with an interest in behalf of their children by way of remainder.

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*The interests of the life-tenants were encumbered with unexecuted trusts in favor of the children, which made it necessary that the legal title should remain in the trustees. The statute does not apply where the interests of others are mixed up with the debtor's title. Rice v. Burnett, Spears Eq. 584 [42 Am. Dec. 336]; Doe v. Greenhill, 4 Barn. & Ald. 684. On the questions discussed, in addition to the cases cited, see also the cases of Ioor v. Hodges, Spears Eq. 596; Bogart v. Perry, 1 Johns. Ch. 52; also, 17 Johns. 352; Lynch v. Utica Ins. Co., 18 Wend. 250.

We think there was no error below in granting the non-suit. The only error assigned in the appeal, being that his Honor held that the land described in the complaint was not subject to levy and sale under an execution against the debtor, being disposed of, it is only necessary to say:

That it is the judgment of this court that the judgment of the Circuit Court be affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

16 S. C. 550

(Case No. 1161.)

KIBLER v. McILWAIN.

(November Term, 1881.)

[1. *Bankruptcy* ⇐213.]

After the sale of a tract of land under the order of the Court of Equity for the foreclosure of a mortgage, the mortgagor was adjudged a bankrupt, and subsequently the sale was confirmed, the assignee in bankruptcy taking no action in the case. *Held*, that the jurisdiction of the State court was not affected by the adjudication of bankruptcy; and that the order of confirmation concluded the assignee as to all matters stated in the report on sales and confirmed by the court, without exception, unless fraud was involved in the proceedings.

[Ed. Note.—Cited in Corbett v. Fogle, 72 S. C. 321, 51 S. E. 884.

For other cases, see Bankruptcy, Cent. Dig. § 339; Dec. Dig. ⇐213.]

[2. *Limitation of Actions* ⇐100.]

When facts constituting a fraud become known, actually and constructively, to the party injuriously affected, the Statute of Limitations then begins to run against the right to have the fraud adjudicated.

[Ed. Note.—Cited in Smith v. Linder, 77 S. C. 541, 58 S. E. 610.

For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480–493; Dec. Dig. ⇐100.]

[3. *Appeal and Error* ⇐1009.]

A finding of fact by the Circuit judge in an equity cause from evidence taken before him, overruled, because clearly inconsistent with the undisputed testimony of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⇐1009.]

[4. *Limitation of Actions* ⇐100.]

A mortgagor knew in 1867 that at a sale of his property under a decree of foreclosure, a part thereof was reserved for his homestead

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in obedience to a *military order, but the report on sales made and confirmed in 1868, and the deed then executed and recorded, covered the entire tract, and these matters were asserted by the mortgagor as a defense to an action brought against him by the purchaser in 1869, for the recovery of this homestead. *Held*, that a petition filed in 1878 in the original foreclosure suit for leave to have the sale vacated for fraud, was barred by the Statute of Limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480–493; Dec. Dig. ⇐100.]

[5. *Limitation of Actions* ⇐130.]

Nor would the currency of the statute be arrested by action instituted in 1872 to set aside the sale for fraud, and dismissed in 1878 because that an original action for such purpose was improper.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 539, 545, 553–566; Dec. Dig. ⇐130.]

[6. *Witnesses* ⇐269.]

In the cross-examination of a witness in this State, counsel may ask him questions bearing upon the whole case, so as to bring out matters of independent defense, and are not

confined to the matters testified to in the examination in chief.

[Ed. Note.—Cited in Dillard v. Samuels, 25 S. C. 322; Dial v. Valley Mut. Life Ass'n of Virginia, 29 S. C. 578, 8 S. E. 27; Owens v. Gentry, 30 S. C. 497, 9 S. E. 525; State v. Howard, 35 S. C. 201, 14 S. E. 481; State v. McGee, 55 S. C. 249, 33 S. E. 353, 74 Am. St. Rep. 741.

For other cases, see Witnesses, Cent. Dig. § 949; Dec. Dig. ⟸269.]

[7. *Limitation of Actions* ⟸37.]

[A proceeding to set aside a deed or judgment on the ground of fraud must be commenced within four or six years (according as the right of action accrued before or after the adoption of the Code of Procedure) from the time when the facts constituting the fraud are discovered by the aggrieved party.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 184; Dec. Dig. ⟸37; Cancellation of Instruments, Cent. Dig. § 54.]

Before Mackey, J., Lancaster, February, 1880.

The case is sufficiently stated in the opinion.

Messrs. Patterson & Gaston, for appellants.

Mr. Ira B. Jones read argument of W. L. De Pass, deceased, contra.

March 8th, 1882. The opinion of the court was delivered by

McIVER, A. J. On May 10th, 1867, the plaintiff filed a bill against the defendant, McIlwain, for a foreclosure of a mortgage on real estate. To this bill, amongst other defenses, McIlwain set up a claim of homestead, which was disallowed, and a judgment of foreclosure was rendered, directing a sale of the whole of the land mortgaged. Under this judgment the whole of the land was advertised for sale on December 2d, 1867, and on that day a sale was made, but exactly what was sold, whether all of the land subject to the defendant's claim of homestead under military orders No. 10, issuing from the headquarters of the department then embracing this State, or whether the homestead was reserved, was the subject of much conflict of testimony. The commissioner in equity, however, who was directed to make the sale, executed a deed on the day of sale to the plaintiff, Kibler, who was the highest and

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last bidder at the sale, for the *whole of the land, and this deed was duly recorded on May 29th, 1868

On June 19th, 1868, the commissioner in equity made his report of the sale to the court, in which he stated that, in conformity with the order of sale, "he exposed for sale the lands described in the pleadings" on the terms prescribed: that Kibler bid off the same, and having complied with the terms of sale, he, as commissioner, had executed a deed to said Kibler "for the lands described in the pleadings." To this report no exceptions appear to have been taken, and accordingly, on June 22d, 1868, the court made an order confirming the report of the sale, "and making it the decree of the court." It appears, however, that in the meantime, to wit: on May 7th, 1868, McIlwain had been adjudged a bankrupt by the District Court of the United States, and that on August 22d, 1868, D. A. Williams became his assignee.

On January 18th, 1869, Kibler commenced an action against one Bridges, who had become the tenant of the assignee Williams, to recover possession of the dwelling house, situate on the land covered by his deed from the commissioner in equity, and about twenty acres adjoining, which was claimed as McIlwain's homestead. The defense to this action rested upon the allegation that under the military orders aforesaid, McIlwain was entitled to a homestead, and that the same was reserved and not sold by the commissioner in equity. The defendant in that action having obtained a judgment in his favor, from which there was an appeal, the Supreme Court ordered a new trial upon the ground that the military orders could confer no right of homestead as against a mortgage. Upon a second trial the defendant again had a judgment, and the Supreme Court again ordered a new trial upon the same ground. (See the case as reported in [Kibler v. Bridges] 3 S. C. 44, and again in [Kibler v. Bridges] 5 S. C. 335.) That case is understood to be still pending in the Circuit Court for Lancaster county.

It appears also that D. A. Williams, as assignee of McIlwain, commenced an action on November 14th, 1872, against Kibler to set aside the sale of the land by the commissioner, substantially upon the ground of fraud.

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This case was heard in May, 1875, *by the Court of Common Pleas for Lancaster county, and a judgment rendered setting aside said sale. From this judgment Kibler appealed, and the same was reversed by the Supreme Court in March, 1878, ([Williams v. Kibler] 10 S. C. 414,) upon the ground: "That if the sale was improperly reported and confirmed, the plaintiff (in that action), as the assignee of McIlwain, bound by the order of confirmation, should have intervened in the foreclosure suit and sought to set that order aside:" it being made to appear to the court that the foreclosure suit was then pending.

On June 19th, 1878, D. A. Williams "resigned his position as assignee of J. D. McIlwain," and the defendant, J. W. De Pass, was appointed in his place. On June 24th, 1878, DePass, as assignee, filed his petition asking that the original foreclosure suit, which had been dropped from the docket, be redocketed, that he, as assignee, might be allowed to intervene, and praying, in substance, that the sale made by the commissioner in equity, together with his deed to Kibler, might be set aside upon the ground

of fraud. To this petition the plaintiff herein filed an answer, in which, amongst other things, he relied upon the Statute of Limitations. The Circuit judge overruled the plea of the Statute of Limitations and rendered judgment in accordance with the prayer of the petition, and from this judgment the plaintiff appeals on numerous grounds.

We do not deem it necessary to consider separately the several grounds of appeal as they are set out in the "case," but will simply consider such questions as are, in our judgment, conclusive of the case.

There can be no doubt that when the original action for foreclosure was commenced the Court of Common Pleas had full jurisdiction of the subject-matter and of the parties, and the fact that, pending the action, McIlwain was adjudged a bankrupt could not divest such jurisdiction. Hence, the judgment of foreclosure and sale and all subsequent proceedings therein had the same force and effect as if there had been no adjudication of bankruptcy. It is true the assignee might have come in and defended the action, or upon a proper showing might have had any orders improperly granted set aside, but until he did so he was as much bound by

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the proceedings as the bankrupt would *have been if there had been no adjudication of bankruptcy. Eyster v. Gaff, 91 U. S. 521 [23 L. Ed. 403]; Daniels v. Moses, 12 S. C. 138.

This being the case the question of fact, as to whether the whole or only a portion of the land was sold by the commissioner in equity, cannot arise now, for it has been adjudged and conclusively settled as to both McIlwain and his assignee, unless such adjudication is assailed upon the ground of fraud. The order required a sale of the whole of the land, and it was so advertised. When, therefore, the commissioner reported that he had sold all the land described in the pleadings; that the purchaser had complied with the terms of sale, and that he had executed a deed for the same, and this report was not excepted to, but, on the contrary, was confirmed and made the decree of the court, the matter was res adjudicata both as to McIlwain and his assignee.

This, however, would not preclude either McIlwain or his assignee from assailing the proceedings upon the ground of fraud, and it therefore becomes necessary for us to consider the case in that aspect. But as we are satisfied that this proceeding on the part of DePass, as assignee, is barred by the Statute of Limitations, it will be unnecessary for us to consider the evidence relied upon as establishing the charge of fraud.

There can be no doubt that a proceeding to set aside a deed or judgment upon the ground of fraud, where the party seeking so to do is in a condition to institute an action for that purpose, must be commenced within four or six years, according as the right of action accrued before or after the adoption of the Code of Procedure, from the time when the facts constituting the fraud are discovered by the aggrieved party. The inquiry then is whether this proceeding was commenced within the time allowed. Although the Circuit judge has found as matter of fact that neither McIlwain nor his assignee had any knowledge of the alleged fraud until some time during the month of July, 1872, we are utterly at a loss to conceive how such a finding can be supported in the face of the undisputed facts appearing in the record.

The alleged fraud consisted in what occurred at the sale, what was stated (untruthfully, as defendants assert,) in the report of the sale and in the confirmation thereof, and

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all these facts were *certainly known to McIlwain at the time, or he had such knowledge as would, by the exercise of the most ordinary diligence, have led to the full discovery of them. He was undoubtedly present at the sale and knew what occurred there. He was a party to the foreclosure suit and knew, or ought to have known, what was done therein. Indeed it would be a great tax upon the credulity of the most credulous person to suppose him ignorant of what disposition was made of his claim to have the homestead reserved from the sale of the balance of the land. The deed conveying the whole of the land, without any reservation of the homestead, was spread upon the records as far back as May 29th, 1868. Kibler commenced an action to recover possession of the very land now in controversy on January 18th, 1869, to which the defense was the very same facts now relied upon to set aside the sale.

In view of all these undisputed facts it is impossible to doubt that McIlwain knew then all that he knew when the present proceeding was commenced, and the statute having commenced to run against him would continue to run against his assignee. But, in addition to this, the first assignee, Williams, in his testimony, admits that, as early as January, 1869, he knew the facts which are now alleged to constitute the fraud, and he must be regarded as having notice of the deed and the terms of it from the time when it was put upon record, and he, therefore, would have been barred in January, 1873, and, of course, his successor, the present assignee, is in no better condition, in this respect, than his predecessor.

We are unable to see how the abortive proceeding instituted by Williams, as assignee, in November, 1872, could affect the currency of the statute. That action was dismissed, and is not and cannot be in any way connected with the present proceeding. It has been adjudged to have been erroneously brought, and can have no effect upon the operation of the statute. It is clear, therefore, that this proceeding comes too late, and that the

Circuit judge erred in not sustaining the plaintiff's plea of the Statute of Limitations.

Although this is conclusive of the case, yet there is one question raised by the exceptions which, from its general importance,

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*had better be determined with a view to settle the practice as to the mode of conducting the cross-examination of a witness, about which, it is said, some difference of opinion exists. That question is whether a party has a right to interrogate a witness, on his cross-examination, as to facts not alluded to in the examination in chief. In this case the Circuit judge followed the rule which Greenleaf (Vol. 1, § 445,) says has been established by the Supreme Court of the United States whereby "a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination, and that if he wishes to examine him as to other matters he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause."

This question, strange to say, does not seem to have been distinctly decided in this State, though in the case of Clinton v. McKenzie, 5 Strobh. 41, it seems to be assumed that the rule is different here from that established by the Supreme Court of the United States, and that here a witness may, on his cross-examination, be interrogated as to any fact pertinent to the case, "whether the examination be directed to qualify, neutralize or discredit the testimony which the witness may have given on his examination in chief, or to lay the foundation of his defense in any new matter in the knowledge of the witness;" and this, so far as we have been able to learn, is the rule which has very generally prevailed in this State. It is conceded by Greenleaf, in the section above cited, that this is the rule in England, and there counsel, in the cross-examination of a witness, are permitted to ask questions bearing upon the whole case, so as to bring out matters of independent defense, and are not confined to the matters testified to in the examination in chief. 1 Whart. Ev. § 529; Morgan v. Brydges, 2 Stark. 314 (3 Eng. Com. L. 361). In Massachusetts the English rule seems to have been adopted. Moody v. Rowell, 17 Pick. 499; Commonwealth v. Morgan, 107 Mass. 205. So also, in Alabama, Kelly v. Brook, 25 Ala. 523, and Fralick v. Presley, 29 Ala. 461. In New York, Jackson v. Varick, 7 Cow. 238, and in Missouri, State v. Sayers, 58 Mo. 585.

We think, also, that this rule has the sup-

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port of reason as well *as of authority. The oath administered to a witness requires him to speak the truth, the whole truth, and nothing but the truth, and, therefore, when a witness is put upon the stand he ought to be allowed an opportunity for stating all the facts within his knowledge bearing upon the issues involved in the case, and should not be confined to those facts only about which the party who offers him as a witness chooses to interrogate him. It is very true that the other party may put him on the stand as his witness and examine him as to any facts within his knowledge which he may desire to bring before the Court, but he is not obliged to do so; and it may and often does happen that the other party would prefer to forego the opportunity of bringing out such facts rather than adopt one of his adversary's witnesses as his own. In such case the result would be that the witness would have no opportunity of telling the whole truth, as he has been sworn to do. We think, therefore, that the English rule, founded as it is in reason, and fully sustained by authority, is the better rule and should be followed. Hence, the Circuit judge erred in refusing to allow counsel for the plaintiff to cross-examine the witness Clyburn except as to such matters as had been brought out on the direct examination.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the petition filed by the defendant De Pass be dismissed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 557

(Case No. 1165.)

MOODY v. TEDDER.

(November Term, 1881.)

[1. *Wills* ⇐616.]

Testator by his will devised and bequeathed to his wife "during the term of her natural life only, all my property both real and personal, authorizing and empowering her to use and dispose of so much thereof as may be necessary for her comfortable support and maintenance in such style and manner as she may see fit and proper;" and after her death, he gave "whatever portion may be remaining of

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my said property to J., her heirs *and assigns forever." *Held*, that the widow, as life-tenant, having an absolute power of disposal, could not be held accountable as trustee to the remainderman, for three slaves sold to pay the debts of the widow, to run the plantation and to support herself and agent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418–1430; Dec. Dig. ⇐616.]

[2. *Deeds* ⇐114.]

The widow, in consideration that T., the husband of J., assumed the payment of her debts and covenanted to support and maintain her through life, conveyed to T. all her interest and life-estate in this property, and he it was who sold the slaves for the purposes mentioned. *Held*, that the deed carried to T. not only the life-estate, but also the power of disposal, and must be referred to her power whether it purported to be an execution or not; and T. was not accountable to the remainder-

men, children of J., after the widow's death, for the purchase-money of the slaves so sold.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 326; Dec. Dig. ⟸114.]

[3. *Wills* ⟸693.]

The deed, accompanied by the widow's acquiescence for fourteen years, could, at least, be construed as a power of attorney, authorizing T. to make the sale.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655–1661; Dec. Dig. ⟸693.]

[4. *Wills* ⟸693.]

But, under this will, the remaindermen had no right to the slaves so sold, as neither they nor the purchase-money were property of the widow remaining at the time of her death. 1. Because they were sold for purposes within the scope of the power and their price so expended; and, 2. Because the slaves were emancipated before the widow's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1655; Dec. Dig. ⟸693.]

[This case is also cited in Rembert v. Vetoe, 89 S. C. 216, 71 S. E. 959, as to the question of intention to execute power, and in Mins v. Hair, 80 S. C. 464, 61 S. E. 968, as to testamentary powers.]

Simpson, C. J., concurred only upon the last ground stated.

Before Wallace, J., Darlington, October, 1881.

The case is fully stated in the opinion of this court. The will is very short and contains only what is copied into the opinion.

Messrs. Boyd & Nettles, for appellants.

Mr. G. W. Dargan, contra.

March 11th, 1882. The opinion of the court was delivered by

McGOWAN, A. J. William Griggs, late of Darlington county, died in the year 1850, leaving a widow, Mary, but no children. At the time of his death he was seized and possessed of his homestead tract of land, containing five or six hundred acres, twenty-seven negro slaves, horses, hogs and other personal property. He left a will by which he devised and bequeathed to his "widow, Mary, during the term of her natural life

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only, *all his property, both real and personal, authorizing and empowering her to use and dispose of so much thereof as may be necessary for her comfortable support and maintenance in such style and manner as she may see fit;" and, secondly, after the death of his said wife, Mary Griggs, he gave "whatever portion may be remaining of his said property to Jemima Tedder (wife of William Tedder), to her, her heirs and assigns forever."

Mrs. Griggs qualified as sole executrix of the will, and continued to reside on the homestead and manage the property. She became embarrassed, and in order to pay the debts and prevent the sale of a negro, which had been levied upon by the sheriff, and doubtless to place the property under the control of one who could manage it, on April 22d, 1856, she executed to William Tedder, the husband of the devisee in remainder, the following deed: "Whereas, William Tedder having this day executed to me an obligation, in writing, to pay all my just debts, as well as the debts, if any, against the estate of William Griggs, deceased, and to give me a respectable maintenance and support for and during my natural life; now, I, the said Mary Griggs, for and in consideration of the obligation above named, and of the sum of one dollar to me paid, have granted, bargained, transferred and delivered, and by these presents do grant, bargain, transfer and deliver unto the said William Tedder all my interest and life-estate in and to all and singular the lands, negroes, horses, cattle, hogs and other property left to me for life by the last will and testament of William Griggs, deceased, together with all the debts due me or the estate of William Griggs aforesaid for negro hire, &c., together with all and singular the rights, members, hereditaments and appurtenances to the said land or other property belonging or in any wise incident or appertaining; to have and to hold all and singular the land or other property named unto the said William Tedder, his heirs and assigns forever. And I do hereby quit claim to the same in behalf of myself and my heirs forever," &c.

Under this deed, William Tedder took possession of the property, leaving Mrs. Griggs in possession of the dwelling-house and household and kitchen furniture. The property at that time was in bad condition. There was

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a lack of provisions and the *work animals consisted of four worn-out horses, two of them blind. The debts amounted to $1,500, and it was necessary to restock the farm. Tedder managed the property skillfully, made good crops and improved the place up to the end of the war, when the slaves were emancipated. In 1859 he sold three negroes (one of them being unmanageable) for $2,700 and used the money in paying off the debts which he had assumed ($1,500), to run the plantation and to support his aunt, Mrs. Griggs, himself and family. When the slaves were emancipated they had increased to thirty-two, exclusive of the three sold. After the war the property depreciated mainly through theft, and at the death of Mrs. Griggs some of the personal property remained, which had been delivered to Tedder.

In 1864, Jemima Tedder died, and her interest in the estate descended to her heirs—her husband, William, to the extent of one-third, and the remainder in equal shares to her seven children, of whom the plaintiff, Mahalie Moody, is one. Mrs. Mary Griggs was supported until she died in 1873, after which time all the children were allowed to cultivate the land, Tedder cultivating about one-third. As they grew up they continued

to hire out the place, planting such of the land as they wished. Plaintiff, Mahalie Moody, and husband, went on the land in 1875, and instituted this proceeding against her father and brothers and sisters in May, 1879, for partition of the land and for an account of the rents and profits, and personal property which went into the possession of William Tedder, under the deed of April, 1856. Before trial it was conceded that the heirs of Jemima were entitled to partition of the land, and the plaintiffs abandoned all claim for account, except for the value of the three negro slaves sold by William Tedder in 1859. That point was referred to J. J. Wood, Esq., as special referee, who held that William Tedder was not liable to account for the $2,700, the price of the slaves sold. The case came up, on exceptions to this report, before Judge Wallace, who held that William Tedder was liable for the value of the negroes sold. From this judgment William Tedder appeals to this court upon the following exceptions:

"1. That the deed of Mary Griggs invested William Tedder with the right to dispose

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absolutely of the negroes, or at least to *dispose of them in the interest of the plantation and for the maintenance of Mary Griggs.

"2. That under the will of William Griggs the plaintiff or remainderman had title only to such of the property as might remain at the death of Mrs. Griggs, and as the three negroes sold did not exist as property at that time they have no right to account for their value.

"3. The circumstances under which and the purposes for which the negroes were sold and the purchase-money applied, justified the sale, and relieved William Tedder from liability for the purchase-money.

"4. The sale being in the interest and for the benefit of the life-estate, William Tedder is not liable for the same."

This case, like that of Finley v. Hunter, 3 Strobh. Eq. 84, must be determined upon the strong phraseology of the testator's will and a manifest intention appearing from the terms he has employed in the gift to his wife for life and the limitation over. It seems that the testator was childless, and naturally his wife was the first object of his bounty. He desired to make her comfortable for the remainder of her days if it took the whole of his estate to do it, as is shown by the gift to her of the whole property for life, "authorizing and empowering her to use and dispose of so much thereof as may be necessary for her comfortable support and maintenance in such style and manner as she may see fit and proper." This was practically an absolute power of disposal, for while it is true that the will indicates the purpose for which it was given and for which alone the power could be exercised, yet in extent it was unlimited, as the widow was made the sole judge of the "style and manner" of her living and necessarily of the amount which would be required to support it.

Being a lady unaccustomed to business she had the right, at least, to employ some one to look after the property for her. There can be no doubt that Mrs. Griggs had the power to dispose of any portion of the estate for the purpose indicated, and if she had sold the three negroes which were sold by Tedder and applied the funds precisely as he applied them, in paying off the debts, restocking the farm, and in supporting herself and the family of Tedder while he was attending to her

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business, there could not *have been a shadow of claim for accountability upon her. "Powers may be general or limited. In a limited power, the limitations contained in it constitute the rule by which it is to be executed. In the execution of a general power there can be no rule but the discretion of the party to whom it is confided." Fronty v. Fronty, Bail. Eq. 529.

We are, therefore, relieved from considering the embarrassing questions which arise out of the relation of technical tenant for life and remainderman. As we understand it, a tenant for life is one who is entitled to the use of property which, at his death, goes over to some one else. The property may consist of particular articles described or of many in one, as a flock of sheep, or a gang of negroes, or a plantation stocked for farming purposes. In each of these classes there is a certain rule of accountability, not always the same, but in all the underlying principle is that it is the property itself that the remainderman is entitled to receive; and as the tenant, while in the use, may have abused or destroyed the property, in that regard he is considered a trustee for the remainderman.

There is no foundation in this case for such relation. The most ample power of disposal was given to the first taker, and the second taker was expressly restricted to what property "remained after the death of Mrs. Griggs." No such relation as that of trustee and cestui que trust in the usual form existed between Mrs. Griggs and Jemima Tedder. It is clear the testator did not intend to make his wife accountable to her niece either for extravagance in the manner of her living, or for want of business habits and economy, or generally for the manner in which she used the property while in her possession. His wife was the first object of his affections, and she was to be made comfortable out of his property if nothing remained of it at her death.

But, conceding as an abstract proposition, that such would have been the result if Mrs. Griggs had retained possession and sold the negroes herself in execution of the power, it is contended that Tedder cannot claim such exception from accountability, for the

reason that the deed from Mrs. Griggs to him was not the execution of her power of disposal, but simply the conveyance of a

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*naked life-estate, and being thus constituted tenant for life without the powers, he falls under the principles applicable in such cases, and, as a consequence, must account for the purchase-money of the slaves sold by him. That is to say, that, although Tedder assumed the responsibility of paying the debts and supporting Mrs. Griggs for life, yet to enable him to do so, no means were conveyed to him except the bare use of the property in its dilapidated condition, with responsibility over to Jemima or her heirs as technical tenant of property belonging to them in remainder.

The first observation suggested by this view is that no life-estate pure and simple was created by this will, and if Tedder held such a position it must have been not under the will of Mr. Griggs, but under the deed of Mrs. Griggs. In such a state of facts, could the plaintiffs, who claim exclusively under the will of Mr. Griggs, go against Tedder in respect to this alleged life-estate? What privity was there between them? But passing over this point let us see what was conveyed to Tedder under the deed of Mrs. Griggs. She had a life-estate in the property and coupled with it an unlimited power of disposal for certain purposes; she found herself unable to manage the property, and in consideration of the payment of the debts and her support she conveyed "all her interest and life-estate in the property to William Tedder, his heirs and assigns forever." Did she mean to convey a bare life-estate or all her rights in the estate, including her power of disposal? A large amount of debt was pressing, some of it in judgment, and a negro hired. Present relief was the object of the arrangement, and the conveyance simply of a life-estate would not have accomplished the purpose. We cannot suppose that at the moment when her need was the greatest she intended to relinquish altogether her power, or to separate the power from the life-estate —conveying the latter and still retaining the former. We think her intention was, in consideration of the payment of the debts and her support, to put Tedder precisely in her place, with all her rights in respect to the property, including the power of disposal.

Did the deed effect that intention? The words are "all my interest and life-estate." No reference in terms is made to the power of disposing, but besides the life-estate she

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had no other *"interest" in the property, and there is express reference to the property as to which the power existed "in and to all and singular the land, negroes, &c., left to me for life by the last will and testament of William Griggs, deceased." It may be true that the word "interest" was not the technical term to express the idea of a power, but in the ordinary acceptation of the word it was broad enough to cover it; and we think the deed was intended to include the power. The question of the execution of a power is always one of intention, "and if the devisee of the power intends to execute it, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation." Bilderback v. Boyce, 14 S. C. 540.

Assuming this to be the proper construction of the deed, and considering the nature of the power, we incline to think that it conveyed the whole interest in the estate, subject to the rights of the remainderman, somewhat in analogy to the remarkable case of McAllister v. Tate, 11 Rich. 510 [73 Am. Dec. 119], in which it was held that a devise in the words "in fee-simple for life" carried the absolute estate. So considered, the deed of Mrs. Griggs, according to well-established principles, must be referred to her power of appointment, and not to her life-estate. "When a man has a power and an interest, and he creates an estate which will not have an effectual continuance in point of time, if it be fed out of his interest, it shall take effect by force of the power. As where a tenant for life, with the power to borrow money, granted a rent charge generally as a fund for the payment of the debt, it was deemed an execution of the power, and not a grant out of his interest." 1 Sugd. Pow. 419.

It is insisted, however, that the deed as to all interest beyond the life-estate was ineffectual, for the reason that it did not purport to be the execution of a power, but the transfer of the power itself, which could not from its nature be delegated. It may be that the deed could not pass the power as property, so as, in respect to its execution, to substitute Tedder for Mrs. Griggs. We have seen that the deed may be construed

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to pass the absolute *estate, subject to the rights of the remainderman, and in that view must be referred to the power, whether it purported to be an execution or not.

But, if we are mistaken in that, we see no great difficulty in construing the deed as a power of attorney, authorizing Tedder to execute the power for and in behalf of Mrs. Griggs. A power may be executed by attorney when it is not of such a character as to impose a personal confidence in the devisee of it to exercise his judgment. At the time the deed to Tedder was executed there was no confidence or option involved in the matter. The debts and the support of Mrs. Griggs were certain and fixed, had to to be provided for, and were referred to in the deed as the very object of its execution. She

was not limited to any particular mode of execution, and, having the right herself to provide for them, she could appoint another to do it for her. Tedder's act in selling the negroes was the act of Mrs. Griggs through him, and this receives confirmation from her silent acquiescence from 1859 until 1873, when she died.

"It is frequently contended in practice that a devisee of a power cannot execute a deed of appointment by attorney. But the cases by no means authorize this position. They merely establish that the devisee cannot delegate the confidence and discretion reposed in him to another. There the devisee points out the precise appointment which he is desirous should be made; there no confidence, no discretion is delegated. The appointment is in every respect an exercise of his own judgment, and there cannot be any reason why he should not be permitted to execute the deed of appointment by attorney. The contrary doctrine would lead to great inconvenience. Where, however, a particular mode of execution is required, it would be difficult to support an execution by attorney." 1 Sugd. Pow. 215.

There is still another view of this case. The plaintiffs claim, through Jemima Tedder, under the will of William Griggs, and it would seem that they should be limited to what the will gives them. The second clause of the will is in these words: "After the death of my said wife, Mary Griggs, I give, decree and bequeath whatever portion may be remaining of my said property to Jemima Tedder (wife of William Tedder), to her, her

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heirs and *assigns forever." The three negroes sold in 1859 were no part of the estate "remaining" in 1873, at the death of Mrs. Griggs, for two reasons, first, that they had been sold during the life of Mrs. Griggs by her authority, and the proceeds of sale applied to the payment of the debts and to the support of her and the family of the said Jemima, including the plaintiff, Mahalie. We see nothing to show that the sale of the negroes was unnecessary, or that the proceeds were not applied as indicated. The plantation, under the control of a widow without business habits, had run down and needed restocking. The debts to be paid amounted to $1,500, and it probably required the whole $2,700 to pay the debts, employ an overseer and refit and begin again; all of which was within the scope of the power in the will. Second. If the negroes had not been sold they could not have constituted any part of the property "remaining" at the death of Mrs. Griggs, for the reason that before that time they had been emancipated and ceased to be property. We do not mean to say that in certain cases the proceeds of property may not be pursued instead of the property itself, but that, under the peculiar provisions of this will, neither the property nor its proceeds can be considered as "remaining" at the death of Mrs. Griggs.

The judgment of this court is that the judgment of the Circuit Court be reversed so far as it required William Tedder to account for the proceeds of the three negroes sold by him, and affirmed in all other respects.

McIVER, A. J., concurred.

SIMPSON, C. J., concurred in the judgment of the court in this case on the last ground stated in the opinion pronounced by Mr. Justice McGOWAN, to wit, the emancipation of the negroes before the falling in of the life-estate.

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16 S. C. *567

*(Case No. 1166.)

HAMMOND v. PORT ROYAL AND AUGUSTA RAILWAY COMPANY.

(November Term, 1881.)

[1. *Covenants* ⇐68.]

Plaintiff conveyed in fee-simple to a railroad company for its road-bed a strip of land through his plantation, by a deed-poll, which contained the express condition, subsequent, "that the system of drainage shall remain the same as now, and ditches to remain of such a depth as to allow, as heretofore, the drainage of the land to the depth of five feet." This condition was violated by the grantees, and afterwards the railroad was purchased by a new company. *Held*, that the terms of the deed did not create a covenant running with the land, and there being no personal covenant by the present owners they were not liable to plaintiff in damages for their mere failure to remove obstructions which had been placed in the ditches by the former company.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 65; Dec. Dig. ⇐68.]

[2. *Railroads* ⇐72.]

To render the defendants liable it must be shown that the plaintiff's system of drainage had been affected by obstructions caused by defendants, or by them increased.

[Ed. Note.—Cited in De Laney v. Georgia, C. & N. R. Co., 58 S. C. 359, 360, 36 S. E. 699, 79 Am. St. Rep. 843; Lawton v. Seaboard Air Line Ry., 75 S. C. 84, 55 S. E. 128.

For other cases, see Railroads, Cent. Dig. §§ 168–178; Dec. Dig. ⇐72.]

[3. *Railroads* ⇐72.]

Plaintiff is not confined to an action to enforce a forfeiture under his deed for condition broken, as the corporations, independently of covenant, are liable for damages done by them to plaintiff's system of drainage; but the defendants' duty was passive—their only obligation was not to obstruct the drainage and to permit plaintiff to keep it up—and, therefore, the Circuit judge erred in charging the jury that the defendants were liable for damages, resulting from their failure to remove the obstructions caused by the acts of the former owners, and to restore the system of drainage as it existed when the deed was executed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168–178; Dec. Dig. ⇐72.]

[4. *Nuisance* ⇐42.]

[Cited in Jones v. Seaboard Air Line R. Co., 67 S. C. 196, 45 S. E. 188, to the point

that a party who is not the creator of a nuisance must have notice before action can be brought against him.]

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 101–103; Dec. Dig. ⇐42.]

[This case is also cited in De Laney v. Georgia, C. & N. R. Co., 58 S. C. 357, 36 S. E. 699, 79 Am. St. Rep. 843, and distinguished therefrom.]

Before Kershaw, J., Aiken, September, 1881.

Action by Paul F. Hammond against the Port Royal and Augusta Railway Company.

To the statement made in the opinion it will be necessary only to add the precise language which raised the points considered by this court.

The motion for non-suit was based, in part, substantially upon the positions taken in the following requests to charge:

1. That the deed of Paul F. Hammond to

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the Port Royal *Railroad Company, was a conveyance upon condition, without any covenant by the grantee to observe or perform the condition, and did not impose upon the defendant, as assignee of the Port Royal Railroad Company, the duty of preserving intact the plaintiff's system of drainage, or of keeping the ditches to such a depth as to allow the drainage of the plaintiff's land to the depth of five feet, and that the only remedy of the grantor for breach of condition, is to enforce a forfeiture of the estate.

2. That the defendants cannot be made responsible for any injury except that occasioned by their own acts of commission or omission, and that the plaintiff is not, therefore, entitled to recover such a sum as would restore the ditches on plaintiff's land to the condition they were in on May 22d, 1872, but only such a sum as would be necessary to restore the ditches to the condition they were in on October 1st, 1878.

3. If the jury find from the testimony that the obstructions to the drainage were put there by the Port Royal Railroad Company prior to October 1st, 1878, no action would lie against the defendants for continuing the nuisance until they had been requested to remove the obstructions and had refused or neglected to do so.

The judge declined to charge in this form. He did charge, "that in order for the plaintiff to recover you must find that the system of drainage on the Cathwood plantation, which existed May 22d, 1872, was obstructed by the Port Royal Railroad Company (the first corporation), and that such obstructions were continued by the present defendant company, after they acquired the property and franchise of the said railroad company and after they were requested by the plaintiff to remove them. Such request may be either in express words or implied from the conduct of the parties." His Honor further instructed the jury: "If the present defendant company did acquire the title and possession under the grantees, under the said deed from the plaintiff, dated May 22d, 1872, they are bound to perform all the conditions set forth in that deed in relation to the system of drainage of the Cathwood plantation, and are responsible for any injury done to the plaintiff attributable to their failure to perform such duty upon the request or demand of the plaintiff, which request or demand may be either in express words or by impli-

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*cation from the circumstances or conduct of the parties. It was incumbent under that deed upon the grantees and their assigns holding the land therein conveyed to them to maintain the system of drainage as it then existed on the Cathwood plantation, so far as it depended upon the transmission of the water across the land therein conveyed to them. In their use of the land they were to take care that this was not impeded, but that the drainage was to be preserved in such a condition that the ditches should remain of such a depth as to allow, as theretofore, the drainage of the land on the Cathwood place to the depth of five feet at all times."

The exceptions, following the language of the charge and requests to charge, allege error on the part of the judge in these particulars.

Messrs. William Elliott, Lord & Inglesby, and James Aldrich, for appellants.

It is conceded that the grantees would have taken this land burdened with the duty of so constructing their road as not to interfere with Hammond's drainage, if the deed had been silent upon this subject. 5 Rich. 415. But the duty which this easement imposed was entirely passive. Washb. Easm. *564–9; 12 Mass. 65; 30 Me. 100. It is clear then that neither the grantee nor its assignee are liable except for obstructing the drainage, unless the deed makes them so. But this deed did not create a covenant running with the land. 15 S. C. 33. The condition here is not a covenant, and the grantor's only remedy for condition broken is to enforce the forfeiture. 11 N. Y. 387. It, therefore, follows, that there was here an implied reservation to the grantor of a right to maintain his system of drainage, with a condition which enabled him to enforce a forfeiture if his easement was obstructed; that it was the grantor's duty to maintain his system on his own land and on the railroad land, and the grantees and their assignees must refrain from doing any act which would prevent him.

The nuisance here was not created by defendants, but merely continued as they found

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it, and, therefore, the plaintiff must *allege and prove notice to the defendants of the existence of the nuisance, the extent of it, and a request to abate or remove it before action could be brought. 5 Rep. 100; Willes 583;

2 Chit. Pl. 333, note (c.); 13 Conn. 303; 44 Me. 154; 9 N. H. 88; 8 Bush. 404; 3 Allen 267; 98 Mass. 43; 13 N. J. 36; 11 Minn. 20; 5 Rich. 420. As there were no facts in this case from which a request or demand might be implied "from the circumstances or conduct of the parties," the charge was erroneous and calculated to mislead the jury. Instructions not relevant to the facts of a case constitute error in the charge. Thomp. Char. Jur. 92, 93.

Messrs. Henderson Bros. and Youmans, attorney-general, contra.

The grantees of the original creators of the disturbance are liable for a continuance. Gale Easm. *404. By accepting the deed the railroad company rendered itself liable for the non-performance of the burdens imposed. Pierce Railr. L. 135; 64 Geo. 492. The condition created an easement by covenant. 8 Paige 402; 11 Ib. 414; 11 N. Y. 389. An easement may be granted by what is in terms an exception or reservation, and whether a perpetual interest or not depends upon whether appurtenant to the land or an easement in gross for the owner. 6 Cush. 132. See, too, 21 N. Y. 507; 21 Ohio St. 235.

March 14th, 1882. The opinion of the court was delivered by

McIVER, A. J. On May 22d, 1872, the plaintiff executed a deed to the Port Royal Railroad Company for a strip of land two hundred feet wide and about one mile and a half in length, running through a tract of land known as the Cathwood plantation. The estate conveyed by this deed was upon certain conditions, the only one with which we are at present concerned being expressed in the following language: "To have and to hold the said strip of land * * * unto the said party of the second part, their successors and assigns, forever: provided always, and this deed is upon the express con-

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ditions. * * * *2. That the system of drainage shall remain the same as now, except that such ditches as have been filled up by the party of the second part are to be reopened by them, and ditches to remain of such a depth as to allow, as heretofore, the drainage of the land to the depth of five feet." This deed, though characterized in the recital as an indenture, was signed only by the plaintiff, and must be regarded as a deed-poll.

All the property of the Port Royal Railroad Company was sold and the defendant company became the purchaser and went into possession in October, 1878, the deed being dated the third of that month, though the sale was not confirmed until May 23d, 1879. On June 23d, 1879, this action was commenced, in which the plaintiff alleged two causes of action. Under the first the plaintiff sought to recover possession of the strip of land above mentioned upon the ground that the conditions upon which the land was conveyed had been broken and that thereby the estate of the grantee was forfeited. The second cause of action was alleged in the following words: "That said defendants having wrongfully taken possession of said tract of land aforesaid, have continued the construction and running of a railroad through the same, and because of the negligent construction of said road-bed, the culverts, trestles and mud-sills, so continued negligently and unlawfully, said defendants have damaged and almost completely destroyed the system of drainage which existed on the plantation of Cathwood aforesaid, by closing up and obstructing the ditches and canals which supported said system, thus causing to the plaintiff the loss of his crops and great deterioration in the value of his land, to the damage of the plaintiff eight thousand dollars."

The defendant demurred to so much of the complaint as set out the second cause of action upon the ground that the facts therein stated were not sufficient to constitute a cause of action. This demurrer was overruled and the case went to trial before a jury, who rendered a verdict in favor of the plaintiff for the land and for a large amount as damages. Upon appeal, this court held (15 S. C. 10) that the above-mentioned deed did create an estate upon condition, but as it was conceded that there had been no such entry or claim by the plaintiff before this action was commenced as would revest

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the plaintiff with the title, that the *action to recover possession of the land could not be maintained. It was also held, that the demurrer was properly overruled, but a new trial was ordered on the second cause of action because the Circuit judge refused to charge as requested by the defendant—"that the jury could not find damages for anything done prior to the possession of the defendant"—this court holding that the charge as given to the jury was calculated to mislead them as to this point.

When the case came on for a new trial, the defendant, at the close of the testimony adduced by the plaintiff, moved for a nonsuit upon various grounds, which motion being refused, the case went to the jury, the defendant declining to offer any evidence, and a verdict for eight thousand dollars was rendered in favor of the plaintiff. The defendant now renews the motion for a nonsuit here, and appeals on the ground that the Circuit judge refused to charge any of the several propositions as submitted by the defendant, and upon exceptions to various propositions of law charged by the judge. Under the view which we take of the case, it will not be necessary to consider the several grounds of appeal seriatim.

The complaint in setting out the second

cause of action substantially alleges that the defendant by continuing the construction and running of a railroad through the said strip of land had damaged and almost completely destroyed the system of drainage which previously existed on Cathwood plantation by closing up and obstructing the ditches and canals which constituted a part of such system. If these allegations were true, then the plaintiff had a good cause of action, for they practically amounted to an allegation that the defendant had obstructed the drainage of plaintiff's land by closing up certain ditches necessary to secure that end. Hence, the demurrer to that portion of the complaint which set out the second cause of action was properly overruled, because such demurrer admitted the truth of the facts as alleged in the complaint, and if those allegations were true, then the plaintiff did have a cause of action.

It seems to us that the fundamental inquiry in this case is whether the present defendant was under any obligation to remove the obstructions which had been placed in

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the ditches *across the said strip of land by the former company, and, if not, whether the present defendant had done any act tending to increase the obstructions placed in said ditches by the former company or to prevent the plaintiff from removing the same.

The defendant bought the strip of land subject to the right of the plaintiff to drain Cathwood plantation through the ditches across said strip, and must hold it subject to that easement. But this would not impose any obligation upon the defendant to remove any obstructions which may have been placed in said ditches by another, unless there was some personal covenant or some covenant running with the land binding the defendant to keep said ditches open and free from obstructions. There is no pretense that there was any such personal covenant on the part of the defendant, and the only inquiry, therefore, is whether the terms of the deed from the plaintiff to the former company created such a covenant running with the land as would bind the defendant to keep the ditches open and free from obstructions, to the depth necessary to maintain the system of drainage originally established by the plaintiff. This court has already decided that said deed created an estate upon condition; and although there are cases in which a deed has been held to contain both a condition and a covenant, yet in those cases it will be found that there are words, either expressly or by necessary implication, creating a covenant and that the deed is in the form of an indenture and not a deed-poll. See the former decision in this case (15 S. C. 19), and also the recent decision of the Supreme Court of the United States, rendered at October Term, 1881, in the case of Hale v. Finch, 104 U. S. 261 [26 L. Ed. 732].

Here, the deed contains no words expressly creating a covenant, and there are none which necessarily imply one. The words relied on are contained in a deed-poll and not in an indenture, and there is nothing to bind the grantee to the performance of any covenant. We do not mean to say that in no case can a covenant binding the grantee be created by a deed-poll, but only mention the form of the deed as one of the circumstances going to negative the idea that the intention was to create a covenant in this case. As was very pertinently said by the Chief Justice in delivering the former opin-

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ion in this case: "If Hammond had *intended to rely for his protection upon a covenant by the grantee, would he not have taken a separate instrument properly prepared and executed? The fact that he did not do this affords a strong presumption that he preferred the right to enforce forfeiture as the most effectual means of protection."

It follows from this that the mere failure of the defendant to remove the obstructions which had been placed in the ditches by the former company affords no cause of action against the present company. The plaintiff must go further and show that by some act of the defendant the plaintiff's system of drainage has been obstructed, or that the obstructions caused by the former company have been increased.

We do not think that the plaintiff's only remedy was to enforce a forfeiture of the estate, for even in the absence of any covenant binding the defendant to keep the ditches open through the said strip of land, the defendant might under this action be made liable for any damages resulting from any act of the defendant which tended to injure the plaintiff's system of drainage, or impair its efficiency. The jury should, therefore, have been instructed to inquire whether the defendant had in any way obstructed the drainage or increased the obstructions caused by the acts of the former company, and, if so, to give such damages as resulted from such acts of the defendant. But we think that the Circuit judge was in error in saying to the jury, in effect, that the defendant was liable for any damages caused by the failure to remove the obstructions caused by the acts of the former company and "to restore the system of drainage as it existed on May 22d, 1872." The duty of defendant was simply passive, not active, and its only obligation was not to obstruct the system of drainage originally established by the plaintiff, and to permit the plaintiff to keep up that system.

Under this view of the case the other questions suggested by the grounds of appeal cannot properly arise, and need not, therefore, be considered.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. *575

*(Case No. 1167.)

HARRIS v. MARCO.

(November Term, 1881.)

[1. *Assault and Battery* ⇐7.]

In action for assault and battery committed on the person of plaintiff while the parties were engaged in a contest over the ownership of a horse, which was found by the plaintiff in a public place and peaceably taken into her actual possession in defendant's view, the Circuit judge did not err in charging the jury that the owner of the property could resist any attempt to take it away, but that he must not commit an assault and battery, or breach of the peace—if he did so, he was liable.

[Ed. Note.—Cited in Willis v. Whittle, 82 S. C. 502, 64 S. E. 410.

For other cases, see Assault and Battery, Cent. Dig. § 4; Dec. Dig. ⇐7.]

[2. *Trial* ⇐285.]

The charge of a judge to a jury should never be considered abstractly, but always in its relation to the facts of the case as developed on the trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 698, 699; Dec. Dig. ⇐285.]

[3. *Trial* ⇐46.]

Evidence of a matter not shown to be relevant is not admissible on the bare statement of counsel that there is a connection between the cause at issue and the evidence proposed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 115–117; Dec. Dig. ⇐46.]

[4. *Assault and Battery* ⇐33; *False Imprisonment* ⇐25.]

In action for assault and battery and false imprisonment, there was no error in charging the jury that the wealth of defendant was a proper matter for the jury to consider in making up their verdict. Rowe v. Moses, 9 Rich. 426, recognized and followed.

[Ed. Note.—Cited in Calder v. Southern Ry., 89 S. C. 303, 71 S. E. 841, Ann. Cas. 1913A, 894.

For other cases, see Assault and Battery, Cent. Dig. § 46; Dec. Dig. ⇐33; False Imprisonment, Cent. Dig. § 102; Dec. Dig. ⇐25.]

Before Wallace, J., Darlington, October, 1881.

Action by Abigail J. Harris against Samuel Marco, demanding $5,000 damages, for assault and battery and false imprisonment, committed by defendant on the person of plaintiff on December 22d, 1879.

The second exception correctly states the ruling of the Circuit judge and the matters connected therewith. The plaintiff stated in his proposed case the charge of the judge complained of in his first exception. To this defendant proposed an amendment which was submitted to Judge Wallace for settlement. The settlement was as follows: "The difference between counsel in this case relates to the terms of the charge to the jury upon one point. I cannot recall at this distance in time, with absolute certainty, the precise terms of an extemporaneous charge. Of course, whatever was said was intended to have relation to the facts of the particular case. It was not disputed that plaintiff had hold of the bridle reins on the horse when

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defendant ap*proached her. On this state of facts, together with the other facts that appear in the brief, I charged the jury, among other things, 'that the owner of the property could resist any attempt to take it away, but that he must not commit an assault and battery or breach of the peace. If he did so, he was liable.'"

He further charged, at the request of plaintiff's counsel, that the wealth of the defendant was a proper matter for the jury to consider in making up their verdict, without explanation and without further words in that connection. There was, however, no request on the part of defendant for further explanation.

This is all of the charge that the brief contains.

Messrs. Boyd & Nettles, for appellant.

Mr. G. W. Dargan, contra.

MARCH 14th, 1882. The opinion of the court was delivered by

SIMPSON, C. J. The plaintiff seeks to recover damages for an alleged assault and battery and false imprisonment committed by the defendant.

The facts are briefly as follows: Holly Harris, the husband of the plaintiff, on the morning of the day of the difficulty carried into Darlington village a bag of cotton. He drove up in front of the store of the defendant, and, unhitching his horse from the cart, left them standing on the public square, while he crossed the square to see some one on business. When he left he called to the defendant to take charge of the horse until he returned. The plaintiff, who was living apart from her husband, finding the horse standing as above described and claiming it as her property, walked up and seized the bridle and was in the act of leading the horse off, when, defendant's attention being attracted, he ran out and resisted. Holly Harris returned in a few minutes, when the defendant retired, leaving the struggle to Harris. This was kept up during the greater part of the day between man and wife, until in the evening these parties were found in an enclosure behind defendant's store, with the contest still undecided, when defendant shut the gate and kept them confined until after

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*dark, when he unlocked the gate and released them. The plaintiff finally gave up

the struggle and yielded possession to her husband.

The above is a skeleton of the case; the filling up on the one side by the plaintiff, of the aggravating circumstances accompanying the injury of which she complained, and the palliations in the defense, were matters of testimony and need not be particularly stated, as the questions of law involved in the appeal do not depend upon these facts. The defendant, in his testimony, at one time stated that Holly Harris had left the horse in his charge when he crossed the square. Afterwards, he corrected himself and said that Harris had delivered the horse to him that morning under a bill of sale. After full testimony, the jury found for the plaintiff one thousand dollars. The defendant moved for a new trial, which was refused. He then appealed, on the following grounds:

"1. Because the presiding judge charged the jury that while the owner of property could resist any attempt to take his property in his view, in making such resistance he must not commit an assault and battery or breach of the peace.

"2. Because when defendant's counsel proposed to question the plaintiff when upon the stand, as to the alleged wrongful taking of a bale of cotton a few days previous to the assault and battery and false imprisonment charged in the complaint, stating that the taking of the said cotton was connected with the alleged assault and battery and false imprisonment, and would show the animus of the parties, plaintiff and defendant, his Honor refused permission to ask the said question on the ground of irrelevancy.

"3. Because his Honor charged the jury, that the wealth of the defendant is a proper matter for the jury to consider in making up their verdict, without giving any explanation as to the contingency under which, and the purposes for which, the wealth of the defendant might properly be considered." In all of which the defendant respectfully submitted that his Honor erred.

While the charge of the judge as to the point embraced in the first exception, if it stood alone and independent of the facts and circumstances of the case, might be too broad

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and general, yet *when applied to the case then under consideration, we do not think there was error. It would be too wide to say, that under no circumstances could one be held excusable for committing an assault and battery or breach of the peace, in resisting an attempt to take his property, in his view, where property is in one's enclosure, or in his house, but not in his actual manual possession, and in that sense simply in his view only. It would not do to say, that he could not resist the taking of that property, by a robber or other person without claim, even to the extent of all necessary violence. The law is not unreasonable, and in such case it would not impose restriction.

But, where there is a contest over title to property, and one of the claimants gets actual possession peaceably, either by finding it in some public place, or otherwise, the other cannot retake it by violence. He must resort to the law, and, though the delay may be dangerous, yet the public peace is more important than his private interests, and this requires that he should stay his hand. He may interfere, if the property is taken in his view, but he must stop short of a breach of the peace. The law will not allow him to commit an assault and battery on the other party over and above, molliter manus imposuit. Davis v. Whitridge, 2 Strobh. 240; State v. Lazarus, 1 Mill Con. R. 34.

The charge of a judge on appeal should never be considered abstractly. This would be unjust and would frequently put him in error, when in fact there was no error. In this case we do not suppose that Judge Wallace intended to convey the idea that no one could resist, in the broad language found in this exception. But he was charging to the case, and this case was one where the property in dispute was found in the public square of a village, almost in overt market. One claimant, not with a strong hand, but peaceably, had gotten actual manual possession, which was legal, and when in the act of leading the horse off, the other, who was in view, resists, and in resisting commits an assault and battery. Under this state of facts, we think his charge was correct, and is sustained by the cases already referred to. See, also, 2 Greenl. Ev. § 95.

The second exception objects to the exclusion of certain testimony offered by the de-

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fendant, on the ground of irrelevancy. *An important rule of evidence is, that the testimony must be confined to the issue; when, therefore, testimony is offered of an independent fact not connected with the issue, it is not error to exclude it on the ground of irrelevancy. This rule, it is true, should be liberally interpreted and enforced. Counsel may see the pertinency of a fact, when this might escape a judge.

But, where the testimony is pertinent, if objected to, its pertinency should be shown. Here, it does not seem to us that the fact attempted to be proved had any connection whatever with the case. It was a matter which occurred days before, and with which the defendant was in no way, as we can see, concerned. Nor do we find anything in the argument showing its relevancy to the question at issue. We find no error, therefore, in its exclusion.

The third exception is in conflict with Rowe v. Moses, 9 Rich. 426 [67 Am. Dec.

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It is the judgment of this court that the judgment of the Circuit Court be affirmed.

McIVER, and McGOWAN, A. J.'s, concurred.

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16 S. C. 579

(Case No. 1168.)

LUPO v. TRUE.

(November Term, 1881.)

[1. *Trusts* ⟸371.]

Where the facts stated in a complaint establish a resulting trust, and these facts are not denied by the answer, they stand admitted and cannot be disregarded. The Circuit judge therefore erred in requiring testimony upon these matters and in basing thereon a finding of fact inconsistent with such admissions, even if not unsupported by the evidence received.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 595; Dec. Dig. ⟸371.]

[2. *Trusts* ⟸372.]

The plaintiffs claimed the possession of a tract of land as heirs-at-law of their mother, in whose favor there was a resulting trust under a deed to A.; the defendant, by his answer, not denying the facts which raised the trust, claimed under the same deed to A., and averred that plaintiffs' mother "never did have legal seizin of the premises or any right to the possession thereof;" and that defendant had held continued occupation of the land for more than twenty years. *Held*, that while it was even doubtful whether defendant was entitled

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under his answer to prove a bona fide pur*chase for valuable consideration without notice, the Circuit judge certainly erred in requiring plaintiffs to show that defendant had notice of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 600; Dec. Dig. ⟸372.]

[3. *Pleading* ⟸87.]

Defenses under the Code of Procedure analyzed, and the manner of pleading them considered.

[Ed. Note.—Cited in Watson v. Barr, 37 S. C. 467, 16 S. E. 188.

For other cases, see Pleading, Cent. Dig. § 180; Dec. Dig. ⟸87.]

[4. *Pleading* ⟸132.]

Purchase for valuable consideration without notice is an equitable defense and must be set out in the answer and sustained by the defendant.

[Ed. Note.—Cited in Henderson v. Williams, 57 S. C. 6, 35 S. E. 261; Robert v. Ellis, 59 S. C. 147, 37 S. E. 250; Carr v. Monzon, 93 S. C. 167, 76 S. E. 201, Ann. Cas. 1914C, 731; Merck v. Merck, 95 S. C. 238, 78 S. E. 1027.

For other cases, see Pleading, Cent. Dig. § 279; Dec. Dig. ⟸132.]

[5. *Costs* ⟸48.]

A defendant answered, claiming an interest in the land in dispute, and afterwards, upon affidavits showing a mistake upon the part of his counsel in so answering, and disclaiming any interest, he moved to dismiss the complaint as to him. *Held*, that in granting the motion without costs, the Circuit judge committed no error.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 129, 192–210; Dec. Dig. ⟸48.]

Before Mackey, J., Kershaw, September 1879.

Action by Mary A. R. Lupo and others, the children and heirs-at-law of Rebecca Copeland, against James H. True, Henry Moak, Andrew Moak and Jonathan Page. True was the party in possession of the land, Jonathan Page, it was alleged, held a mortgage on the property, and the Moaks were heirs-at-law of Laban W. Moak. The action was commenced in March, 1876. The pleadings are sufficiently stated in the opinion, and the nature of the plaintiff's claim is there set forth. The defendant, True, claimed possession by permission of the owner under a title traced back to Laban W. Moak, who took the deed which the plaintiffs claimed was by operation of law a trust for their mother. This deed was dated November 3d, 1849. Soon afterwards, Moses Copeland (husband of Rebecca), and then Rebecca, died. Laban W. Moak sold the land to Cook, in 1854, for $400. Cook not knowing of the trust, but a tenant then being in possession of the land who was put there by Moak with the statement that it was his sister's land. Cook sold to Dunlap, Dunlap to Kennedy, Kennedy to Hogan, Hogan to Mrs. True, the husband of defendant, Mrs. True to Gerald about the time this action was commenced, but possession not taken until afterwards. Neither Mrs. True nor Gerald were parties. There were alleged defects in defendant's title, not necessary to state, as the court has not considered them.

It was referred to a referee to take testimony, and upon the testimony by him reported, the cause came on for a hearing, when a jury was empaneled as stated in the opinion.

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*The Circuit decree made a statement of facts, and continued as follows:

After the whole testimony was read, the counsel moved to dismiss the complaint as to the defendant Page, upon the ground that at the commencement of the action Page had no interest in the suit, he having marked satisfied his mortgage upon the land, and delivered it up to Mrs. True, the mortgagor; and that though he had filed a joint answer, with the defendant, True, setting up title to the land, that, in point of fact, he had instructed his counsel not to answer, defending the action, but to have him dismissed as a party defendant. This answer was not sworn to, neither was the complaint. Notice of this motion having been served on the plaintiffs in ample time, with proof of mistaken action upon the part of counsel in answering the action, and the proof thereof being satisfactory to the court, it was ordered that the complaint be dismissed as to the defendant, Jonathan Page, without costs; nothwithstanding plaintiff's attorney resisted the motion.

The court finds, as matter of law, that the plaintiffs cannot sustain their action. Their failure to bring home notice of the trust to the aliences of Laban W. Moak, the alleged trustee, or of any fact to put the purchasers upon inquiry as to any trust resulting to the ancestress of plaintiffs by reason of the alleged purchase of said land by Laban W. Moak with her money, is fatal to their recovery. It is proper also to add, that to the mind of the court the evidence going to establish the trust was unsatisfactory.

The plaintiffs contended, that if the defendants relied upon their being purchasers for valuable consideration without notice, that they should have alleged the same in their answer. The court, in reply, said that if the complaint had shown that there was a written declaration of the trust, such as was evidenced by a deed, will, or any writing duly recorded setting forth the same; or that the holding of the land by the trustee was attended with circumstances of a public nature that evidenced its character; or that the trust was a matter of public notoriety, so that any person dealing with the property, by the exercise of ordinary caution or prudence in making proper inquiries,

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could have ascertained *the truth and thus been put on their guard: then the position of plaintiffs would have force. But that the complaint, so far from showing that the land was held in trust, set forth the fact itself that there was an absolute conveyance of the land in fee from Wiley Albert to Laban W. Moak by deed duly recorded; but alleged that Laban W. Moak had purchased the land with his sister's money, and held it in trust for her and her children.

The court ruled that the defendants having denied the alleged trust or title of plaintiffs' ancestress, Rebecca Copeland, and having set up title in those under whom they claimed possession, the plaintiffs were bound to make out their own case; and, therefore, the burden of proof rested upon them to establish the trust, as well as to show notice of it.

It is, therefore, ordered, adjudged and decreed, that the complaint of the plaintiffs be dismissed with costs to the defendants.

There were fourteen exceptions to this decree, but only the following were considered by this court:

1. Because the decree erroneously holds that by the pleadings it devolved upon the plaintiffs to prove a resulting trust in favor of the plaintiffs' ancestress, and notice thereof to the defendants.

2. Because the decree erroneously holds that the defendants denied the trust and claimed to hold under aliences in fee, who were purchasers for valuable consideration from Laban W. Moak; and even if this was so, it could not avail them, unless they denied all notice of the trust prior to this purchase, which they did not do.

9. Because the decree continually holds that the defendants denied the trust and set up the title in those under whom they claimed, which is contrary to what the pleadings show. They did not deny the trust, and founded their claim explicitly on the title deed of Wiley Albert to Laban W. Moak and continuous occupancy under it.

10. Because the decree holds that the averment in the answer, mixed up with the plea of the Statute of Limitations, "that the plaintiffs' ancestress never did have legal seizin of the premises in question or any right to the possession of the same," threw the burden on the plaintiffs of establishing the resulting trust and notice of it to the defendants.

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*11. Because the decree permits the defendants to avail themselves of the defense of being purchasers for valuable consideration without notice, when they set up no such defense in their answer.

12. Because the court should have confined the defendants to their plea of the Statute of Limitations, and have also held that as they, in their answer, founded their claim upon the deed of Wiley Albert to Laban W. Moak, they could not occupy any better position thereunder than Moak could himself.

13. Because the decree dismissed the complaint as to the defendant Page, upon his disclaimer of any interest in the land at the commencement of the suit.

14. Because the decree dismissed the complaint, with the costs to the defendants, when one of the defendants had previously been discharged from the action without costs, on his disclaimer of having any interest therein.

Messrs. Chesnut & Workman, for appellants.

Mr. W. D. Trantham, contra.

March 14th, 1882. The opinion of the Court was delivered by

SIMPSON, C. J. The plaintiffs, appellants, heirs-at-law of Rebecca Copeland, deceased, instituted this action against the respondents, alleging in their complaint, that some time prior to November 3d, 1849, one Laban W. Moak, a brother of the said Rebecca Copeland, had in his hands a certain sum of money belonging to the said Rebecca; that at her request, and to preserve the same from the marital rights of her husband, the said Moak bought with this money a tract of land, lying in Kershaw county, containing some five hundred acres; that the deed from the grantor, Wiley Albert, was executed to the said Moak in fee and without trust; that she was placed in possession and so remained until her death, confiding in her

brother as her friend and adviser to protect her rights; that not long after the death of the said Rebecca, the plaintiffs, her children, who were then minors of tender years,

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were taken by the said Moak, their *uncle, to Lexington county, where they were brought up in ignorance of their rights as to the land, until within less than four years before the commencement of their action; that at the death of their mother the land was taken possession of by Moak; that defendant is now wrongfully in possession and has been for four years; that defendant Page wrongfully claims an interest therein; that the rents and profits are reasonably worth $100 per annum. Wherefore they prayed judgment, that defendants, Henry Moak and Andrew Moak, execute titles to plaintiffs; that plaintiffs be let into immediate possession, and that defendant True pay to the plaintiffs four hundred dollars for the use and occupation thereof, and for costs.

The Moak defendants, who are the heirs-at-law of Laban W. Moak, made default. But the defendants True and Page, answered, denying that Rebecca Copeland "ever had legal seizin of the premises or any right to the possession thereof;" that defendant True entered under claim of title in fee, founding this claim upon a written instrument, to wit, a deed from one Wiley Albert, executed on November 3d, 1849; that there had been a "continued occupation and possession of said premises under this claim for more than twenty years last before this action, by the defendants, and those under whom they claimed; that they deny the truth of each and every allegation inconsistent with what is herein stated."

At the hearing, the complaint was dismissed as to Page, upon affidavits that he had no interest in the land and that he had answered by mistake. The cause was referred to a referee, and a jury was empaneled to aid the court in reaching a conclusion. It does not appear in the brief what verdict the jury rendered. But the presiding judge found as matter of fact that the evidence going to show the resulting trust under which the plaintiffs claimed was not satisfactory, and even if the trust were established, that the plaintiffs had failed to bring notice thereof home to the defendants, which, he held as a matter of law, devolved upon them. On these grounds he dismissed the complaint. The appeal questions the correctness of this ruling:

First, as to the finding of fact by the judge, that the resulting trust had not been established; and, second, as to the proposition

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*of law, that it devolved upon the plaintiff to bring home to the defendants notice of such trust, if it existed.

The complaint states fully the facts out of which the plaintiffs claim that the trust originated. If these facts, thus alleged in the complaint, had been denied in the answer, thus raising a direct issue as to their truth, and testimony had been admitted upon such issue, then the finding of fact by the judge would hardly be disturbed, certainly not under the decisions of this State so often cited, unless it was clearly and patently against the evidence. But the allegations in the complaint, which, if true, assuredly raised a trust as between the original parties in favor of Mrs. Copeland, were not denied in the answer. The answer simply claimed title in the defendants, even that not very clearly, and denied as a legal conclusion that Mrs. Copeland ever had legal seizin or any right to possession. This, if true, did not controvert the positive allegations in the complaint of the facts, herein above stated, and which gave rise to the trust.

The defendants, then, not having denied these allegations, either generally or specially, they stood as admitted, (Code § 191,) and being admitted, the trust was established as against the defendants. The error of the judge was not in his finding of fact as to the existence of the trust, upon the testimony before him, but in regarding that as an open question, under the pleadings as they then stood, and requiring further testimony thereto besides the admissions of defendants in their answer. Mr. Pomeroy, section 617, in treating of failure to deny in the answer the allegations of the complaint, says: "Such allegations are admitted to be true, and the plaintiff need not prove any material allegation so conceded to be true. Evidence in contradiction of them cannot be received, and a finding of fact in opposition to such admissions will be disregarded and set aside on appeal."

2. Did the judge err in holding that it devolved upon the plaintiffs to prove that the defendants had notice of the trust?

It is always necessary for a plaintiff to make out his case, and when the facts alleged by him are denied, he must prove them to the satisfaction of the jury, or the court, as the case may be. Here plaintiffs' cause of action consisted in defendants depriving them of the benefit of a certain tract of land, to

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which they *claimed they were entitled by virtue of a resulting trust in favor of their mother.

The essential facts in this cause of action, at least until the defense appeared, were, first, the existence of the trust, and, second, the deprivation of possession. These facts the plaintiffs proved; what else, before defense, could they be required to prove? They could not be expected to anticipate the defendants' ground of defense and to attempt to destroy it in advance. It was time enough for them to do this when such defense was interposed.

The defense of bona fide purchase without

notice is in many cases a good defense, but it is not one which the law raises and presumes to exist, like the presumption of innocence in criminal cases. On the contrary, it must be presented and made out by the party who attempts to shield himself with it. In this case this defense is not set up in the answer, and under the pleadings it is doubtful whether the defendants could have legally introduced evidence to sustain it, even if they had desired to do so, much less that the plaintiffs should have been required to anticipate it and to meet it.

Defenses are of two classes: first, denials of plaintiff's allegations, either general or special, and thereby raising a direct issue as to their truth; and, second, the interposition of what is called "new matter," that is, the averment of facts different from those alleged in the complaint, and not embraced within the judicial inquiry into their truth. This latter class being also divided into two classes, to wit, those which are defensive, and which, if true, bars the plaintiff's right of action, (Pomeroy § 593,) and those which set up an independent cause of action in favor of the defendant, as counterclaim, &c.

Both of the original classes may be set up in the same answer; when so done, however, they should not be mixed together, but should appear in separate and distinct paragraphs. When the defendant relies in his answer upon but one of these defenses, for example, a denial, then, as a general rule, his testimony must be confined to the issue raised by such defense. Pomeroy §§ 690–91.

In fact, the tendency of the decisions in most of the States where the code has been

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adopted, is to a rigid and universal *application of this rule. How far this principle shall be applied in this State it is not now necessary to determine, but we will say that the rule is logical in its character, and, if closely adhered to, would be highly beneficial.

But where denial is not relied upon, on the contrary the defendant stands upon "new matter," admitting the allegations of the complaint, he must aver his new matter in his answer, otherwise it is not properly in the case, and no testimony in reference to it will be admitted. Pomeroy § 706.

Here the defendants admitted the plaintiffs' cause of action, but failed to set up the new matter upon which the case turned, to wit, "Innocent purchaser without notice," and yet the plaintiffs' action was dismissed because he did not rebut this defense in advance of its being presented, or any prima facie showing made of its truth. The defense of bona fide purchase without notice is an equitable defense, must be set out in the answer, and must be sustained by the party who erects it as a shield. Frost v. Beekman, 1 Johns. Ch. 288; 2 Abb. For. 167, note; 2 Lead. Cas. Eq. (Hare & W.) 119–120; White & T. Lead. Cas. 102.

We think the Circuit judge erred in his rulings, both as to the fact of the existence of the trust, and as to the legal necessity of plaintiff's proving that defendants had notice thereof.

We think that the complaint was properly dismissed as to the defendant Page, upon the showing made. The other exceptions raise no question requiring the opinion of this court.

The judgment of this court is that the order of the Circuit Court dismissing the complaint be reversed, and that the case be remanded for a new trial.

McIVER and McGOWAN, A. J.'s, concurred.

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16 S. C. 587

(Case No. 1172.)

WILSON & CO. v. ATLANTA AND CHARLOTTE AIRLINE RAILWAY COMPANY.

(November Term, 1881.)

[1. *Evidence* ⇐158.]

An agent having testified positively and of his own knowledge that certain cotton (for the negligent burning of which the action was

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brought) be*longed to the plaintiffs jointly, said upon his cross-examination, "my books show how the cotton was owned." *Held*, that objection to the statement of witness, in the absence of his books, as to the ownership of the cotton, was properly overruled.

[Ed. Note.—Cited in Dobson v. Cothran, 34 S. C. 530, 13 S. E. 679.

For other cases, see Evidence, Cent. Dig. § 474½; Dec. Dig. ⇐158.]

[2. *Trial* ⇐139.]

The trial judge could not charge that plaintiffs were not joint owners of the cotton, there being testimony tending to show that they were.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⇐ 139.]

[3. *Railroads* ⇐454.]

In action against a railroad company for the negligent burning of cotton near its track, the judge did not err in refusing to charge "that if the jury find from the evidence that the defendant corporation was provided with the most approved machinery for protection against fire, and said machinery was worked by competent and careful employés, they will find for the defendant."

[Ed. Note.—Cited in Hutto v. Seaboard Air Line Ry., 81 S. C. 573, 62 S. E. 835; Brown v. Seaboard Air Line Ry., 83 S. C. 561, 65 S. E. 1102.

For other cases, see Railroads, Cent. Dig. § 1671; Dec. Dig. ⇐454.]

[4. *New Trial* ⇐76.]

Motion in the Circuit Court for new trial is the proper proceeding for the correction of an alleged error committed by the jury in the allowance of interest in their verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153–156; Dec. Dig. ⇐76.]

[5. *Damages* ⟸226.]

The verdict being for a gross sum as damages, it cannot be set aside as erroneous, even if the amount found was reached in part by an allowance of interest.

[Ed. Note.—Cited in Woods v. Cramer, 34 S. C. 518, 13 S. E. 660.

For other cases, see Damages, Cent. Dig. § 570; Dec. Dig. ⟸226.]

[This case is also cited in Brown v. Atlanta & C. A. L. Ry. Co., 19 S. C. 39, as to facts.]

Before Wallace, J., Spartanburg, March, 1880.

This was an action commenced February 5th, 1880, by R. T. Wilson & Co., Gustav Dambman and the Navassa Guano Company against the Atlanta and Charlotte Airline Railway Company. The complaint demanded $2,200 damages for the negligent burning of thirty-three bales of cotton belonging to the plaintiffs at Gaffney City, in Spartanburg county, on November 2d, 1879. The cotton was on a platform belonging to the town, near the railroad track. It had not been delivered to the railway company.

W. J. Duncan, agent for the plaintiffs, testified that plaintiffs jointly owned the cotton; that the burnt bales contained 16,005 pounds of middling, worth at that time ten and a quarter cents per pound, but such cotton had since sold at twelve and three-quarters cents. The fire broke out on top of the cotton within a few minutes after the eastward bound passenger train had left the depot, after a stay of twenty minutes for dinner. The distance of the engine from this platform, whether it emitted sparks or not, and whether parties were at the same time sitting upon these bales smoking cigars, were matters upon which the testimony was conflicting.

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*Defendant made certain requests to charge, which are correctly stated in the exceptions. Other matters are given in the opinion.

His Honor charged the jury as follows:

In this case there are three plaintiffs suing jointly, and the jury must be satisfied they were joint owners of the cotton alleged to have been burnt. If they were not joint owners they cannot recover, and the verdict must be for the defendant. If you find that they were joint owners, you must next inquire, first, how was it burned? If you find that the agents of defendant did not burn the cotton, then you must find for the defendant. Defendant is liable only in case of negligence. Defendant had the legal right to run its trains over their road. Defendant must have proper equipments on its trains. If trains are properly equipped and fires occur, and that is proved and no more, it would be no negligence, but accident, and defendant would not be liable. Negligence is absence of due care in performing any act. If any act is done in pursuing a right, and injury occur in the absence of due care, the defendant would be liable. If anything is done in pursuance of a right that common prudence forbids, defendant would be liable, because it would be negligence. To make it negligence the defendant must have been doing an act that, under all the circumstances of the particular case, the plain suggestion of prudence would forbid.

Verdict for plaintiffs for $1,686.73.

A motion on the minutes for a new trial was refused, and defendant appealed upon the following exceptions:

1. Because of error in that the Circuit judge erred in overruling the objection of defendant's counsel to the statement of W. J. Duncan as to quantity and ownership of the cotton, when such quantity and ownership was, he testified, shown by his books, the books themselves not being produced.

2. Because the Circuit judge erred in not instructing the jury, as requested by defendant's counsel, that, as a matter of law, Gustav Dambman was not a joint owner with the other plaintiffs in the cotton.

3. Because the Circuit judge erred in not instructing the jury, as requested by defendant's counsel, that, as a matter of law, the

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*Navassa Guano Company was not a joint owner with the other plaintiffs in the cotton.

4. Because the Circuit judge erred in not instructing the jury, as requested by defendant's counsel, that, as a matter of law, from the proof made by the plaintiffs, none of them were joint owners in the cotton.

5. Because the Circuit judge erred in not instructing the jury, as requested, "that if the jury find from the evidence that the defendant corporation was provided with the most approved machinery for protection against fire, and that said machinery was worked by competent and careful employés, they will find for the defendant."

7. Because of error in that the Circuit judge refused the motion for a new trial when the evidence was uncontradicted that the defendant corporation had provided the most improved machinery for the protection against fire, and said machinery was worked by careful, prudent and competent employés.

Messrs. W. E. Earle, D. R. Duncan, and Wells, Orr & Westmoreland, for appellant.

Messrs. Bobo & Carlisle, and J. S. R. Thomson, contra.

March 15th, 1882. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover damages for the destruction of thirty-three bales of cotton alleged to have been burned by the negligence of the defendant company. The cotton was deposited near the railroad track for shipment, but had not been receipted for by the agent of the company when it was destroyed by fire.

The first question raised by the appeal is as to the competency of certain testimony adduced for the purpose of showing that the plaintiffs were joint owners of the cotton. The witness, Duncan, testified that he was the agent of all the plaintiffs and that the cotton "was owned by the three companies in common." Afterwards, in reply to a question propounded by defendant's counsel, he said, "My books show how the cotton was

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owned," where*upon the counsel for defendant "objected to the statement as to ownership of the cotton in the absence of the books," which objection was overruled and the defendant excepted.

The exception seemed to be based upon the assumption that the witness spoke of the ownership of the cotton from his books only, but there is no foundation for such an assumption. The witness did not say, either expressly or by implication, that he derived his knowledge as to the ownership of the cotton from his book entries, but, on the contrary, testified positively that the plaintiffs were joint owners; and it was only in reply to a question of defendant's counsel that he stated that this fact, which he had previously testified to as within his own knowledge, likewise appeared upon his books. He nowhere refers to the books as the source of his knowledge, and it cannot be pretended that the ownership could only be proved by the books. There was, therefore, no foundation for this exception.

The second, third and fourth grounds of appeal complain of error on the part of the Circuit judge in not instructing the jury, as matter of law, that the plaintiffs were not joint owners of the cotton. This he could not do without invading the province of the jury. There was testimony tending to show that they were joint owners, and the question whether the testimony was sufficient to establish the fact was solely for the jury. All that the judge could properly do was to leave the question of fact to the jury, instructing them, as he did most explicitly, that unless the testimony satisfied them that the plaintiffs were joint owners of the cotton, they could not recover. These grounds cannot be sustained.

The fifth and seventh grounds of appeal may be considered together, as they raise, substantially, the same question. Did the facts that the company had provided its engines with the most approved appliances for preventing the escape of sparks from the smoke-stacks, and had employed competent and careful persons to run the engines, preclude the further inquiry, whether, upon the particular occasion in question, there had been negligence on the part of any of the employés of the company causing the damage of which the plaintiffs complained? These facts would certainly create a very strong

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presumption in *favor of the company, but it will not do to say that they would be absolutely conclusive that there was no negligence, and that the judge should, as matter of law, have instructed the jury that proof of these facts would relieve the company from the charge of negligence. This could only be upon the assumption that competent and careful persons always exercise their skill in a careful manner, and are never negligent in the discharge of their duties—an assumption which is contradicted by experience.

Negligence, as is said in the case of Scott v. Crews, 2 S. C. 531, and the authorities there cited, is a mixed question of law and fact. Whether a person has been guilty of negligence in a particular case is to be determined, first, by ascertaining what constitutes negligence; second, whether the evidence in such case shows that he has done or omitted to do any act which would constitute negligence thus defined. The first is a matter for the court, and the second for the jury.

Here, it was the duty of the Circuit judge to define negligence by explaining to the jury what would constitute it, and then leave it for the jury to say whether the defendant, by its employés, had done or omitted to do any act, the doing or omission of which would constitute negligence as thus defined. This duty was fully performed, for the Circuit judge, after explaining to the jury what would constitute negligence, in terms to which no exception has been taken, explicitly instructed them that the defendant could not be made liable unless such negligence was established by the evidence. In fact, he went further and said to the jury that "if trains are properly equipped and fires occur, and that is proved and no more, it would be no negligence but accident, and defendant would not be liable." There was, therefore, no error of law, as charged, in either of these grounds of appeal.

The sixth ground alleges error, because the jury, by their verdict, allowed interest on the value of the cotton. This ground should properly have been presented on a motion addressed to the Circuit judge for a new trial, for it does not appear that there was any request for any instruction to the jury upon this point, or that any instruction was given. It, however, could not be sustained, even

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if it had been properly presented. The *verdict does not find interest eo nomine, but it is simply for a gross sum, which either may or may not include interest. The action was for damages, and in arriving at the amount of damages sustained by the plaintiff, interest could be assessed by the jury as part of the damages. Kyle v. The Laurens Railroad Company, 10 Rich. 387 [70 Am. Dec. 231]. If the jury had undertaken to allow interest eo nomine, it may be that, under the case of Ancrum v. Stone, 2 Speers 594, there might have been ground for the exception, but that is not the case here.

The eighth ground of appeal presents no question of law and need not be considered. Indeed, this, as well as the sixth ground, seem to have been abandoned, as neither of them were alluded to in the argument.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

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16 S. C. 593

(Case No. 1173.)

MILLS v. WILLIAMS.

(November Term, 1881.)

[1. *Sunday* ⟸11.]

A party seeking to impeach a contract because it was made on Sunday must show that it was done by a person in the exercise of the business of his ordinary calling. Hellams v. Abercrombie, 15 S. C. 110 [40 Am. Rep. 684], approved.

[Ed. Note.—Cited in Mitchell v. Bates, 57 S. C. 52, 35 S. E. 420.

For other cases, see Sunday, Cent. Dig. § 32; Dec. Dig. ⟸11.]

[2. *Chattel Mortgages* ⟸263.]

A horse was sold at public auction under a mortgage, and purchased by a disinterested third person, and he, failing to comply, transferred his bid to the mortgagee, who took possession. There being no evidence to show fraud in the sale, or that the price paid was, at the time, inadequate, or that the mortgagee had resold at a profit, *held*, that the sale was valid.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 544; Dec. Dig. ⟸263.]

[3. *Principal and Agent* ⟸148.]

A principal executed a sealed note, with her husband and two others as sureties, for a sum certain, expressed to be for "value received in mule," with the name of the payee left blank, and delivered it to her husband, as her agent, to purchase a mule from a certain drover whose name was forgotten. The husband used the note in the purchase of a horse of greater value from another person, giving his own obligation for the difference. *Held*, that as to the other parties to the note there was no delivery, and the husband was alone liable to the holder, even if no notice, other than that expressed in the note, was brought home to the holder that the note was intended for another person. Gourdin v. Read, 8 Rich. 230, recognized and followed.

[Ed. Note.—Cited in Reeves v. Brayton, 36 S. C. 402, 15 S. E. 658; Weyman v. Perry, 42 S. C. 418, 20 S. E. 287; Sullivan v. Williams, 43 S. C. 506, 508, 21 S. E. 642.

For other cases, see Principal and Agent, Cent. Dig. § 547; Dec. Dig. ⟸148.]

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[4. *Principal and Surety* ⟸27.]

*Knowledge by the principal and her other sureties that this horse had been purchased was no ratification of the delivery of the note, whether they knew of the use of the note for such purpose or not. Nor did the deposit by the principal of a sum of money with her sureties to save them harmless in this suit, nor a remark made by one of such sureties after action commenced, that the note would have been paid if one sued, amount to a ratification of the misappropriation of the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 56; Dec. Dig. ⟸27.]

[This case is also cited in Fowler v. Allen, 32 S. C. 229, 10 S. E. 947, 7 L. R. A. 745, and distinguished therefrom.]

Before Kershaw, J., Spartanburg, October, 1880.

The opinion states the case.

Mr. J. S. R. Thomson, for appellants.

Messrs. Bobo & Carlisle, contra.

March 15th, 1882. The opinion of the court was delivered by

McIVER, A. J. This was an action on a note under seal, of which the following is a copy:

"By the first of November next, we or either of us, promise to pay . or bearer, the sum of eighty-five dollars, value received in mule, this March 30th, 1879.

"Witness our hands and seals, with interest from date.

(Signed.) "Diana Williams, [L. S.]
"A. J. Williams, [L. S.]
"W. D. O'Shields, [L. S.]
"R. M. Smith." [L. S.]

The circumstances attending the signing of this note were as follows: Mrs. Diana Williams had contracted for the purchase of a mule from a certain drover, whose name she could not recall, and had agreed to give a note, with sureties, for the same. Accordingly, the above-mentioned note was signed by her as principal, with the other defendants as sureties, she, at the time, agreeing to secure her sureties from ultimate loss by a mortgage on the mule. Not remembering the name of the drover with whom the contract had been made, there was a blank left in the note for the name of the payee, and the note

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was delivered to *the defendant, A. J. Williams, the husband of Diana, for the purpose of being delivered to the drover and obtaining from him the mule.

A. J. Williams, however, in violation of the trust thus reposed in him, did not deliver the note to the drover, and did not obtain said mule, but, on the contrary, without any authority from the other signers of the note, delivered said note to the plaintiff, in part of the purchase-money of a horse, and gave a mortgage on the horse to secure an alleged balance of forty dollars. The defendants knew shortly afterwards that A. J. Williams had bought a horse from the plaintiff but whether they knew that the aforesaid note had been used in settlement for the horse, did not appear.

It also appeared that when the note for forty dollars became payable, the plaintiff seized the horse under his mortgage, and sold him at public auction for fifty-five dollars, at which sale the defendant R. M. Smith

was present. The purchaser at this sale having failed to comply with his bid, "sold said horse to L. A. Mills at same price, and Mills still owns the horse," (as is stated in the "case,") and the evidence was that the horse, at the time of the trial, was estimated to be worth from one hundred to one hundred and twenty-five dollars.

The plaintiff testified that when he sold the horse to A. J. Williams he had no notice of the arrangement between the defendants in regard to the purchase of the mule from the drover, and also, that the defendant Smith told him that they had the money to pay off the note, and would have done so if plaintiff had not brought suit. This money, it seems, had been placed in the hands of her sureties by Diana Williams to indemnify them in the suit, and was her own money.

The defendants requested the Circuit judge to charge as follows: "First, if, from the testimony, the jury believe that the defendants, Diana Williams, W. D. O'Shields and R. M. Smith, signed and sealed said note given to be filled out in favor of a certain person not a party to this proceeding, for a certain mule, and never gave consent that the same should be delivered to L. A. Mills or should be used in the purchase of a horse, then the verdict must be in favor of the defendants

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named. Second, *if the jury believe that the contract in this case was executed on Sunday, they must find a verdict for all of the defendants."

Both of these requests were refused, and the judge charged "that in order for Diana Williams, W. D. O'Shields and R. M. Smith to avoid the note, it was necessary for them to bring home notice to the plaintiff that the note was intended for another person, and that A. J. Williams was not authorized to deliver it to plaintiff. That a sealed note executed under the circumstances under which this was given could have been delivered to any person for any work animal, (though not, perhaps, for an entirely different species of property,) and that such transferee of note could recover thereon from all the signers thereof. That the circumstances under which the note was executed, and the fact that A. J. Williams delivered it for different property and to a different person than intended by the other signers, in no way relieved the defendants, or either of them, from their liability on said note. That the value of the horse at the time of mortgage sale by plaintiff must first go in payment of the mortgage note for forty dollars and interest, given by A. J. Williams to L. A. Mills, and the balance, if any, was applicable as a credit on said note sued on in this action. That the jury will not be authorized to presume from the date of the note that plaintiff sold the horse on Sunday. The presumption would be that he did not, as no person is presumed to do wrong. That the only direct testimony on this point was that of W. D. O'Shields, to the effect that he saw the horse on Tuesday, after Williams had purchased him from plaintiff on Saturday."

Judgment having been rendered for plaintiff, the defendants appeal, and we are called upon to determine whether there was any error on the part of the Circuit judge in refusing to charge as requested, or in any of the propositions of law laid down in the charge, to all of which exceptions were duly taken.

The appeal of the defendant, A. J. Williams, stands upon an entirely different footing from that of the other defendants, and we propose to consider his appeal first. He raises only two questions: First, whether the judge erred in refusing to charge that if the jury believed from the testimony that the contract, evidenced by the note, was made

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on Sunday, the plaintiff could *not recover. This court has recently decided, in the case of Hellams v. Abercrombie, 15 S. C. 110 [40 Am. Rep. 684], that the mere fact that a contract was made on Sunday will not render it invalid, but that the party seeking to impeach it must go further and show that the contract was made by a person in the exercise of the business of his ordinary calling. Hence, in that case, a mortgage on real estate, executed on Sunday, which was given to indemnify a surety, was held valid. In this case there is no evidence tending to show that either of the parties in making this contract were in the exercise of the business of their ordinary calling, and, therefore, even if the contract had been made on Sunday, it would be a valid one. There was no error in this respect.

The next ground relied upon by A. J. Williams is, that the judge erred in instructing the jury that the value of the horse, at the time it was sold under the mortgage, must be first applied to the payment of the note for forty dollars, and only the balance, if any, was applicable to the note sued on. We are at a loss to conceive how A. J. Williams could object to this, for it was precisely in conformity to his contract with the plaintiff by which the horse stood pledged for the payment of that particular note, and, of course, the proceeds of the sale should first be applied to its payment. Judging from the argument here, however, the real point of this exception, which is not presented very distinctly in the "case" or the exceptions, seems to be that Mills was, in fact, the real purchaser at the sale under the mortgage, and that he could not legally become the purchaser at his own sale as mortgagee.

The case of Black v. Hair & Black, 2 Hill Eq. 622, [30 Am. Dec. 389], is an authority to the contrary. Here, the sale was made at public auction, was attended by at least one of the other defendants, and the property was bid off by a disinterested third person. This, we think, in the absence of any evi-

dence tending to show any fraud in the sale, or that the property brought less than its value at that time, sufficient to bring this case within the rule established by Black v. Hair & Black, supra. We do not see how, otherwise, the plaintiff could show that his purchase was fair, except by showing that

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the property was sold at public *auction, that third persons attended the sale, one of whom, at least, might be regarded as having an interest to make the property bring its full value, and that the property was bid off by a third person and his bid transferred to the mortgagee, for that is what we understand to be the effect of the statement made in the "case," "that the purchaser failed to comply with his bid, and sold said horse to L. A. Mills at same price." There is no evidence here, as there was in the case above cited, that the property brought an inadequate price, or that it was afterwards sold for a profit, for the fact testified to, that the horse was estimated to be worth more at a subsequent period, about a year afterwards, might be accounted for in various ways, and yet the sale was sustained in Black v. Hair & Black. This ground of appeal cannot be sustained.

The other defendants, in addition to the grounds already disposed of, take the further ground that the judge erred in charging the jury, that, to enable these defendants to escape liability on this note, it was necessary to satisfy the jury that the plaintiff had notice, when he took the note from A. J. Williams, that it was intended for another person, and that A. J. Williams did not have authority to deliver it to the plaintiff, and that, in the absence of such notice, the circumstances under which, and the purposes for which the note was signed and delivered to A. J. Williams, already detailed, would not relieve these defendants from liability on the note. It will, of course, be conceded that the mere signing of the note in question would not, of itself, impose any liability upon those who signed it. Until it was delivered, the contract which it was intended to evidence was inchoate and not complete, and, therefore, the case really turns upon the question, whether these defendants ever delivered the note to the plaintiff. They certainly never intended to do so, and, on the contrary, intended that the note should be delivered to another person for a different piece of property which was mentioned in the note, though the name of the person for whom it was intended was left blank, and was, therefore, uncertain.

The practical inquiry, therefore, is, whether a person who entrusts a sealed note, with the name of the payee left blank, to an agent for the purpose of being delivered to

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one person, in *exchange for a particular piece of property specified in the note, is bound by the act of the agent who delivers the note to another person for a different piece of property, unless the person to whom the note was actually delivered had notice, at the time, of this departure from his instructions on the part of the agent.

This question, we think, is settled by the decisions of the former Court of Appeals in this State, in the case of Gourdin v. Read, reported first in 6 Rich. 497, and again in 8 Rich. 230. In that case, Read, for the purpose of assisting one Commander, signed with him, as surety, a joint and several bond, leaving the date and the name of the obligee blank, with the understanding that when Commander found some one willing to lend money on that security he was to fill the blanks, and with the money borrowed he was to purchase slaves and give Read a mortgage on them to indemnify him against any loss by reason of his suretyship. Commander borrowed money from Gourdin and delivered to him this bond as collateral security, after first filling in the name of Gourdin as obligee and the date, but, instead of applying the money to the purchase of slaves, he used it for the payment of his debts. The Circuit judge charged the jury that the question in the case was a mere question of fact—"Whether Commander was authorized by Read to fill up the blanks in the bond and to use the same when complete as he had done?"

On appeal, it was held, amongst other things, that the latter part of this charge was calculated to mislead the jury into supposing that the fact that Commander had used the money obtained on the bond in a manner different from that intended by Read, would discharge Read, and that if Read had, by parol or otherwise, authorized Commander to fill the blanks in the bond with the name of any person from whom he could borrow the money, he would be liable, even though Commander had not applied the money to the purpose understood between them at the time the bond was signed.

On the next trial, Read set up a new defense, based upon the allegation that he had revoked the authority originally given to Commander to fill the blanks in the bond and negotiate it before the money was borrowed from Gourdin. At the hearing below, the jury were instructed that, even if

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Commander's *authority had been revoked, this would not discharge Read, unless Gourdin had notice of such revocation before he loaned the money to Commander, but, on the second hearing in the Court of Appeals, it was held that no such notice was necessary, and that, if Commander's authority was revoked before the money was loaned, then Read would be discharged, even if Gourdin had no notice of such revocation.

In delivering the opinion of the court, Withers, J., uses this language: "Gourdin's title rests upon the fact of the existing power of Commander at the time he inserted his name as obligee and delivered it, to do that as the act of Read. * * * * The plaintiff judged of the creation and the continued existence of Commander's authority from the circumstances before him. He also took the risk of its revocation from a view of the same circumstances. Whether he had notice of its revocation does not affect the question."

This is much stronger than the case now before the court. There, the surety had originally invested the principal with authority to fill the blank in the bond with the name of any person from whom he could borrow the money, and yet, although the bond was left in the possession of the principal, it was held that if such authority was revoked, the surety would be discharged, even though the person who loaned the money had no notice that such authority had been revoked. Here, however, the person who delivered the note to the plaintiff never had any authority to do so, but, on the contrary, his instructions were to deliver it to another person, for a particular thing specified in the note, and his delivery to the plaintiff was wholly unauthorized, and cannot bind these defendants.

They certainly never in person made any contract with the plaintiff, and, if it is sought to bind them by a contract made through their agent, the plaintiff must show that the act of the agent was within the scope of his authority. The very fact that the note contained in itself the evidence that it was intended to be given for a mule, was sufficient to show that there was not even any apparent authority conferred upon A. J. Williams by the possession of the note, with the name of the payee left blank, to fill the blank with the name of any per-

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son to whom *he might choose to deliver it, for that showed that there had been a previous negotiation with some person for the purchase of the particular property specified in the note at the price therein named.

The plaintiff cannot claim that he was induced to take the note by the apparent authority which the possession of the note seemed to give A. J. Williams to fill the blank, for he must have known that he was not the person with whom there had been a previous negotiation for the purchase of a mule for the sum for which the note was given. We think, therefore, that the judge erred in charging the jury that these defendants would be liable on the note, unless notice was brought home to the plaintiff that the note was intended for another person, and that A. J. Williams was not authorized to deliver it to the plaintiff.

It is urged, however, that even if A. J. Williams had no authority originally to deliver the note to the plaintiff, yet that his act in doing so has been subsequently ratified by these defendants, and they are, therefore, bound by it. There is no doubt that subsequent ratification of the unauthorized act of the agent, by the principal, will make such act the act of the principal, so far as to bind him to the same extent as if the agent had been originally invested with authority to do the act. But we are unable to see anything in this case to warrant the application of this principle. It does not appear that the defendants, whose appeal we are now considering, did, by any word or act, ratify the action of A. J. Williams in using the note for the purchase of a horse for his own benefit. The testimony goes to show that they knew that he had purchased the horse, but there is no evidence that they knew that this note had been used for that purpose, until about the time this controversy arose, and even if they had known it we do not see how this could be regarded as any ratification of the act of A. J. Williams. He had a perfect right to buy a horse, and if the person from whom he purchased was careless enough to take a worthless note in exchange for the horse, we do not see how this could affect these defendants. They appear to have denied their liability as soon as they were called upon to pay the note, and we do not see what more they could have been expected to do.

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*The fact that Mrs. Diana Williams deposited with her sureties money to the amount of the note, to indemnify them against any loss they might sustain by this suit, was certainly no confirmation of the act of her husband in appropriating the note to a purpose other than that for which it was intended. She had agreed, if they would, by becoming her sureties, enable her to buy a mule, that she would indemnify them by a mortgage on the mule, and having failed to get the mule, and not knowing what might be the result of the threatened suit on the note, she very properly resorted to other means to indemnify them.

So, too, the statement made by R. M. Smith to the plaintiff that "they had the money to pay off the note, and would have done so if plaintiff had not sued," cannot amount to anything, for the form of the expressions show that this remark was made after the suit was commenced.

The judgment of this court is that the judgment of the Circuit Court, so far as it affects the defendant A. J. Williams, be affirmed, and so far as it affects the other defendants, that it be reversed, and that the case be remanded to the Circuit Court for a new trial as to all the defendants except A. J. Williams.

SIMPSON, C. J., and McGOWAN, A. J., concurred.

16 S. C. 602

(Case No. 1183.†)

McGOWAN v. HITT.

(April Term, 1881.)

[1. *Fraudulent Conveyances* ⟸94.]

A man on the eve of his marriage, and on the alleged consideration of the marriage, but with intent to defeat the claims of his creditors, conveyed his entire visible estate to his intended wife, she being ignorant of his fraudulent purpose. *Held*, that the deed was fraudulent, and its terms were sufficient to charge the wife with notice and to affect her with the fraud.

[Ed. Note.—Cited in Harrell v. Kea, 37 S. C. 374, 16 S. E. 42.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 236; Dec. Dig. ⟸94.]

[2. *Limitation of Actions* ⟸100.]

And the deed being recorded, creditors of the husband were chargeable with notice of the fraud which the terms of the deed disclosed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480–493; Dec. Dig. ⟸100.]

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[3. *Executors and Administrators* ⟸368.]

*Distributees of an estate having given to an administratrix, in 1861, their bonds, with sureties, for purchases at the estate sale of personalty, it would seem that the administratrix, by reason of the sureties' rights, have proceeded in equity to subject the distributive shares of the principals to the extinguishment of their indebtedness.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1507–1515; Dec. Dig. ⟸368.]

[4. *Fraudulent Conveyances*. ⟸241.]

A creditor cannot be said to have so exhausted his legal remedies against a surety as to entitle him to ask the aid of the Court of Equity to reach property fraudulently conveyed away, until he has exhausted his legal remedies against the principal and other surety also.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694, 696–726; Dec. Dig. ⟸241.]

[5. *Limitation of Actions* ⟸100.]

A debtor fraudulently conveyed away his estate, pending action against him. From failure of the courts to sit, and other causes, judgment was not obtained until seven years afterwards, and thereupon plaintiff promptly proceeded in equity to reach the property so transferred. Without imputing any laches to plaintiff in obtaining his judgment—*Held*, that the Statute of Limitations commenced to run from the discovery of the fraud, and was not suspended until judgment obtained at law; and that the suit in equity was barred. McIver, A. J., dissenting.

[Ed. Note.—Cited in Suber v. Chandler, 18 S. C. 533; State ex rel. George v. Aiken, 42 S. C. 228, 20 S. E. 221, 26 L. R. A. 345; Lyles v. Lyles, 71 S. C. 399, 51 S. E. 113.

For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480–493; Dec. Dig. ⟸100.]

[This case is also cited and overruled in Suber v. Chandler, 18 S. C. 526.]

Before Hudson, J., Laurens, February, 1881.

At the hearing of this appeal, Hon. BENJAMIN C. PRESSLEY, of the First Judicial Circuit, and Hon. THOMAS B. FRASER, of the Third Circuit, sat in the stead of the CHIEF JUSTICE and Associate Justice McGOWAN, who were constitutionally disqualified.

The action was by John J. McGowan as administrator de bonis non of William Hitt, deceased, against Martin Hitt and Mary, his wife, and Aaron Wells.

The Circuit decree (omitting its statement of facts, which are repeated in the opinion,) was as follows:

The issues presented and the questions to be determined in this case are of a very interesting character, and I would be pleased to have more time to elaborate my views upon them, but pressure of business requires that I shall forego this desire and give my opinion briefly.

Antenuptial conveyances sometimes are made to the intended wife voluntarily by the man through overflowing love and affection, and unsolicited by the woman. In this case they are more properly denominated voluntary deeds, than conveyances in consideration of marriage. Others, again, are the result of negotiations between the parties. They are made conditions precedent to the marriage, enter into and form part of the con-

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sideration, *and are properly denominated deeds in consideration of marriage, which it is needless to say constitutes the highest and most valuable consideration known to law. In either instance the deed may on its face purport to be in consideration of marriage, but the fact may be, that in the one case it is an unsolicited donation, and in the other the result of deliberate contract, and a sine qua non to the solemnization of the marriage. Evidence, I think, is always admissible to prove the facts of the case, and these facts should be made always to appear, as they may seriously affect consequent litigation.

The first question raised for answer is, Was it lawful for Martin Hitt, being indebted $2,200, and owning property worth but little if any more, voluntarily to give the whole of this property to his intended wife, and thus to entirely defeat, delay and hinder his creditors? The leading case on this subject in South Carolina is that of Simpson & Davidson v. Admiral Richard Graves and others, Riley's Ch. 232. I cannot find that this case has been overruled or even modified by subsequent decisions, but on the contrary has been recognized as sound law by later decisions of our courts.

Judge Staples, of Virginia, in the late case of Herring v. Wickham, 29 Gratt. 628, takes issue with Justice Nott, of South Carolina, in the aforesaid case, and in a very learned opinion combats this doctrine of South Carolina. His opinion lays down the bold doctrine that creditors are utterly helpless as against an antenuptial convey-

†Inserted out of its order, so as to complete in this volume the cases of April Term, 1881.—REPORTER.

ance of a man's entire property to his intended wife, however much he may be in debt and however fraudulent may be his intention, provided the wife is not cognizant of the fraud. The two opinions are able and learned, and hold the opposite extremes of the law of fraud as applicable to antemptial settlement by insolvent debtors. I regard the views of Justice Nott as the sounder and safer of the two, and certainly more binding on me. I shall not trouble myself to make extracts from either, nor from other judgments upon this subject. I hold that the conveyance by an insolvent man voluntarily of his entire property to an intended wife on the eve of marriage is fraudulent as against his creditors, and will be declared void, on proper and timely application to the courts.

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*Secondly. Does the fact that the conveyance of his entire property by an insolvent to his intended wife on the eve of marriage is made at her special instance and request and as a condition precedent to the marriage, she being innocent of fraudulent intent, alter the case? We think not. And for our reasons refer to the aforesaid opinion of Justice Nott. We hold that a man in debt cannot be allowed to make marriage the means and occasion of entirely defeating, delaying and hindering creditors by settling the whole of his property on a woman in consideration of marriage. The case in hand clearly shows that Martin Hitt, being indebted to an amount nearly equal to the value of his entire property, did, on the eve of marriage, convey to his affianced his entire property, with intent thereby to defeat his creditors. Though not cognizant of this intent, his wife cannot retain this property against the demands of the creditors, unless these demands are barred by the Statute of Limitations interposed in her behalf; and to this inquiry we will address ourselves.

The deed in this instance is expressed to be in consideration of marriage and purports to convey certain well-defined real estate and specific articles and items of personal property. The present plaintiff, McGowan, was familiar with the property of Hitt, and still more cognizant of his affairs was Milly Hitt, the first administratrix of William Hitt, and payee of these notes. She knew that Hitt had conveyed his entire property to Mary Henderson, solely in consideration of marriage, whilst her suit for a large amount was pending against him. Not a fact or circumstance alleged now against this deed was not known to her when it was made, and seems also to have been known to McGowan. But, whether positively and actually known, or not, the deed was duly recorded November 30th, 1868, and bears on its face all the facts constituting the fraud, or enough at least to put the parties upon inquiry.

A recorded deed is constructive notice to the world of all that it contains on its face, and if it express on its face all the elements that constitute the fraud, it becomes notice of the fraud itself. If an insolvent man convey away all his property, expressed to be for a valuable consideration, it is not con-

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structive *notice of fraud, because it may speak truth. But it may afterwards be discovered that it speaks falsely in expressing a valuable consideration, when in fact it is voluntary. From this discovery of the fraud alone would the currency of the statute begin; but if the deed on its face announced a gift to be made, it is notice of all the fraud that a gift gives rise to, and the statute would run from the date of the recording against all having no previous actual notice. To his kinswoman, Milly, and neighbor McGowan, the deed when recorded proclaimed its own character, and they had personal knowledge that he was in debt, and that the deed covered his entire visible, tangible property. They were thus affected with notice of the fraud from November 30th, 1868. Nine years elapsed before the institution of this suit, and more than four, perhaps six years, before the death of Milly Hitt.

But the plaintiff contends that he could not ask relief of the Court of Common Pleas sitting in equity, until he had recovered judgment at law and exhausted his remedy there. That this did not occur until June, 1875, from which date alone can the currency of the statute against him begin, and that having come into this court November 1st, 1877, the bar was not complete. But the inflexible rule of law, and also in equity, is that the statute runs from the discovery of the fraud. To all persons sui juris the law allows four years from this date, in which to begin proceedings. Within this time all persons not under disability are supposed to be able to proceed at law, exhaust their remedy there, and, if necessary, come into equity. Certain it is that this is all the time the law as it then stood, allowed them. If their own tardiness or untoward events prevented them from entering suit in due time, it is the plaintiff's loss and the defendant's gain. Vigilantibus non dormientibus leges subveniunt.

The payee of the note, Milly Hitt, was barred in her life-time against this action and claim, and her successor, the plaintiff, is in no better condition. The action is barred by lapse of time, and it is adjudged that the complaint be dismissed with cost.

Plaintiff appealed upon the following exceptions:

1. Because his Honor erred in holding that the deed from defendant Hitt to his wife

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was sufficient knowledge of the fraud *to give currency to the Statute of Limitations, or that the plaintiff was otherwise affected

with knowledge of the fraud for more than four years previous to filing his complaint.

2. Because his Honor erred in holding that the Statute of Limitations began to run before the judgment was obtained in the action at law against the defendant, Martin Hitt, upon which this action was based.

The defendants' attorneys gave notice that they would move before the Supreme Court to review the entire decree and modify the same, because his Honor erred in holding:

1. That Martin Hitt was insolvent at the time of the conveyance to his intended wife, Miss Henderson.

2. That the antenuptial conveyance by Martin Hitt to his intended wife, though marriage was a valuable consideration, was intended to defraud creditors, and void as to them.

3. That his Honor erred in finding that though Mary Henderson was not cognizant of the indebtedness of Martin Hitt, and any intent on his part to defraud creditors, the antenuptial conveyance is still void and cannot hold against and in preference to the creditors of Martin Hitt.

4. Because his Honor erred in holding that the defendant, Aaron Wells, was cognizant of any fraudulent intent on the part of Martin Hitt, in conveying to his intended wife the property named in the antenuptial deed of conveyance.

5. Because his Honor erred in holding that the deed of conveyance from Mary Hitt to Aaron Wells, though an innocent holder and without notice, was void, except the action was barred by the Statute of Limitation.

Messrs. Holmes & Simpson, for appellant.

The deed from Hitt to his wife was not sufficient to charge plaintiff with knowledge of the fraud, or to give currency to the Statute of Limitations. The burden of proof was on the defendants. 6 Rich. Eq. 96; 7 Id. 430; Bump Fraud. Conv. 532-3. The record of the deed was not sufficient to put plaintiff on inquiry; it was constructive notice only of what appeared on its face. 5 Wait Dig. 440, No. 46; 47 N. Y. 410. The

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*statute did not commence to run before judgment obtained, for until then the equitable action would not lie. Burrill Ass. 597; Van Santv. Eq. Pr. 129; Bump Fraud. Conv. 454, 511; 1 S. C. 186; 2 McC. Ch. 410; 4 Johns. Ch. 671; 2 Id. 144; 18 N. Y. 500; 2 Ed. Ch. 197; 2 Paige 54; 1 Id. 308; 30 Barb. 550; 17 Ala. 685; 4 Jones (N. C.) 66; 1 Denio 190; 26 How. Pr. 80. There was no cause of action then until the judgment was obtained in June, 1875, and then the statute began to run. 2 Story Eq. Jur. 1521a; 7 Wait Ac. & Def. 231, 278; 25 N. Y. 194; 37 Id. 657; 26 Tex. 551; 7 Am. Dec. 737; 8 Cranch 93. The deed was voluntary and void. 1 Am. Lead. Cas. 74, 77; Riley Ch. 241; 2 Desaus. 264. If the settlement was made on the solicitation of the intended wife, it being for the whole of his estate, it cannot be sustained. Authorities, supra; 3 Wait Ac. & Def. 669; Bump Fraud. Conv. 309.

Mr. B. W. Ball, for Hitt and wife.

The marriage was a sufficient consideration to support the settlement, even of the husband's entire estate, for the proof shows that the marriage was contingent on the settlement. 7 Am. Dec. 362, note; 29 Gratt. 628; 17 Ves. 264; 6 Id. 752; 2 Desaus. 264; 3 Id. 223; 1 DeG. M. & G. 441; 7 Pet. 389; 103 U. S. 22; Bump Fraud. Conv. 293. Upon examination it will be found that the facts of this case differ materially from those in Davidson v. Graves, Riley Ch. 232. The statute commenced to run from the record of the deed, and was not suspended until judgment obtained. 7 Rich. Eq. 260, 430; 1 Hill Ch. 113; 4 S. C. 249; Bump Fraud. Conv. 548; 50 Mo. 95; 10 Rich. Eq. 353; 11 Id. 27, 39. In 1 S. C. 186, and 14 Rich. Eq. 154, there were simple contract creditors, while here they are bond creditors. In this case there was judgment, but no proof of execution and return of nulla bona, which were necessary. 2 Johns. Ch. 283; 4 Id. 671; 6 Id. 139.

Mr. J. W. Ferguson, for defendant Wells.

March 29th, 1882. The opinion of the court was delivered by

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*PRESSLEY, A. A. J. The personal estate of William Hitt was sold by his administratrix in November, 1861, and his son Henry and son-in-law Marion Andrews then bought some of said property and settled for it by sealed notes, to both of which Martin Hitt was one surety, and B. L. Hitt was the other as to the note of Marion Andrews.

Martin Hitt was sued on said notes in March, 1867. At that time Marion Andrews was living in Mississippi. His other surety, B. L. Hitt, had died, leaving an estate of $3,500. His administrator paid all his debts except those due to estate of William Hitt. Why he did not pay the said sealed note, or whether any effort was made to fix devastavit on him for its non-payment, does not appear. Henry Hitt was then alive, but died in 1873. He and Marion Andrews, by virtue of his marital rights in his wife's share, were distributees of William Hitt's estate. It is not proved when, if ever, their shares were paid to them, nor is any reason shown why their shares were not applied to extinguish their said notes. Suits thereon against Martin Hitt were pending until June, 1875, and judgments were recovered against him. The long delay arose from failure to hold the courts and from other causes not stated.

Martin Hitt married his present wife in November, 1868, then settling on her all his visible estate. The marriage was stated as the consideration, but his express purpose was

to avoid payment of said notes. She did not know of that purpose and made no inquiry on the subject of his indebtedness. Afterwards, in December, 1873, she and he sold one of the plantations, thus settled, to their co-defendant Aaron Wells, for full consideration secured by mortgage of said plantation. He knew of her title and of the said suits against Martin Hitt, and was cautioned not to buy said land, but nothing appears in the testimony which indicates that said sale was made as a further attempt by Martin Hitt to put his land more certainly out of reach of his creditors, and such intent by him would seem to be rebutted by the fact that said sale was on credit, secured by mortgage.

Mary Hitt, administratrix of William Hitt, died after recovering said judgments, and plaintiff, as administrator de bonis non, filed this complaint in November, 1877. It al-

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leges fraud in *said settlement, seeks to set aside both the settlement and the conveyance to Aaron Wells, and alleges that the fraud was discovered within four years. The Circuit judge holds that said settlement was a fraud and that its contents are such as to affect the wife with the fraud, though she was ignorant of the other facts, but he dismisses the complaint because he sustains defendants' plea of the Statute of Limitations.

Plaintiff appeals on the question of the statute, and defendants appeal from that portion of the decree which holds that the wife is affected by the fraud of the husband.

The case of Davidson v. Graves, Riley Eq. 232, fully sustains the Circuit decree in this case on the fraud question. It is most earnestly argued before us that said case is clearly in conflict with a long series of well-considered cases which conclusively settle that marriage is a sufficient consideration to uphold a settlement by an insolvent person, even though fraud be thereby intended, if the wife be ignorant of that intent. We concede that doctrine to be so settled, and, it seems to us, to be fully recognized in the case of Davidson v. Graves.

In that case, two settlements were before the court—one, ante-nuptial and the other, post-nuptial—the former, being a settlement by the son of Admiral Graves, is that to which the chief portion of said decision relates. It was a settlement without precedent, in that it conveyed, in consideration of marriage, the whole estate of the husband. None of the settlements in any of the previous cases had attempted such wholesale fraud.

In Tunno v. Trezvant, 2 Desaus. 264, the husband was engaged in merchandise as one of a partnership. He settled upon the intended wife all his private estate. But, before that settlement was accepted, the friends of the wife made proper inquiry, and were satisfied that the assets of the partnership were sufficient to pay its debts. Those assets proved insufficient, but the court held that as due diligence had been used by the friends of the wife, her rights in said settlement could not be affected by the subsequent discovery that the partnership, of which the husband was a member, was insolvent at the time of the settlement.

But, in Davidson v. Graves, and also, in

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this case, the whole *estate of the husband was conveyed away, nothing whatever being reserved for the payment of any debts, however small or few. The very contents of such a settlement are, at least, sufficient notice of fraud to make it the imperative duty of the wife to inquire whether it could be honestly made. There was no such inquiry in Davidson v. Graves, and none in this case. The wife is, therefore, regarded as having the knowledge which proper inquiry would have given her, and she is, therefore, affected by the fraud involved in the settlement. This is the principle which, applied to the special facts in the case of Graves ads. Davidson, places it in complete harmony with the previous cases, and leaves it unassailable.

On the question of the statute, plaintiff contends that it should not begin to run at the time the said settlement was recorded, because, he says, it did not contain matter amounting to notice of the fraud. We regard the rule as well established, that where the facts set forth in a deed furnish a reasonable clue to the discovery of a fraud involved therein, that is notice of the fraud when the deed is recorded. In this case, we have held that the very contents of the settlement were notice of the fraud to the wife, who did not know that Martin Hitt owed any debts; much more, then, were they notice to the plaintiff, who was the chief creditor.

Plaintiff further contends, that, since he could not sue in equity to set aside said settlement until he had recovered judgments at law, therefore the statute should not run against him until the date of his said judgments. It is not certain that equity would not have original jurisdiction of this matter. Martin Hitt being only surety to said notes, and his principals being distributees of said estate, he had rights in equity to have their share applied to said notes. In 1867, when that suit at law commenced, such equitable defense could not be set up in that court. To get advantage thereof required removal of the case into equity, and that right of removal by defendant was recognized in Hinson v. Pickett, 1 Hill Eq. 35, as giving the plaintiff the privilege of commencing his case in equity, in order to avoid circuity of action.

But, if plaintiff could not originally have

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sued this whole *matter in equity, then he is not yet properly in that court, because the rule which prevents the suing a purely legal debt in equity until after judgment at law, as imperatively requires that the legal remedies be fully exhausted before seeking

relief in equity in such case, and that is not proved to have been done in this case, either as to the principals or other surety to the said notes.

However, conceding that plaintiff is rightfully in equity, and that he could not have come there until the recovery of judgment at law, is the running of the statute thereby suspended until the date of said judgment? It is so decided in several of the other States, and some of us have had very grave doubts on that point. But a very careful examination of the cases in this State has convinced us that a long series of uniform decisions conclusively settle that in this State the statute begins to run at the discovery of the fraud. It was so decided in Van Rhyn v. Vincent, 1 McC. Eq. 314. That case was afterwards confirmed in Eichelberger v. Kibler, 1 Hill Eq. 113 [26 Am. Dec. 192], and in Prescott v. Hubbell, 1 Hill Eq. 213.

Nowhere in any of these cases and others on same point is there the slightest recognition that any obstacle which due diligence of the creditor could remove will stay the running of the statute until he shall remove it. That point was expressly raised in McLure v. Ashby, 7 Rich. Eq. 430, and Chancellor Dunkin on Circuit held that the statute in such case would be stayed, but, on appeal, he was overruled, he only dissenting from the rest of the court. Subsequently, in Lott v. De Graffenried, 10 Rich. Eq. 346, the court again affirmed that the statute runs from the discovery of the fraud, and said that is the "well-settled doctrine."

The foregoing view makes it unnecessary for us to inquire whether, if said settlement were set aside, Aaron Wells would, nevertheless, have valid title to the land conveyed to him by Martin Hitt and wife before the lien of said judgment. That question has not been pressed in the argument, and we refer to it only to reserve it.

The Circuit decree is affirmed and the appeal dismissed.

FRASER, A. A. J., concurred.

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*McIVER, A. J. Being unable to concur in so much of the opinion of the majority of this court as sustains defendant's plea of the Statute of Limitations, I propose to state, very briefly, the reasons for my dissent.

It is quite true, as a general rule, that in actions of the character of the one now under consideration, the statute begins to run from the discovery of the fraud complained of, but I do not think it is universally true, as there may be circumstances which will prevent the statute from commencing to run until after that time; as, for example, where there is no one in existence capable of then commencing the action. The undoubted rule in an action on a promissory note is, that the statute begins to run at the maturity of the note; and yet it is well settled, where the payee of the note is dead at that time, the statute will not begin to run until administration is granted. Geiger v. Brown, 4 McC. 423, and, to same effect, see Harvin v. Riggs, Rich. Eq. Cas. 287. The same doctrine was held in Murray v. East India Co., 5 Barn. & Ald. 204, (7 Eng. Com. L. 66,) where Abbott, C. J., uses this language: "It cannot be said that a cause of action exists unless there be a person in existence capable of suing."

Upon the same principle, it seems to me, the statute could not commence to run until the plaintiff, by exhausting his legal remedies, was in a condition to enable him to bring this action, for it is conceded that until then an action of this character could not be maintained. The cause of action cannot be said to have accrued until there is some one to whom the cause of action has accrued, as is well said by Colcock, J., in Geiger v. Brown, supra. If, however, a plaintiff should be guilty of laches in exhausting his legal remedies, then a court of equity might very well, upon another principle, refuse to grant the relief sought.

But where a plaintiff has, through no fault on his part, but from unavoidable causes, been delayed in exhausting his legal remedies beyond the statutory period, a court of equity should not inexorably apply the bar of the statute; but, upon principle established in the cases above cited, might very well hold that the statute did not commence to

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run until there was some one in *a condition which enabled him to bring the action—some one to whom a cause of action has accrued.

This seems to be the rule adopted in some of the other States, as appears by the authorities cited in argument of the counsel for the plaintiff, which need not be repeated here; and in the absence of any express adjudication here to the contrary, this rule is recommended to our approval by the manifest equity upon which it rests.

It is worthy of notice, too, that the rule relied upon by the majority of this court is usually stated in a negative rather than an affirmative form—that in equity the statute will not commence to run until the discovery of the fraud—and it would not necessarily follow from the rule so stated, that in all cases the statute would commence to run as soon as the fraud was discovered. It only fixes a period beyond which the statute shall not commence to run, but it does not necessarily fix the period at which it shall commence to run. Hence, if any other circumstance intervenes of such a character as that it ought to prevent the currency of the statute, there is no departure from the rule in allowing such circumstance its legitimate effect.

Of course, these views are advanced upon the theory that the question under consideration has never been distinctly decided in this

State, for if it had, then, of course, I would cheerfully yield my judgment to such authority. I do not, however, think that the point has ever been distinctly decided in this State. The strongest case looking that way, and the one principally relied on, is McLure v. Ashby, 7 Rich. Eq., 430.

In that case Stephen J. Ashby, in March, 1843, confessed a judgment to a number of his creditors, including the plaintiffs and his brother John, and in January, 1852, the plaintiffs filed their bill alleging that the debt to John was pretensive and fraudulent, and seeking to be relieved against such fraud. The property of Stephen was levied on and sold by the sheriff at different times between 1844 and January, 1847, and a portion of the proceeds applied to older executions, leaving in the hands of the sheriff a large amount applicable to the judgment of March, 1843. There was, however, an older judgment in favor of one De Graffenried, which it was alleged was satisfied, and a

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*litigation was pending as to that fact, which was not determined until 1851, when it was ascertained that there was nothing due on the De Graffenried judgment, thus leaving the whole amount in the hands of the sheriff applicable to the judgment of March, 1843. When this litigation terminated, John Ashby obtained a rule against the sheriff to show cause why he did not pay over to him the amount of his demand. Thereupon the plaintiffs filed their bill alleging that the claim of John Ashby was fraudulent, and asking to be relieved against it. To this bill the Statute of Limitations was pleaded, and the plea was sustained upon the ground that the evidence showed that the plaintiffs had knowledge of the fraud at the time the judgment was confessed, in March, 1843.

From this brief statement of the case it will be seen that there was no legal obstacle in the way to prevent the plaintiffs from filing their bill as soon as the fraud was discovered, for they were then judgment creditors, and it does not appear that there was anything to prevent them from proceeding at once to exhaust their legal remedies against the judgment debtor and then filing their bill to be relieved from the fraud charged. The cause of action had then accrued to them, and hence the statute then commenced to run. Their delay was voluntary, and they, of course, were properly held to the consequences of such delay.

Here, however, the plaintiff could not proceed until he had obtained judgment: a cause of action did not accrue to him until he had exhausted his legal remedies, and if he was delayed in obtaining his judgment by causes beyond his control, and proceeded with reasonable promptness after obtaining his judgment to institute this action, it does seem to me that a court of equity should not apply the bar of the statute.

As is said by Johnson, Ch., in speaking of the Statute of Limitations, in his Circuit decree in McLure v. Ashby: "In matters of an equitable nature—the terms of the statute not extending to them—this court is not imperatively bound to apply it, and only applies it by analogy to the practice at law, and then it does not apply it when sound conscience would be offended by its application." Or, as is said by Dargan, Ch., in delivering the opinion of the Court of Appeals

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in the same case, where he is *pointing out the distinction between the rules which govern the application of the Statute of Limitations in a court of law, and those which obtain in a court of equity, when called upon to adjudicate a matter of purely equitable cognizance: "They are not obligatory upon this court and do not apply to proceedings in equity, except so far as the court has thought it conducive to the ends of justice to apply them in analogy to the rules which prevail in a court of law. And as the court only acts on this analogy, because of its subserviency to the ends of justice, it withholds such action when it would be obviously subversive of equity."††

For these reasons I am unable to concur in the conclusion that the action of the plaintiff was barred by the Statute of Limitations.

Decree affirmed.

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††There is a class of cases to which reference might be appropriately made here, and that is, those cases where the Statute of Limitations is held to be suspended as between debtor and creditor of two countries at war with each other, while the war continues. Such was the decision in our own State, in the case of Robson v. Wall, 2 N. & McC. 498 [10 Am. Dec. 623], where the right of action accrued before the war of 1812, between Great Britain and the United States, but was held to be suspended during that war, the creditor being a citizen of Great Britain and the debtor a citizen of this State. Speaking of the Statute of Limitations, Judge Bay, in delivering the opinion of the court, says: "It never could have been intended to prevent a man who had never been guilty of any willful laches or delay, but who had been prevented by inevitable necessity from pursuing his just rights." On a similar state of facts, the same conclusion was reached in Hanger v. Abbott, 6 Wall. 532 [18 L. Ed. 939]. In these cases it is held, that it is against public policy to permit actions between belligerents to be maintained. This principle affects the right of action only, for the non-computation of time under the Statute of Limitations is not a matter of public policy, but is a result of the same rule declared in Moses v. Jones, 2 N. & McC. 259, that the courts will not apply the bar of the statute to a demand while suit is prohibited by law. See other cases cited in 10 Am. Dec. 633. The case of Shand v. Gage, 9 S. C. 187, was decided upon the principle that the military order there relied upon as having prevented the action, was an "interference with the plaintiff's remedy which did not occur through the act of a source of authority competent to enact or modify any State statute." In the principal case, the settled law did not permit an action to set aside the fraudulent conveyance until judgment was obtained on the debt.—Reporter.

NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full.

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16 S. C. *617

*No. 1084. IRBY v. HENRY. April Term, 1881.

Pending suit, a debtor conveyed his land to a kinsman of his wife upon the alleged consideration of $5,000, and, after judgment obtained, it was reconveyed to the debtor's wife upon a like consideration alleged. Action was then instituted by the judgment creditor in the county where the land lay to set aside these deeds for fraud, the defendants residing in another county. The complaint was verified. Unverified answers were tendered and refused. No demand was made to change the place of trial, but the rejected answers asserted as a defense that the defendants could not be sued in the selected county. Order of reference was made by consent. At the reference, the referee refused to permit defendants to put in either answer or testimony, held that the facts stated in the complaint were admitted and confined counsel to the law points involved. The referee filed his report granting the prayer of the complaint, and five months afterwards it was confirmed in open court without exception. Four days before its confirmation, the grantee of the debtor, a defendant to the action, had died. At the second term of court thereafter a motion was made in behalf of the debtor and wife, alleging negligence on the part of their former attorney, and asking that the judgment be set aside, and that they be allowed to come in, answer and defend. The proposed defense was to the effect that by ante-nuptial settlement between this debtor and his wife, land, negroes, bank stock to the amount of $500, cash to the amount of $900, and furniture belonging to the woman, were transferred to a trustee in trust "for the wife for life, and after her death to go to the heirs of her body;" that this property was also turned over to the husband shortly after the marriage,

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which was thirty *years before the deeds were executed. There was, however, no further trace of this property, except the debtor's statement that the land here involved was bought with the wife's money, and conveyance made to the husband "instead of the trustee through ignorance, and without her knowledge or consent." The Circuit judge (Thomson) dismissed the motion, and petitioners appealed. *Held*—

[1. *Venue* ⇐19, 61.]

That in 1876 it was not necessary to sue defendants in the county of their residence, and the right to move for a change of venue may be lost by laches.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 33, 94–99; Dec. Dig. ⇐19, 61.]

[2. *Fraudulent Conveyances* ⇐255.]

That the grantee of the debtor, having reconveyed the land, was not a necessary party to the action, and, therefore, his death did not prevent a valid judgment against the other defendants.

[Ed. Note.—Cited in Bomar v. Means, 37 S. C. 528, 16 S. E. 537, 34 Am. St. Rep. 772.

For other cases, see Fraudulent Conveyances, Cent. Dig. ⇐741–750; Dec. Dig. ⇐255.]

[3. *Judgment* ⇐368.]

Nothing short of fraud will justify the court in correcting the mismanagement of counsel.

[Ed. Note.—Cited in Ex parte Jones, In re Alma Lumber Co. v. Beacham, 47 S. C. 396, 25 S. E. 285.

For other cases, see Judgment, Cent. Dig. § 710; Dec. Dig. ⇐368.]

[4. *Appeal and Error* ⇐982; *Judgment* ⇐379.]

Quære. Can the discretion of the Circuit judge, in refusing a motion like this in an equity cause, be controlled by this court? But the facts stated in defendants' affidavits show that they have no substantial grounds of defense, and therefore the discretion of the Circuit judge was wisely exercised here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3877–3879; Dec. Dig. ⇐982; Judgment, Cent. Dig. §§ 717, 718; Dec. Dig. ⇐379.]

Opinion by Fraser, A. A. J., (sitting instead of the Chief Justice,) September 20th, 1881. Jones & Jones and M. A. Carlisle, for appellants. J. W. Ferguson, contra.

Nos. 1089, 1090. GRIERSON v. HARMON; WERTS v. SPEARMAN. April Term, 1881.

[*New Trial* ⇐155.]

These were distinct actions, but they were both cases in chancery involving fraudulent conveyances, in which certain issues of fact were submitted to a jury. Upon the rendition of the verdicts in both cases, motions were made for new trials, and by consent of counsel the hearing of these motions was postponed to be taken up at chambers, but

there was no agreement to have any other matter considered at chambers, except the motions for new trial. These motions were accordingly heard at chambers, and being refused, the Circuit judge rendered final judgment in both cases for the plaintiffs, the defendants not consenting. The defendants in both cases appealed to this court, and upon the hearing here the judgments were set aside, the court saying that a judge at chambers can only hear such cases as are pro-

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vided for by statute, and that *there is no provision for the hearing of such a case at chambers. Notwithstanding the verdict of the jury, the parties had a right to have a hearing by the court upon the merits, and such hearing could not be had at chambers—certainly not without the consent of all the parties.

[Ed. Note.—Cited in Peake v. Peake, 17 S. C. 427; In re Conant's Claims, 21 S. C. 365; Rynerson v. Allison, 28 S. C. 85, 5 S. E. 218.

For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. ⟸155.]

Opinions by McIVER, A. J., September 30th, 1881. Pope & Fair, Suber & Caldwell, for appellants. Jones & Jones, T. S. Moorman, contra.

[For subsequent opinion, see 22 S. C. 200.]

No. 1096. CURETON v. DARGAN. April Term, 1881.

[1. *Appeal and Error* ⟸248.]

This court may decline to hear an appeal when the record contains no exceptions pointing out the specific errors complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1468; Dec. Dig. ⟸248.]

[2. *Costs* ⟸214.]

In a case where costs follow the judgment as matter of course, a Circuit judge cannot, under the form of a motion to set aside the taxation of costs, review the previous action of the Circuit judge, who ordered the judgment.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 798, 799, 801, 807, 809–813, 816, 818–820, 825; Dec. Dig. ⟸214.]

[3. *Attachment* ⟸158.]

This court cannot assume that an order dismissing a complaint was based upon the same grounds as a previous order by the same judge setting aside an attachment. The validity or invalidity of the attachment in no way affects the validity of the action.

[Ed. Note.—Cited in Central R. & Banking Co. v. Georgia Const. & Investment Co., 32 S. C. 344, 11 S. E. 192.

For other cases, see Attachment, Cent. Dig. § 451; Dec. Dig. ⟸158.]

4. There was nothing in the appeal from the order vacating the attachment in Cureton v. Dargan, 12 S. C. 122, that prevented the trial of the cause on its merits pending that appeal. Code § 364.

Opinion by McIVER, A. J., October 6th, 1881. E. F. Stokes, for appellant. George Westmoreland, contra.

Judgment affirmed.

No. 1097. STOKES v. WALLACE. April Term, 1881.

The object of this action was to obtain the settlement of an intestate's estate, and the defendant, as administrator, was called upon to account. On such accounting a balance was found in favor of the administrator on his transactions from 1862 to 1865, and the referee reported that, in the absence of all proof as to what species of currency was used by the administrator, as matter of law, the debits and credits should be in United States currency. The referee also reported the testimony, in which the bare fact appeared that a distributee had received a negro boy from his father, the intestate, but whether as a gift, remu-

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neration for ser*vices rendered, or otherwise, did not appear. Judge Mackey confirmed the referee's report, and also charged this distributee with the negro boy as an advancement, and referred it back to the referee to ascertain the value. *Held*—

[1. *Executors and Administrators* ⟸109.]

That there was some evidence to show that the administrator had dealt in Confederate States currency, but, if not, as trustee he cannot invoke for his protection the rule declared in Neely v. McFadden, 2 S. C. 169, but must fully explain all of his transactions, and cannot get credit in good and lawful money for his disbursements made at a time when the currency was depreciated, without proof by him that his payments were not in the depreciated money then current.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 435; Dec. Dig. ⟸109.]

2. The fact of advancement as well as its value should have been recommitted for report.

Opinion by McIVER, A. J., October 6th, 1881. S. P. Hamilton, Witherspoon & Spencer, for appellants. W. B. Wilson, contra.

No. 1107. WRIGHT v. HERLONG. April Term, 1881.

This was a bill in equity, filed in 1866, by an administrator for the settlement of his intestate's estate. It was referred to the commissioner in equity to state the accounts, and he filed his report, showing a balance in the administrator's hands. The case was never transferred to the calen-

dar of the Court of Common Pleas, as, under the law, should have been done after January 1st, 1869. An order was passed, however, in 1870, by the Circuit judge, referring it to a referee to report the condition of the estate and scheme for a settlement. Before reference held under this order, the attorney for the defendants, distributees, died, and it does not appear that notice was given to them of the reference. But a reference was held. Whether a report was made and confirmed is doubtful, but, if made, it was never filed, it would seem, and, if confirmed, it was done at chambers without consent or notice. Defendants moved, in 1880, for leave to transfer the cause from the equity docket to the calendar of the Court of Common Pleas, and for an order referring the case to the master to state the condition of the estate and the accounts of the administrator. This motion was refused by the Circuit judge (Aldrich) upon the ground that the relief sought could not be obtained by motion. Defendants appealed. *Held*—

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[1. *Appeal and Error* ⇐106.]

*That the refusal of the Circuit judge, upon the ground stated, to grant the motion, was error of law affecting a substantial right, and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 732; Dec. Dig. ⇐106.]

[2. *Reference* ⇐102.]

The motion should have been granted, for the order of confirmation, if passed, being passed at chambers, without notice and consent of all parties, was a nullity; and, besides, the order not having been filed, or notice given of it, there was no final judgment.

[Ed. Note.—Cited in Wardlaw v. Erskine, 21 S. C. 361; Gee v. Humphries, 49 S. C. 256, 27 S. E. 101.

For other cases, see Reference, Cent. Dig. §§ 181–187; Dec. Dig. ⇐102.]

[3. *Reference* ⇐18.]

The order passed in 1870 was within the jurisdiction of the Court of Common Pleas, and valid, notwithstanding the cause had not been transferred to its proper calendar.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 24, 34; Dec. Dig. ⇐18.]

[4. *Executors and Administrators* ⇐507.]

In stating the accounts of the administrator, the master cannot go behind the commissioner's report; and, if the administrator can show that these appellants had notice of the reference held under the order of 1870, and that the referee filed his report, or that they had notice of it, then that report will also be binding upon them.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2004, 2005, 2178–2191; Dec. Dig. ⇐507.]

[5. *Executors and Administrators* ⇐507.]

If that report be binding, it can be assailed only by action brought, but, if ex parte, then a further accounting should be ordered, at which all matters may be considered.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2004, 2005, 2178–2191; Dec. Dig. ⇐507.]

Opinion by McIVER, A. J., November 15th, 1881. B. W. Bettis, for appellants. Norris & Folk, J. C. Sheppard, contra.

No. 1119.† BROOKS v. BROOKS. April Term, 1881.

[1. *Appeal and Error* ⇐1187.]

All questions raised and adjudged at the hearing of the appeal in Brooks v. Brooks, 12 S. C. 422, and all points which could have been raised before that decision was made, are not now open for consideration.

[Ed. Note.—Cited in Jones v. Charleston & W. C. Ry. Co., 65 S. C. 418, 43 S. E. 884.

For other cases, see Appeal and Error, Cent. Dig. § 4642; Dec. Dig. ⇐1187.]

[2. *Appeal and Error* ⇐1219.]

The Circuit Court regains its jurisdiction of a cause when the remittitur is issued by the clerk of the Supreme Court. The failure to file it in the Circuit Court is a mere irregularity, which is waived by subsequent proceedings had without objection.

[Ed. Note.—Cited in Carpenter v. Lewis, 65 S. C. 403, 43 S. E. 881.

For other cases, see Appeal and Error, Cent. Dig. § 4720; Dec. Dig. ⇐1219.]

[3. *Executors and Administrators* ⇐511.]

A counsel fee, admitted to be reasonable, for services rendered in a case for the settlement of two estates, may be allowed without requiring a bill of particulars; and it is within the discretion of the Circuit Court to di-

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rect in what proportions the *two estates shall pay those counsel fees, and also the tax costs of the case, and such direction will not be here reviewed, unless an abuse of discretion be apparent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2257–2266; Dec. Dig. ⇐511.]

[4. *Attorney and Client* ⇐92; *Depositions* ⇐34, 39.]

It is not a valid objection to a commission to examine witnesses, that it was applied for by attorney and not in person; nor, that after notice given of intention to apply for it, a proposition was made to accept the affidavit of the witness, which proposition was declined before the time for issuing the commission expired; nor, that the commission was not issued by the referee to whom the whole case was referred; nor, that it was

† Nos. 1110 and 1121 will be found in 15 S. C. Reports, pp. 581 and 602.

issued by the deputy clerk and not by the clerk.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 173; Dec. Dig. ⟸92; Depositions, Cent. Dig. §§ 43, 54, 58; Dec. Dig. ⟸34, 39.]

[5. *Executors and Administrators* ⟸510.]

Quære: Can attorneys appeal in their own names and behalf from an order determining the amount of fees to be paid them, and directing how and by whom payable?

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2235–2256; Dec. Dig. ⟸510.]

[6. *Attorney and Client* ⟸155.]

This court refused to disturb the order in this case disallowing some counsel fees and allowing others, fixing amounts, and directing out of what funds and by whom payable —no abuse of discretion being shown.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 316; Dec. Dig. ⟸155.]

Opinion by McIVER, A. J., November 21st, 1881. R. G. M. Dunovant, A. J. Norris, H. W. Addison, for appellants. J. E. Bacon, Simonton & Barker, contra.

Judgment affirmed.

[For subsequent opinion, see Ex parte Dunovant, 16 S. C. 299.]

No. 1128. MORDECAI v. STUTTS. November Term, 1881.

[*Mortgages* ⟸544.]

This case involved the construction of a power of sale contained in a mortgage of land, in words following, to wit: "And it is expressly understood and agreed that if, in any time within the period aforesaid, the said R. R. Stutts should fail or neglect to send, consign, ship and deliver to the said J. H. Parker & Co., in Charleston, the crude turpentine and resin, and spirits of turpentine, as provided in said bond, and the conditions and recitals thereof, according to the true intent and meaning thereof, then, on such default, said J. H. Parker & Co. shall have the right, if they see fit, to consider this mortgage forfeited, and the said J. H. Parker & Co., their executors, administrators or assigns shall be at liberty (if they see fit), and the said R. R. Stutts does hereby authorize and empower the said J. H. Parker & Co., their heirs, executors, administrators or assigns, to grant, bargain, sell, release and convey the said real estate, with its appurtenances, at public auction," &c.

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*And the mortgagees having made sale and executed titles, and the purchaser having brought action for the recovery of the land and proved the non-payment of the debt before sale, but having made no proof of the failure by the mortgagor to ship resin, crude turpentine, &c., *Held*, that the plaintiff was properly nonsuited.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1570; Dec. Dig. ⟸544.]

Opinion by SIMPSON, C. J., January 10th, 1882. H. A. M. Smith, for appellant. Tracy & Tracy, contra.

No. 1142. BLANTON v. BARNWELL COUNTY. November Term, 1881.

[*Counties* ⟸132.]

The fourth section of the act of March 12th, 1878, (16 Stat. 445,) which provided that the county of Barnwell should not be liable in criminal cases for more than one-half the fees and costs allowed by law to constables, was a special provision as to the manner of payment and in relation to the extent of the liability of that county in certain circumstances, and, therefore, was not repealed by the act passed ten days afterwards (16 Stat. 624), fixing the costs and fees of certain officers throughout the State, including constables.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 208; Dec. Dig. ⟸132; Statutes, Cent. Dig. § 237.]

Opinion by McGOWAN, A. J., February 18th, 1882. J. J. Maher, for appellant. H. M. Thompson, contra.

Judgment reversed.

No. 1144. GARY v. WATSON. November Term, 1881.

An attorney-at-law brought his action against an executrix for counsel fees due him by the testator and the defendant. Pending a reference on the issues involved, a compromise was effected and a writing signed and sealed, which provided that the plaintiff should retain $2,500 out of funds then in his hands belonging to defendant as executrix, in full settlement of his claim for fees, and should pay the costs of his attorneys and witnesses, and that defendants should pay the other costs of the case. The referee reported these facts, and that the reference had been adjourned sine die. Meantime, the plaintiff, deducting the $2,500, and also $531.62, nulla bona taxed costs due him in cases in which fees were charged in the account sued on, and deposited the balance in bank to the credit of defendant. Defendant refused to receive this deposit, and thereupon excepted to the referee's report upon an immaterial point, and upon the further ground that the agreement, having been violated by the plaintiff, was not binding on defendant, and, at the same time, she gave

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notice of *a motion to be made at the next term of the Circuit Court for an order recommitting the report. This motion and the

exceptions were heard by Judge Mackey on affidavits submitted by both parties. The Circuit judge held that the plaintiff had violated the terms of the settlement, and that it was not, therefore, binding on defendant, and he signed the order of reference asked for. On appeal by the plaintiff to this court it was held, that (without considering how an inquiry into the facts should have been conducted, inasmuch as the mode of hearing on affidavits was pursued without objection,) the only point here to be determined was whether there had been a settlement; and the affidavits showing that the minds of the litigants never met—that the plaintiff was agreeing only to a settlement of the account sued on, and the defendants only to a settlement of all demands—that there was no settlement. And upon this ground the order of reference was affirmed.

[Ed. Note.—Cited in Burns v. Mills, 31 S. C. 60, 9 S. E. 689; Melchers v. Springs, 33 S. C. 282, 11 S. E. 788.]

Opinion by McIVER, A. J., February 23d, 1882. J. C. Sheppard, Ernest Gary, for appellants. J. P. Carroll, M. C. Butler, C. L. Woodward, contra.

Three months after this opinion was filed, but before remittitur sent down, an order was passed per curiam correcting an error in the opinion in the title of the cause.

No. 1146. STATE v. SWEAT. November Term, 1881.

[1. *Criminal Law* ⇐1156.]

After conviction of defendant on a charge of murder, and before sentence, he moved in the Circuit Court for a new trial, upon the grounds of surprise and newly-discovered evidence, supporting his motion by affidavits. The motion was refused. *Held*, on appeal, that the motion and affidavits were exclusively for the determination of the Circuit judge, and that the Supreme Court could not consider the question.

[Ed. Note.—Cited in State v. Don Carlos, 38 S. C. 227, 16 S. E. 832; State v. Jones, 89 S. C. 51, 52, 71 S. E. 291, Ann. Cas. 1912D, 1298.

For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. ⇐1156.]

[2. *Criminal Law* ⇐107.]

The act of December 21st, 1880, (17 Stat. 336,) which provides that a prisoner charged with murder may be indicted and tried either in the county where the injuries were inflicted, or in the county where death ensued, does not apply to a trial for murder resulting from blows inflicted July 2d, 1880. In this case the deceased died July 21st, 1880.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 219; Dec. Dig. ⇐107.]

[3. *Criminal Law* ⇐737.]

It being proved that deceased died in Richland county from wounds received at the house of the prisoner, who was her husband, the Circuit judge committed no error

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of law in refusing to *direct a verdict of acquittal for failure on the part of the prosecution to prove that the wounds were inflicted in Richland, for the jury might have reached the conclusion from these facts, and in the absence of proof to the contrary, that the injuries were inflicted, as alleged, in Richland county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1703, 1704, 1706; Dec Dig. ⇐737.]

Opinion by McGOWAN, A. J., February 28th, 1882. J. T. Seibles, for appellant. Bonham, solicitor, contra.

No. 1148. SHAFFER v. SHAFFER. November Term, 1881.

Frederick Shaffer died June 14th, 1859, leaving of force a last will and testament, which was as follows:

"Item. It is my will and desire that all my property, real and personal, be kept together till my youngest child becomes of age (21 years), and the income be appropriated yearly to the payment of my debts and the support and maintenance of my wife and children in their minority.

"Item. After all my just debts are fully paid, and the support and maintenance of my wife and children are provided for, from time to time out the income of my property, I then desire my executrix and executor from time to time, from the surplus, to pay each of my children ($5,000) five thousand dollars.

"Item. My daughter, Elizabeth W. Shaffer, having received from me negroes to the amount of ($5,000) five thousand dollars, I consider her as having already received the amount provided for in the above clause.

"Item. It is my will and desire, so long as my wife, Elizabeth Shaffer, remains my widow, that she and my children shall have the use of the income derived from my property. But should she marry, then she shall no longer exercise the control of executrix over my property, or have any interest or benefit therein, and the property, real and personal, shall be divided, share and share alike, amongst my children, provided the youngest has become of age. I do hereby nominate and appoint my wife, Elizabeth Shaffer, executrix, and my son, Frederick J. Shaffer, my executor of this my last will and testament, dated Charleston, South Carolina, second day August, 1845."

At the date of this will testator had nine children, nearly all of whom were minors, and at the time of his death ten children, two of whom were minors, and the youngest attained her majority in 1867. At his death his estate was worth $162,000. A plantation, of which he died seized, was sold in 1859 for

$50,000, under a bill in the Court of Equity, filed by his executrix and executor, and in

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that proceeding the widow made no *claim of dower, and the case has long since ended. Other real estate was purchased by the executors. After testator's death, the widow resided in Charleston and then in Marion. Some of the children lived with her all the time, some off and on, and some not at all. The daughter Elizabeth, upon her husband's death in 1869, returned to her mother with two daughters, and died in 1871. One of these daughters remained with her grandmother until in 1879, and the other is still there. The children all received moneys from the executors, but none of them to the extent of $5,000. Frederick J. Shaffer died after this action was commenced. The present value of the estate is $84,767.37. The object of the action was to obtain a construction of the will and a settlement of the estate, and the widow demanded dower. It was instituted in January, 1880, by the executrix and executor, against the children of testator, and the children of his deceased children. *Held*—

[1. *Wills* ⇐733.]

That there was to be no division while the widow lived and remained unmarried, but the property was to be kept together for the payment of debts and for the maintenance of his wife and children, but upon the widow's marriage was to be divided, if the children were all then of age, and, if not, as soon as the youngest became of age. If the widow did not again marry, then she and the children were to have the use of the income derived from the property for and during the life of the widow. But, if the widow consents to a division now, upon satisfactory provision being made for her, the court may so order.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1825; Dec. Dig. ⇐733.]

[2. *Wills* ⇐782, 794.]

The provisions of this will in favor of the widow were intended by testator to be in lieu and bar of dower. The conduct of the widow in the sale of the plantation, the reinvestment of the proceeds without claim of dower, the occupation of the homestead, and in other respects, sufficiently indicated her determination to take under the will, and she cannot now be permitted to make her election to take against the will. These principles are not affected by the fact that the remainder in these lands are not disposed of by the will.

[Ed. Note.—Cited in Shelton v. Shelton, 20 S. C. 566; Hair v. Goldsmith, 22 S. C. 573; Bannister v. Bannister, 37 S. C. 533, 16 S. E. 612.

For other cases, see Wills, Cent. Dig. §§ 2018–2033, 2056–2059; Dec. Dig. ⇐782, 794.]

[3. *Wills* ⇐730.]

The support and maintenance provided for the children was only to be during their minority, and as they respectively attained to the age of twenty-one, they were to have the "use of the income" in the shape of a legacy of $5,000, to be paid to each out of the surplus income.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1785–1792; Dec. Dig. ⇐730.]

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[4. *Wills* ⇐732.]

*The losses of the estate having made it impossible to pay these legacies of $5,000 to each of the children, they are entitled to receive it out of the corpus before partition is made. In ascertaining balance due on this legacy, amounts received for support and maintenance during minority should not be deducted, but all sums received after majority are proper credits on the legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1732–1737, 1801–1818; Dec. Dig. ⇐732.]

[5. *Wills* ⇐734.]

This legacy bears interest from one year after testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847–1872; Dec. Dig. ⇐734.]

Opinion by McGOWAN, A. J., March 4th, 1882. S. Lord, Jr., C. A. Woods, for plaintiffs. W. W. Harllee, Johnson & Johnson, Townsend & McKerall, for defendants.

Decree modified.

No. 1150. SIMRIL v. COLEMAN. November Term, 1881.

Defendant employed plaintiff to do some work for him, which he was to pay for as it progressed, the first payment to be "$138 and four Chester county bonds of the face value of $100 each, taken at the valuation of $308, including accrued interest." This contract was in writing, and dated October 10th, 1879. On November 7th, 1879, the first payment being due, defendant paid to plaintiff $138 in money, and gave to him four Chester county bonds, and took his receipt for $446. Afterwards, plaintiff discovered that the coupons of January 1st, 1879, had been cut off. The work being done, plaintiff sued for a balance due him on his contract, and credited the account with $418, paid November 7th, 1879.

These bonds bore seven per cent. interest, payable annually. No interest was payable on the issue until January 1st, 1879, and could not be collected until the taxes were paid in October, after they fell due, when they could be used in paying taxes. At the trial, the presiding judge (Fraser) refused to permit defendant to prove that when he bought these bonds the coupons of January 1st, 1879, were missing. *Held*—

[1. *Counties* ⇐186.]

That in this ruling there was no error—the evidence was irrelevant.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 289–292; Dec. Dig. ⇐186.]

[2. *Contracts* ⇐235.]

That the written contract required the delivery of bonds with the coupons of January, 1879, attached.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1104; Dec. Dig. ⇐235.]

[3. *Counties* ⇐186.]

That there was no error in permitting plaintiff to prove the condition of the bonds

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when he received them, and the error *in the receipt given for $446, notwithstanding the complaint made no allegations of mistake.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 289–292; Dec. Dig. ⇐186.]

[4. *Appeal and Error* ⇐757.]

When the brief makes no statement of what the judge charged, this court cannot say whether there was error in the charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. ⇐757.]

[This case is also cited in McLaurin v. Rion, 24 S. C. 409, as to facts.]

Opinion by McGOWAN, A. J., March 4th, 1882. S. P. Hamilton, for appellants. J. & J. Hemphill, contra.

Judgment affirmed.

No. 1151. JONES v. CLARKSON. November Term, 1881.

C. rented land to J. for $37, and agreed to advance $80 under lien to make his crop, which latter lien was signed by J. and his wife, and filed. In the fall, J. owed C. the rent, $94.75 for advances, $45 for guano and $15 on a note. J. paid C. $114.15 in cotton made on the rented land, giving no directions as to its application. C. applied the payment first to the rent, next to the debt due for guano, next to the note, and the balance to the account for advances, and then brought action before trial justice H. to recover the balance due, and procured an attachment which was levied by a constable on a bale of cotton made by J. or his wife on this land. The constable stored it in C.'s ginhouse, where, without C.'s fault, it was burned before the trial. What became of that action does not appear. A few days afterwards, this action was instituted by Mrs. J. against C. and the constable, before trial justice F., to recover the value of this bale of cotton, which was alleged to be her property. F. gave judgment for the defendants, and the Circuit Court affirmed it, and a further appeal to this court was dismissed.

The following points were decided:

[1. *Agriculture* ⇐15; *Clerks of Courts* ⇐65.]

A warrant to enforce an agricultural lien can be issued only by the clerk of court, and executed only by the sheriff.

[Ed. Note.—Cited in Cavender v. Ward, 28 S. C. 473, 6 S. E. 302.

For other cases, see Agriculture, Cent. Dig. § 45; Dec. Dig. ⇐15; Clerks of Courts, Cent. Dig. § 95; Dec. Dig. ⇐65.]

[2. *Justices of the Peace* ⇐48, 86.]

But the creditor may sue for his debt by ordinary action, and the trial justice has jurisdiction to issue in such action an attachment, which could not in another action be questioned for irregularity.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 177, 284; Dec. Dig. ⇐48, 86.]

[3. *Landlord and Tenant* ⇐213.]

If the debt was paid before the action was instituted by C., then the process was void. But it was not paid, for although C. had no right to apply the payments realized from the crops covered by the lien to his unsecured claims, he could apply it first to the payment of the rent (which was less than one-

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third *of the crop made); and the remainder applied to the account for advances, left a small balance still due.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 858; Dec. Dig. ⇐213.]

4. It cannot be said that cotton made on the leased premises could not be attached, even if made by J.'s wife.

Opinion by McGOWAN, A. J., March 4th, 1882. U. R. Brooks, for appellant. Andrew Crawford, contra.

No. 1152. BENEDICT v. ROSE. November Term, 1881.

This was an action on a promissory note made by Neagle, and endorsed by Carpenter and Rose, and payable at one of the banks in the city of Columbia, where all the parties resided. Rose, the appellant here, denied his signature and notice of protest. The plaintiff proved demand, non-payment, and notice of protest sent through the mails addressed to "W. E. Rose, Columbia, S. C.," with printed notice on the back of the envelope requesting a return of the letter if not delivered in five days, and that it had never been returned. Plaintiff also proved that such service was according to the custom of all the Columbia banks, and he also produced witnesses, including Neagle, who testified that the signature of Rose was genuine. Defendant denied the signature and denied receiving notice of protest, and his son testified that his father had not endorsed the note.

The judge charged that the jury should regard both plaintiff and defendant as interested witnesses, and should, therefore, inquire which of them was corroborated by witnesses not interested in the case. That plaintiff was sustained by Mr. Neagle, and by the witnesses claiming to know the handwriting of defendant. In such case it was usual for defendant to produce other witnesses, either skilled in detecting false signatures or acquainted with defendant's handwriting, to support his allegation of the forgery, and

the jury had the right from defendant's failure to do so in this case to conclude that he could not corroborate his testimony on that point. That if the custom relied on by plaintiff, as to the notice to endorsers living in the same city where the note was payable, was proved to the satisfaction of the jury, then the notice sent by T. H. Gibbes, Notary Public, was sufficient to charge the endorsers, and there was no need of proof of its reception. That the sufficiency of the notice to charge the endorsers was in no manner affected by the endorsement on the envelope.

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*Verdict was rendered for plaintiff against Rose (judgment having been previously obtained against Neagle and Carpenter), and Rose appealed.

[1. *Bills and Notes* ⟸421.]

This court *held* that under the proof made of the custom of the Columbia banks, the notice of protest was properly served, and the validity of the service was not affected by the notice on the back of the envelope.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1184; Dec. Dig. ⟸421.]

[2. *Trial* ⟸194.]

Upon the charge of the judge as to the signature of Rose, this court said: "The fundamental principle of our system of administering justice is that the judge shall decide the law and the jury determine the facts. Const., Art. IV., § 26. This is plain enough in theory, but it is not always easy to carry it out in practice. In most transactions which fall under the cognizance of courts in the administration of justice, law and fact are so intermingled and blended that it is difficult to draw clearly the line that separates them. The judge is required to announce the law, but that cannot be done properly until the facts are established. He cannot be expected in every case to announce all the law, but only so much of it as is applicable to the case made by the facts. It is, therefore, absolutely necessary for him in discharging his part of the duty, not only to understand, but to make reference to the facts, which must constitute the basis of the law he announces. Accordingly the constitution declares that he has the right 'to state the testimony and declare the law.' What is the proper extent and scope of this power? It has been properly held that 'stating the testimony' means more than repeating it. It includes the idea of stating it in its logical relations to the propositions which it is to support or contradict, as well as to the principles of law by which its bearing and force ought to be controlled, or, as it is expressed by the technical phrase, 'summing up.' But while it means more than merely repeating the testimony, the other part of the provision negatives the right to invade the proper province of the jury by expressly declaring that 'judges shall not charge juries in respect to matters of fact.' It may be difficult, or even impossible, to define with precision the exact limits of the distinction indicated, but it is important, for many reasons, that it should be maintained. [After citing and stating the ruling of the court in State v. Bailey, 1 S. C. 1; Redding v. Railroad Company, 5 Id. 67, and State v. White, 15 Id. 392, the

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opinion continued.] In view of *the provision in the constitution, and in the light of these interpretations, we are of opinion that the judge transcended the prescribed limits when he charged 'that in such cases it was usual for the defendant to produce other witnesses, either skilled in detecting false signatures or acquainted with defendant's handwriting, to support his allegation of the forgery, and the jury had the right, from the defendant's failure to do so, to conclude that he could not corroborate his testimony on that point.' This was not merely arranging the testimony in proper and logical order, with a view to apply the law, but was, in effect, the expression of an opinion to the jury, drawn from the supposed existence of a usage in such cases, and the absence of all testimony of a particular character."

[Ed. Note.—Cited in McPherson v. McPherson, 21 S. C. 273; State v. Addy, 28 S. C. 13, 4 S. E. 814; Moore v. Columbia, etc., R. Co., 38 S. C. 32, 16 S. E. 781; State v. Ezzard, 40 S. C. 323, 18 S. E. 1025; Norris v. Clinkscales, 47 S. C. 513, 515, 521, 25 S. E. 797.]

[For other cases, see Trial, Cent. Dig. § 461; Dec. Dig. ⟸194.]

Opinion by McGOWAN, A. J., March 4th, 1882. Bachman & Youmans, for appellant. J. T. Sloan, F. W. McMaster, contra.

New trial granted.

[For subsequent opinion, see 24 S. C. 297.]

No. 1153. SHAW v. CUNNINGHAM. November Term, 1881.

This was a trial by a jury, in the Circuit Court, of the issue submitted to them under the order of the Supreme Court in Shaw v. Cunningham, 9 S. C. 271, namely: whether a paper purporting to be a deed, conveying the land in question from A. D. Jones, Sr., to J. G. Jones, had been delivered. The jury found that it had not been delivered. Judge Mackey, presiding, thereupon signed a paper stating that the court, without expressing any opinion upon the merits, had rendered judgment in accordance with the verdict found, and from this judgment, appeal was taken. Nearly three months afterwards he filed a decree bearing the date of the trial, in which he gave a statement of the case and his own conclusions upon the facts, and specifically directed judgment for defendants upon the

matters at issue. The plaintiff appealed to this court. *Held*—

[1. *Appeal and Error* ⇐1071.]

That the error assigned in the failure on the part of the Circuit judge to give his own judgment upon the question of fact submitted was cured by the subsequent decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234–4239; Dec. Dig. ⇐ 1071.]

2. That the form in which the judgment was rendered furnished no ground for a new hearing.

[3. *Appeal and Error* ⇐757.]

To enable this court to say whether there was error in a judge's charge to the jury, the

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whole charge, or, at least, so much *as embraces fully the error complained of, should be given in the brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. ⇐757.]

[4. *Trial* ⇐251.]

There is no error in refusing to charge upon a hypothetical case that is irrelevant and immaterial to the issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. ⇐251.]

[5. *Trial* ⇐191.]

There is no error in refusing to charge a request that assumed facts at issue to be proved, and stated their force and effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. ⇐191.]

[6. *Deeds* ⇐194.]

The fact that a party is in possession of a deed at a given time is not conclusive proof in all cases that it had been legally delivered. It may have been found or stolen.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 577; Dec. Dig. ⇐194.]

[7. *Deeds* ⇐66.]

The judge could not charge as matter of law that the deed had been delivered; it was the fact in issue.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 127; Dec. Dig. ⇐66.]

8. The finding of fact by judge and jury was affirmed.

[9. *Deeds* ⇐200.]

The very question at issue being whether there was a delivery, declarations of the grantor could not have been excluded upon the objection that they were subsequent declarations.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601; Dec. Dig. ⇐200.]

[10. *Witnesses* ⇐160.]

Testimony is not incompetent by reason of the proviso to Section 415 of the Code of Procedure, where the witness testifies to transactions or communications between the deceased and other persons, or to independent facts within his own knowledge, or is not a witness against the representatives of the deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 696; Dec. Dig. ⇐160.]

Opinion by SIMPSON, C. J., May 7th, 1882. R. A. Lynch, for appellant. W. H. R. Workman, J. H. Rion, contra.

Judgment affirmed.

[For prior opinion, see 9 S. C. 271.]

No. 1162. GARY v. BURNETT. November Term, 1881.

[1. *Appeal and Error* ⇐1008.]

The first point decided in this case is thus stated in the opinion: "The testimony was taken by a referee, who was appointed simply for that purpose, and not charged with the duty of hearing or determining any of the issues in the case; and, it is argued, that when the testimony is in writing, the rule is different from that which prevails when the witnesses are examined orally before the judge, and that this court will more readily overrule the findings of fact by a Circuit judge where he hears the case upon written testimony than in those cases where the witnesses are examined orally before him. We think, however, that the rule is substantially the same, and before this court will reverse the findings of fact by a Circuit judge,

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even *when based upon written testimony, we must be satisfied that the clear result of undisputed testimony points manifestly to a different conclusion from that reached by the Circuit judge. Where the testimony is conflicting and the Circuit judge has, upon weighing it, reached a conclusion which can be supported by the testimony, we will not interfere, although there may be other testimony in the case pointing to a different conclusion. We are not to substitute our judgment for that of the Circuit judge as to the comparative weight of the testimony. It is only where there is no testimony to support his conclusion, or where manifest error is shown, that this court will undertake to overrule a finding of fact by a Circuit judge. * * In this case, there was certainly much conflict of testimony, and we cannot say that there was any such manifest error on the part of the Circuit judge as would warrant our interference. On the contrary, we think his conclusions may very well be supported by a review of all the testimony."

[Ed. Note.—Cited in Dawson v. Niver, 19 S. C. 606; Huguenin v. Courtenay, 21 S. C. 411; State v. Pacific Guano Co., 22 S. C. 79; Lebby v. Ahrens, 26 S. C. 282, 2 S. E. 387; McGee v. Jones, 34 S. C. 151, 13 S. E. 326; Visanska v. Workingmen's Bldg. & Loan Ass'n, 41 S. C. 546, 19 S. E. 202; Pollock v. Carolina Interstate B. & L. Ass'n, 51 S. C. 439, 29 S. E. 77, 64 Am. St. Rep. 683.

For other cases, see Appeal and Error, Cent. Dig. § 3965; Dec. Dig. ⇐1008.]

[2. *Judgment* ⟸272.]

The objection that the decree was not filed within the time required by law, cannot avail the appellants. Koon v. Munro, (9) 11 S. C. 140.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 512–523; Dec. Dig. ⟸272.]

[3. *Depositions* ⟸36.]

Testimony taken by commission should not be stricken out because that the affidavit upon which the commission issued was sworn to before one of the attorneys of record in the case. There is no rule of the Circuit Courts corresponding to Rule XVI. of this court.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 47; Dec. Dig. ⟸36.]

Opinion by McIVER, A. J., March 8th, 1882. Gary & Gary, Bettis & Wardlaw, for appellants. Butler & Woodward, J. C. Sheppard, contra.

Judgment affirmed.

No. 1163. BONHAM v. RAILROAD COMPANY. November Term, 1881.

Upon the return of this case to the Circuit Court after the judgment rendered on the former appeal (13 S. C. 267), it was referred to the master to inquire and report whether cotton packed in bales was classified as a heavy article, or as an article of measurement, according to the custom in practice with railroads and common carriers in South Carolina in December, 1846, (the date of the charter.) The master took testimony and reported that cotton was classified by common

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carriers in Decem*ber, 1846, as a heavy article. This report was confirmed by Judge Pressley, who gave judgment perpetually enjoining the defendant from transporting cotton in bales otherwise tha as a heavy article, subject to the tolls allowed by its charter for the carriage of heavy articles.

On appeal, this judgment was affirmed, no manifest error being shown in the concurrent finding of fact by master and Circuit judge. There was no evidence to show that cotton packed was ever classified as an article of measurement, most of the witnesses stating that its transportation in 1846 was charged by the bale, but a bale was explained to mean a certain number of pounds of cotton, and not a package of so many cubic feet. "The standard by which the railroad determined its rate was the weight and not the size of the bale." One witness, however, who was a director in 1852, testified that cotton was charged as a heavy article.

Opinion by McIVER, A. J., March 11th, 1882. J. H. Rion, for appellant. Youmans, Attorney-General, J. T. Rhett, contra.

No. 1164. CRAWFORD v. SCHMIDT. November Term, 1881.

[*Appeal and Error* ⟸966.]

The refusal by the Circuit judge of a motion for continuance seldom afforded any ground for a new trial, even before 1868, but since the constitution of that year limiting this court to a correction of errors at law, such a motion is addressed solely to the discretion of the Circuit judge, and his refusal in a case at law furnishes no ground for the interference of this court. State v. McNinch, 13 S. C. 452.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. ⟸966.]

Opinion by McIVER, A. J., March 11th, 1882. J. T. Seibles, for appellant. J. T. Sloan, contra.

No. 1169. CLEVELAND v. BRYANT. November Term, 1881.

This was an action for breach of a written contract, whereby plaintiffs agreed to erect a building according to plan, and defendants agreed to rent the same at $200 a year, payable quarterly, and to keep the post office in the building so long as the defendant, Bryant, was postmaster. The building was completed in December, 1873, and tendered to defendants, and they declined to receive it. A few days afterwards plaintiffs brought this action, claiming $1,000 damages. The case came up on exceptions to Judge Kershaw's charge and refusals to charge. *Held*—

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[1. *Appeal and Error* ⟸719.]

*This court will not consider objections raised in argument only.

[Ed. Note.—Cited in Fields v. Hurst, 20 S. C. 294.

For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982, 3490; Dec. Dig. ⟸719.]

[2. *Trial* ⟸139.]

There was no error in refusing to charge "that the verdict should be for defendants, nothing being due for rent at time of action brought, or, in no event, could it be for more than nominal damages." In this connection the court say: "It is only in cases destitute of facts that the judge is warranted in charging as requested here. A judge may err in acceding to requests of the kind made in this case, but he will seldom err in refusing them; certainly, in such refusals as to matters of fact he should be safe from reversal by this court."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⟸139.]

[3. *Landlord and Tenant* ⟸22.]

There was no error in charging the jury that if plaintiffs built the house according to

contract and tendered it, that a cause of action arose immediately on refusal by defendants to take it, for the full amount of damages, present and prospective, which were the necessary and direct result of the violation of the contract; and that the measure of damages would be $600 less the amount the plaintiffs received during the three years that Bryant had continued to be postmaster.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 59; Dec. Dig. ⇐22.]

[4. *New Trial* ⇐41.]

A charge to the jury upon a hypothetical case will not furnish ground for a new trial where it was immaterial and could not have affected the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67–71; Dec. Dig. ⇐41.]

Opinion by SIMPSON, C. J., March 14th, 1882. J. S. R. Thomson, for appellant. Bobo & Carlisle, contra.

Judgment affirmed.

No. 1170. TODD v. GRAY. November Term, 1881.

Action on sealed note tried before Kershaw, J., Verdict for defendant. Motion for new trial refused. Plaintiff appealed. *Held*—

[1. *Jury* ⇐90.]

That one of the jurors was the husband of a third cousin of defendant does not affect the validity of the verdict. And the objection comes too late if not made until after verdict.

[Ed. Note.—Cited in State v. Cooler, 36 S. C. 108, 8 S. E. 692, 3 L. R. A. 181; Jones & Williams v. Fitzpatrick, 47 S. C. 60, 24 S. E. 1030.

For other cases, see Jury, Cent. Dig. § 414; Dec. Dig. ⇐90.]

[2. *New Trial* ⇐49.]

The fact that the defendant's son, who was also his attorney, entertained one of the jurors at his house after the trial, but during the term, furnishes no ground for a new trial

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 97–99; Dec. Dig. ⇐49.]

Opinion by McIVER, A. J., March 15th, 1882. Ball & Watts, for appellants. J. W. Ferguson, Y. J. Pope, contra.

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*No. 1171. MILLER v. BOLT. November Term, 1881.

[*Trial* ⇐139.]

This was an action for enticing away and harboring a hired servant of the plaintiff. Witnesses for plaintiff testified that G. W. Miller, husband of plaintiff, hired one Hix for a year, to work on his wife's farm; that Hix knew he was hired for plaintiff; that there were no conditions in the contract; that it was well known in the neighborhood that the farm belonged to plaintiff, and defendant lived on the adjoining farm and had seen Hix at work on Mrs. Miller's place, and that before the year expired Bolt hired Hix. A motion was made by defendant for a non-suit, because there was no evidence to show that he knew that Hix was hired by plaintiff. The presiding judge (Kershaw) then permitted plaintiff to introduce further testimony, and Hix was sworn. He testified that he contracted only with G. W. Miller; did not know Mrs. Miller in the transaction, and did not know that her husband was her agent, and that, by the contract, he could leave at pleasure. The judge then ordered the non-suit. On appeal, this order was set aside, this court holding that there was some testimony to sustain the case of the plaintiff. Whether it was sufficient should have been left to the jury. A non-suit in invitum should not be granted if there is any prima facie evidence in support of the action.

[Ed. Note.—Cited in Carter v. Columbia & G. R. Co., 19 S. C. 24, 45 Am. Rep. 754; Wallace v. Columbia, etc., R. Co., 37 S. C. 342, 16 S. E. 35.

For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. 139.]

Opinion by McIVER, A. J., March 15th, 1882. W. S. Brown, for appellant. Murray & Murray, contra.

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